THE SUPREME COURT'S SHADOW DOCKET

HEARING

BEFORE THE
SUBCOMMITTEE ON COURTS, INTELLECTUAL
PROPERTY, AND THE INTERNET
OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTEENTH CONGRESS
FIRST SESSION

THURSDAY, FEBRUARY 18, 2021

Serial No. 117–5

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THE SUPREME COURT’S SHADOW DOCKET

Thursday, February 18, 2021

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 2:05 p.m., via Webex, Hon. Henry Johnson [Chair of the Subcommittee] presiding.

Present: Representatives Johnson of Georgia, Lieu, Stanton, Lofgren, Cohen, Jones, Ross, Issa, Chabot, Gohmert, Johnson of Louisiana, Massie, Bishop, Fischbach, Fitzgerald, and Bentz.

Staff Present: John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Jordan Dashow, Professional Staff Member; John Williams, Parliamentarian; Jamie Simpson, Chief Counsel, Subcommittee on Courts; Danielle Johnson, Counsel, Subcommittee on Courts; Matt Robinson, Counsel, Subcommittee on Courts; MaryBeth Walker, Detailee, Subcommittee on Courts; Rosalind Jackson, Professional Staff Member, Subcommittee on Courts; Katy Rother, Minority Deputy General Counsel and Parliamentarian; Ken David, Minority Counsel; and Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. Hello, everyone.

The Subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

Welcome to this morning’s hearing on the Supreme Court’s shadow docket.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I will now recognize myself for an opening statement.

Welcome to this Subcommittee’s first hearing of the 117th Congress, on the topic of the Supreme Court’s shadow docket.

The Supreme Court is one of the Nation’s most vital institutions. Its decisions have consequences that are wide-ranging and far-reaching, and the public’s ability to learn how and why those decisions were made is critical to maintaining open justice.
This transparency is a foundational element of the Supreme Court’s integrity. For many of the Court’s notable cases, we know how the majority reached its decision, we know which Justices agree or disagree with the majority’s opinion and why, and we have detailed briefings from the litigants and third parties about their views. Importantly, in most instances, this process gives the public months to scrutinize and understand the significant issues at bar and their potential impact.

Yet not all the Court’s work takes place so openly. There exists a segment of decisions on what is unofficially called the shadow docket. Coined by Professor William Baude in 2015, the shadow docket comprises emergency orders and summary decisions not found on the Court’s main docket.

Here, the Justices make their decisions based on shorter-than-usual briefs, without oral arguments, and under a tight timeline. The Justices are also not required to publicly record which way they have voted, and, as a result, the public has little or no insight into the Court’s decisionmaking.

Despite the brevity of the Court’s consideration of cases on the shadow docket, the stakes are still high, sometimes a matter of life and death. Over the last year alone, decisions on the shadow docket have effectively ended the 2020 Census count, cleared the way for the first Federal executions in 17 years, and have covered some of the last Administration’s most controversial policies, such as the border wall, the travel ban, abortion, and transgender rights. Matters relating to or impacted by the COVID–19 pandemic are also on the shadow docket, including State election laws and State rules limiting attendance at places of worship.

The shadow docket has expanded in recent years. We can point to a few reasons why. Among them, a large share of emergency requests during the Trump Administration were at the request of the Federal Government. Such requests are not unprecedented, but the increase in volume certainly is. Under the Trump Administration, the Solicitor General sought five times the number of such emergency or extraordinary petitions than the George W. Bush and Obama Administrations combined.

The divisiveness of these decisions seems to have risen in tandem. An increasing number of emergency orders on the shadow docket are decided by a narrow five-four margin, often along ideological lines.

The onslaught of these important decisions has prompted concerns over the Supreme Court’s transparency as well as the executive branch’s role in shaping the Supreme Court’s agenda through the shadow docket.

We are not here to doubt the Justices’ hard work, but for justice to be fair, justice must be open. The Court’s recent shadow docket decisions demonstrate that, at a minimum, more transparency is needed. Knowing why the Justices selected certain cases, how each of them voted, and their reasoning is indispensable to the public’s trust in the Court’s integrity.

Today’s hearing marks the first time that Congress has explored the shadow docket in depth. As scholars and practitioners before the Court, each of today’s Witnesses brings important insight into what the shadow docket has become, its impact on the law and on
the American people, and what could or should be done. I look forward to an informative and productive dialogue.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from California, Mr. Issa, for his opening statement.

Mr. Issa. Thank you, Mr. Chair. Thank you for holding this very timely and important hearing today.

At this time, I would like to ask unanimous consent to enter into the record a number of articles from one of our Witnesses, Professor Morley, so they can be circulated to the staff before his testimony.

Mr. Johnson of Georgia. Without objection, so ordered.

[The information follows:]
MR. ISSA FOR THE RECORD
Professor Stephen J. Vladeck’s recent essay in the Harvard Law Review entitled “The Solicitor General and the Shadow Docket” critiques the Solicitor General’s “unprecedented number of requests for emergency or extraordinary relief from the Justices,” including stays, mandamus, and certiorari before final judgment. For example, he notes that the current administration has sought certiorari before judgment nine times in less than three years, far more than previous administrations, contributing to the rapid growth of the Court’s so-called “shadow docket.”

Professor Vladeck suggests that the Solicitor General’s frequent use of such esoteric strategies to obtain immediate Supreme Court relief when lower courts invalidate Federal laws, executive
orders, or other legal authorities may be an "abuse[s]" of the Solicitor General's "unique position." He further contends that the Court's receptiveness to these requests suggests favoritism toward the government and, in particular, the current administration.

To the contrary, the Court's willingness to grant certiorari before judgment to the government when district courts hold federal legal provisions unconstitutional is consistent with Congress' intent when it enacted the Supreme Court Case Selection Improvement Act of 1988. Prior to the act's passage, throughout much of the twentieth century, 28 U.S.C. § 1252 allowed any party to appeal directly to the Supreme Court as of right when a district court held a federal law unconstitutional. This measure was adopted during the New Deal Era out of concern that lower courts were too readily invalidating the Roosevelt Administration's initiatives.

The Improvement Act repealed § 1252 in order to reduce the Supreme Court's caseload, making the Court's jurisdiction over such constitutional cases almost entirely discretionary. Some senators, however, expressed concern about eliminating immediate, mandatory Supreme Court review of district court rulings holding laws unconstitutional. To attempt to assuage such concerns, the House Judiciary Committee report accompanying the Act explained that repealing § 1252 "should not create an obstacle to the expedient review of cases of great importance" because certiorari before judgment remained available under 28 U.S.C. § 1254(1). That provision allows the Supreme Court to grant writs of certiorari to review cases pending in the court of appeals "before or after rendition of judgment."

The Committee recognized that "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable for reasons of separation of powers, avoiding unwarranted interference with the government's administration of the laws and protection of the public interest." Repealing § 1252 "increases[d] the importance of certiorari before judgment" as a means of securing an expeditious and definitive resolution of questions of statutory unconstitutionality by the Supreme Court." The report concluded that the Committee "contemplates that the Court will give appropriate weight to the elimination of direct review under § 1252 when deciding whether to grant certiorari before final judgment in cases where a lower court has invalidated a federal law.

The Department of Justice, in advocating the Improvement Act, likewise emphasized that repealing § 1252 "need not [prevent] . . . expedient review in cases of exceptional importance." It explained that, when "expedited consideration by the Supreme Court is required," the Court can grant certiorari before judgment, as it had recently done in Dames & Moore v. Regan and United States v. Nixon. The Department observed that such relief is "ordinarily" appropriate for "lower federal court decisions invalidating acts of Congress," because they "present issues of great public importance warranting Supreme Court review." Other witnesses similarly pointed to the availability of certiorari before judgment as a substitute for direct appeal as of right.

This embrace of certiorari before judgment was not an anomaly. Over a decade earlier, in the Three-Judge Court Revision Act, Congress greatly curtailed the jurisdiction of three-judge district court panels, which previously had been required to adjudicate any cases in which a litigant sought injunctive relief against a federal or state law on constitutional grounds. A
separate statute, 28 U.S.C. § 1253, gave the Supreme Court direct appellate jurisdiction over such panels' rulings on the merits of litigants' constitutional challenges. The Senate Judiciary Committee report accompanying the Revision Act explained that, even after Congress transferred responsibility for most constitutional litigation from three-judge district court panels to traditional single-judge district courts, subject to review in the Courts of Appeals through ordinary appellate procedures, the Supreme Court could still engage in "[s]wift judicial review...where the public interest requires it." Although litigants in such cases could no longer take a direct appeal as of right to the Supreme Court under § 1253, the Committee declared that it "expects that the Supreme Court will give early consideration to those cases which, on the basis of equitable principles, warrant immediate consideration."

Thus, the Solicitor General's frequent reliance on certiorari before judgment under § 1253(1) when district courts hold federal legal provisions unconstitutional is not an unanticipated abuse of power, but rather fully consistent with Congress' intent when it curtailed the Court's mandatory appellate jurisdiction in constitutional cases. Indeed, Congress expected that the Court would be receptive to such requests. And direct Supreme Court review of district courts' rulings on important constitutional issues is also consistent with the structure of constitutional litigation throughout much of the twentieth century. The Court's "shadow docket" is not the result of partisan manipulation, but rather—at least in part—a safety valve Congress relied upon to mitigate the consequences of its elimination of the Court's direct appellate jurisdiction over constitutional matters.
DISAGGREGATING NATIONWIDE INJUNCTIONS

Michael T. Morley

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DISAGGREGATING NATIONWIDE INJUNCTIONS

Michael T. Morley*

Nationwide injunctions have become a focus of heated judicial, academic, and even public debate. Much of this analysis treats nationwide injunctions as a unitary concept, referring to a particular type of court order. In fact, the term may apply to five different categories of orders of national applicability, each of which raises very different constitutional, fairness, rule-based, structural, prudential, and other concerns.

This Article presents a taxonomy of the five types of nationwide injunctions and the proper judicial treatment of each. Rather than focusing on the geographic applicability and scope of a court order, injunctions should instead be categorized based on the entity whose rights they seek to enjoin and whether the case is a class action. Based on these considerations, the proposed taxonomy distinguishes among “nationwide plaintiff-oriented injunctions,” “nationwide plaintiff-class injunctions,” “nationwide association-oriented injunctions,” “nationwide defendant-oriented injunctions,” and “nationwide private enforcement injunctions.”

After presenting this new framework for determining the validity of nationwide injunctions, this Article goes on to demonstrate that stare decisis, rather than nationwide defendant-oriented injunctions or even class certification under Federal Rule of Civil Procedure Rule 23(b)(2), is the most appropriate means of protecting the rights of third parties who are not personally involved in litigation. Allowing district- or circuit-wide stare decisis effect to district court rulings allows members of the public to benefit from them and reduces the need for wasteful litigation. At the same time, this approach recognizes the limited authority of lower court judges in our decentralized, hierarchical judiciary; mitigates the effects of extreme forum shopping; and ensures some degree of persistance of important constitutional issues.

* Assistant Professor, Florida State University College of Law. Clemenko Fellow and Lecturer on Law, Harvard Law School, 2012–14; J.D., Yale Law School, 2005; A.B., magna cum laude, Princeton University, 2000. I am grateful to Jenny Carroll, Zachary Clopton, Brian Frye, Rebecca Hollander-Blumoff, Douglas Laycock, Jack Linford, Jonathan Nash, Doug Askmen, Caprice Roberts, Mark Seidenfeld, Alan Trammell, and Hannah Wieseman for comments on this draft. I also deeply appreciate discussions on the subject with Samuel Bray, Erwin Chemerinsky, Amanda Frost, and Howard Wasserman. This piece benefited tremendously from feedback and suggestions I received at the Notre Dame Remedies Roundtable, the “Equity in the Modern World” panel at the 2019 American Association of Law Schools annual conference, the Southeastern Junior-Senior Workshop at the University of Georgia School of Law, the fourth annual Civil Procedure Junior Scholars Workshop at Stanford Law School, the tenth annual Federal Courts Junior Scholars Workshop at the University of Oklahoma College of Law, the 2018 American Constitution Society Constitutional Law Symposium, the panel entitled “Should One Judge Have All This Power?” at the 2018 American Association of Law Libraries annual conference, the Federal Courts/Civil Procedure Works-in-Progress Workshop at the 2018 Southeastern Association of Law Schools (SEALS) annual conference, and the Remedies Discussion Group on “The Law of Equity” at the 2017 SEALS annual conference. I would like to offer special thanks to Mary McCormick and Kat Klepfer of the Florida State University College of Law Research Center for their tireless assistance. Additionally, I am very grateful for the extraordinary editorial assistance of Nance Bryant and the staff of the Alabama Law Review.
INTRODUCTION

What exactly does it mean for a court to “strike down” an unconstitutional legal provision? Judicial review, as described and applied in Marbury v. Madison, originated as a procedure for resolving certain conflict-of-laws problems that arise in the course of adjudicating a case: “[I]f a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case . . . [Because] 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.” In other words, a court would simply ignore any laws it determined violated the Constitution.

Likewise, when a court determined that a government official acted unconstitutionally, it would decline to recognize that official’s legal authorization or governmental status as an affirmative defense in common law suits for damages against that official. Thus, for approximately the first century of American history, the primary remedy for a constitutional violation was courts’ refusal to give effect to a statute or government action in the case before it. A case was generally not brought as a constitutional challenge; rather, constitutional questions would arise in the course of other, nonconstitutional litigation, including federal criminal prosecutions, or tort or property suits involving government officers.

Both the nature of constitutional adjudication and the implications of “striking down” a law have fundamentally changed. In the modern era, the judiciary’s role in enforcing the Constitution has expanded to prospectively ensuring the constitutionality of government conduct by affirmatively preventing constitutional violations from occurring ex ante and terminating ongoing ones. Congress facilitated this shift by enacting the Civil Rights Act of 1871, which authorized plaintiffs to sue local and county officials for injunctive relief against constitutional violations, even when those officials’ actions did not give rise to a claim for relief at common law. Such litigation provided a model for analogous claims against state and federal officials. The Administrative Procedure Act

1. 5 U.S. (1 Cranch) 137 (1803).
2. Id at 178.
7. See, e.g., Ex parte Young, 209 U.S. 123, 150–60 (1908).
(APA) likewise invites courts to grant injunctions against federal agencies that act arbitrarily, capriciously, or contrary to law.9

The proliferation of positive federal rights, resulting from both the rise of the welfare state and various Warren Court-era rulings,10 bolstered the need for more assertive forms of judicial relief to enforce constitutional restrictions and requirements. Historically, injunctive relief had been treated as an “extraordinary” remedy.11 As institutional reform litigation, particularly school desegregation suits, became more frequent, injunctions became commonplace, developing into the expected remedy in constitutional cases.12 Scholars such as Owen Fiss and Abram Chayes hailed courts' growing use of injunctions as a means of enforcing social values.13

Armed with this new approach to enforcing constitutional limits on governmental action, courts have also become increasingly willing to issue various types of “nationwide injunctions,” including sweeping orders that completely prohibit a government agency or official from enforcing a challenged statute, regulation, or policy against anyone, anywhere in the nation. As recently as the 1980s, nationwide injunctions against government actors were discussed in only a handful of opinions. Their frequency picked up somewhat beginning in the 1990s, reaching a peak in the first year of the Administration of President Donald J. Trump.14

Over the past few years, federal district courts have entered a series of nationwide injunctions against many of the President’s signature policy initiatives,

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14. See Att’y Gen., Jeff Sessions, Remarks Announcing New Memo on National Injunctions (Sept. 13, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-new-memo-national-injunctions (“Since President Trump took office less than two years ago, he has been hit with 25 of these nationwide orders.”).
including the travel ban, restrictions on transgender people serving in the military, and the prohibition on federal funds for sanctuary cities. Conservative litigants likewise obtained similar injunctions against some of President Barack Obama’s major policies during his Administration, including his Deferred Action for Parents of Aliens (DAPA) program and expansion of his Deferred Action for Children of Aliens (DACA) program, as well as U.S. Department of Education guidelines concerning transgender students’ bathroom usage in


schools and parts of the Affordable Care Act. In late 2018, then-Attorney General Jeff Sessions issued a memorandum declaring that the U.S. Department of Justice would oppose the issuance of nationwide injunctions against federal legal provisions. The propriety of nationwide injunctions is truly a nonpartisan issue; laws, regulations, and policies favored by either major party may be completely invalidated, at least for a time, by a single district judge handpicked by plaintiffs, anywhere in the nation.

A substantial amount of recent scholarship has focused on nationwide injunctions. Most of the literature has cautioned against their use, though a few scholars have defended them. This first wave of scholarship concerning nationwide injunctions builds upon earlier work examining class actions against


22. See, e.g., Samuel L. Bey, Multiple Chancellors Reforming the National Injunction, 151 HARV. L. REV. 418 (2017) (arguing that nationwide injunctions are not supported by either the traditional equitable principles of the English Court of Chancery or the historical practice of American courts); Michael T. Morley, De Facto Class Action? Plaintiffs and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 59 HASTINGS L.J. & PUB. POL’Y 487 (2016) (hereinafter Morley, De Facto Class Action?) (arguing that courts in public law cases should generally tailor injunctions to enforcing the rights of the plaintiffs before them, rather than completely prohibiting the government defendants from enforcing the challenged legal provisions against anyone); Michael T. Morley, Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts, 97 B.U. L. REV. 615 (2017) (hereinafter Morley, Nationwide Injunctions) (arguing that courts should not certify nationwide classes under Rule 23(b)(2) in challenges concerning the validity or proper interpretation of legal provisions); Zayn Sidiqque, Nationwide Injunctions, 117 COLUM. L. REV. 2095 (2017) (arguing that nationwide injunctions are inappropriate because relief should be tailored to enforcing the rights of the plaintiffs before the court); Howard M. Wasserman, Nationwide Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018) (arguing that nationwide injunctions violate Article III and raise forum-shopping concerns, and that many nationwide injunctions issued against President Trump’s initiatives were inappropriate); Gretel Berger, Note, Nationwide Injunctions Against the Federal Government: A Structural Approach, 92 N.Y.U. L. REV. 1068, 1093–104 (2017) (arguing that, although nationwide injunctions are lawful, they are inconsistent with the structure of the federal court system and courts should issue circuit-wide injunctions instead); Katherine B. Wheeler, Comment, Why There Should Be a Presumption Against Nationwide Injunctions, 96 N.C.L. REV. 200 (2017) (arguing that courts should presumptively decline to issue nationwide injunctions and apply special procedural precautions when such relief is necessary).

23. See generally, e.g., Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. REV. 1005 (2018) (identifying circumstances under which nationwide injunctions are most appropriate); Kate Huddleston, Nationwide Injunctions: From Considerations, 127 YALE L.J.F. 242 (2017) (arguing that nationwide injunctions are preferable to the alternative of allowing individual plaintiffs to take advantage of venue rules to have their cases governed by more favorable bodies of precedent); Suzette M. Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 HARV. L. REV. 58, 59 (2017) (“Although national injunctions are imperfect and crude forms of justice, they are better than no justice at all—which for some actions, may be the alternative.”).
the government\textsuperscript{24} and the rise of aggregate claims in nonclass litigation,\textsuperscript{25} as well as the substantial body of literature debating agency nonacquiescence in circuit court decisions.\textsuperscript{26}

Scholars and courts have debated the proper terminology for nationwide injunctions, either defending that label\textsuperscript{27} or suggesting alternatives such as “national injunction,”\textsuperscript{28} “defendant-oriented injunction,”\textsuperscript{29} “universal injunction,”\textsuperscript{30} and even “cosmic injunction.”\textsuperscript{31} Beyond this squabble over terminology, however, is a critical point that has been largely overlooked: the concept of nationwide injunctions as a \textit{they}, not an \textit{it}. Several importantly different types of orders have been deemed, or reasonably may be considered, nationwide injunctions. Each raises a range of distinct concerns and warrants categorically different treatment by courts. Failing to distinguish among the various categories of nationwide injunctions not only leads to confusion but also causes reformers to fail to recognize the full scope of the problem and various permutations in which it appears.

This Article offers four main contributions to the literature. First, it disaggregates the concept of \textit{nationwide injunction} by presenting a taxonomy of the different types of orders to which it may refer, exploring the proper judicial response to each. This discussion also draws attention to a type of nationwide injunction that has previously gone virtually unrecognized: the “nationwide private enforcement injunction.” Readers may use this taxonomy as a framework for distinguishing among the different types of nationwide injunctions, even if


\textsuperscript{26} Numerous commentators have opposed “intracircuit nonacquiescence,” arguing that federal agencies should follow a circuit court’s precedents within that court’s geographic boundaries, regardless of whether an injunction has been issued ordering the agency to do so. See generally, e.g., Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 MINN. L. REV. 1339, 1347 (1991); Matthew DiLoreto & Nancy Morawetz, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revez, 99 YALE L.J. 801, 821–28 (1990). Some scholars, in contrast, argue that intracircuit nonacquiescence can be appropriate. Samuel Estreicher & Richard L. Revez, Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679, 735 (1989); see also Deborah Marrs, Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Paradox of Pluralism, 59 Vand. L. REV. 471, 537 (1986).

\textsuperscript{27} Frost, supra note 25, at 1071.

\textsuperscript{28} Busy, supra note 22, at 419 n.5.

\textsuperscript{29} Monkey, De Facto Class Actions?, supra note 22, at 490.


they disagree with its normative recommendations concerning the proper treatment of each one.

Second, this Article contends that the most appropriate mechanism for allowing third-party nonlitigants to be protected by lower courts’ constitutional adjudications is stare decisis, rather than any type of nationwide injunction. Stare decisis is the vehicle through which U.S. Supreme Court rulings are implemented throughout the nation. District court rulings can similarly be given district- or circuit-wide stare decisis effect to protect third parties while respecting both the bounds of Article III and geographic limitations on the scope of lower courts’ authority.

Third, this Article is the first to respond to the recent defenses of nationwide injunctions by scholars such as Amanda Frost.32 Finally, this piece goes beyond existing critiques of nationwide injunctions by offering a comprehensive analysis of the various ancillary rules and doctrines that must be reformed to fully implement any restrictions on such orders.

Part I of this Article begins by presenting a taxonomy of the five different types of nationwide injunctions: (i) nationwide plaintiff-oriented injunctions, (ii) nationwide plaintiff-class injunctions, (iii) nationwide associational injunctions, (iv) nationwide defendant-oriented injunctions, and (v) nationwide private enforcement injunctions. Most importantly, this taxonomy suggests that, in non-class cases, courts should tailor injunctions to enforce only the rights of the plaintiffs before the court, and not third-party nonlitigants, as well. In class actions, courts should certify district- or circuit-wide classes, rather than nationwide classes requiring nationwide relief. Because of the problems posed by Rule 23(b)(2) classes, however, courts should rely primarily on stare decisis rather than such class actions to give third-party nonlitigants the benefit of their constitutional and other public law rulings. And courts should ensure that plaintiff entities do not use associative standing to bring de facto class actions outside the context of Rule 23 to obtain backdoor nationwide injunctions.

Part II delves into the range of other doctrines that must be reconsidered or modified to fully implement the necessary restrictions on nationwide injunctions. In particular, federal agencies should adopt a policy of intracircuit acquiescence—giving legal effect in administrative proceedings to courts of appeals’ rulings in matters subject to judicial review within their respective circuits. In addition, federal courts must abandon the “necessity doctrine,” which allows them to deny requests for class certification in public law cases on the ground that certification would not affect the scope of available relief. Federal courts should likewise reject the “one good plaintiff” rule, which allows a court to adjudicate a public law case after confirming that only a single plaintiff has standing, rather than assessing the standing of each plaintiff. Finally, Congress

32. See Frost, supra note 23.
must reassess federal venue statutes to determine the circumstances under which plaintiffs from across the nation should be able to file constitutional and other public law cases in the U.S. District Court for the District of Columbia, potentially allowing that court and the D.C. Circuit to give their rulings the force of law across the entire nation (as they already do in many administrative law matters). Part III briefly concludes.

I. A TAXONOMY OF NATIONWIDE INJUNCTIONS

The term nationwide injunction is not defined in the U.S. Code, the Federal Rules of Civil Procedure, or Supreme Court precedent. As mentioned earlier, commentators cannot even agree that nationwide injunction is the proper terminology for the orders they wish to discuss.33

Nationwide injunction is best understood as referring not to a single type of order, but rather a family of different types of orders with nationwide applicability. As the following taxonomy demonstrates, even that definition of nationwide injunction is misleading because many of these orders may apply even beyond the nation’s geographic boundaries, around the world. The main distinguishing characteristic among the different categories of nationwide injunctions are the particular people or entities whose rights they are tailored to enforce and the nature of the plaintiff or plaintiffs bringing the case. Each category of nationwide injunctions raises different constitutional, fairness-related, rule-based, structural, and prudential concerns, and, accordingly, should be treated differently by the courts.

The concept of nationwide injunction encompasses the following five distinct categories of orders, which this Part discusses in turn:

(i) Nationwide Plaintiff-Oriented Injunction—an order in a nonclass case prohibiting the defendant34 from enforcing a challenged statute, regulation, order, policy, or other issuance (collectively, “legal provision”) against the plaintiff or plaintiffs before the court—either individuals, or entities asserting organizational standing35—regardless of where in the nation (or potentially even the world) such violations occur. Plaintiff-oriented injunctions are presumptively the proper type of injunctive relief; nationwide plaintiff-oriented injunctions are

33. See supra text accompanying notes 27–31.
34. Throughout this Article, unless context dictates otherwise, “defendant” should be understood as referring not only to the enjoined party itself but also its agent and proxies, as well as other third-party non-parties who have received notice of the injunction and are acting in concert with any of those entities. See Fed. R. Civ. P. 65(d)(2).
valid when the plaintiff satisfies the legality, standing, and threat constraints (discussed below). 36

(ii) Nationwide Plaintiff-Class Injunction—an order prohibiting the defendant from enforcing a challenged legal provision against any members of a plaintiff class certified under Rule 23(b)(2) that includes all right holders across the nation (or potentially even the world). Nationwide plaintiff-class injunctions are a valid form of relief when the court has certified a nationwide class, but courts should typically certify only district- or circuit-wide classes in challenges to federal legal provisions. More broadly, courts should rely on stare decisis rather than plaintiff-class injunctions under Rule 23(b)(2) as their primary mechanism for ensuring that rulings in constitutional and other public law cases protect right holders other than the named plaintiffs in a case.

(iii) Nationwide Associational Injunction—an order in a case brought by a plaintiff entity asserting associational standing on behalf of its members that prohibits the defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even the world). Courts should not issue nationwide associational injunctions. When an entity asserts associational standing to enforce its members’ rights, those members (as of the date of judgment) are the real parties in interest, and the court should enter a plaintiff-oriented injunction in favor of those individuals.

(iv) Nationwide Defendant-Oriented Injunction—an order in a non-class case brought by individuals or entities asserting organizational standing that prohibits the defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even the world), including third-party nonlitigants. Courts should not issue nationwide defendant-oriented injunctions. When a case involves indivisible rights, in which it is impossible to enforce the rights of the plaintiff before the court without thereby also enforcing others’ rights as well, a valid plaintiff-oriented injunction will resemble a nationwide defendant-oriented injunction.

(v) Nationwide Private Enforcement Injunction—an order attempting to prohibit all potential plaintiffs throughout the nation (or potentially even the world) from bringing a private right of action under a federal legal provision against a particular person or entity. Nationwide private enforcement injunctions are likely precluded under current law. Courts should consider developing some mechanism to allow an individual or entity to bring an effective pre-enforcement challenge against federal legal provisions that create private rights of action.

36. See infra Part I.A.
This Part discusses each of these categories of nationwide injunction in turn.

A. Plaintiff-Oriented Injunctions

A plaintiff-oriented injunction is an order tailored to enforcing the rights of the particular plaintiff or plaintiffs before the court, without unnecessarily extending it further to protect the rights of third-party nonlitigants, as well. Plaintiff-oriented injunctions are the presumptively proper form of relief in nonclass cases. As discussed below, the geographic breadth of a plaintiff-oriented injunction is determined by the scope of the plaintiff’s rights. The court may restrict the defendant’s behavior—as well as the behavior of third parties acting in concert with the defendant who receive notice of the injunction—anywhere in the nation, including outside the court’s territorial jurisdiction, as needed to protect the plaintiff’s rights. When a court enters a plaintiff-oriented injunction in a constitutional challenge or other public law case, the government defendants generally may continue enforcing the challenged legal provision against other people.

Occasionally, the right at issue in a lawsuit will be indivisible; the nature of the dispute makes it impossible for the government to enforce just the plaintiff’s rights without simultaneously enforcing third-party nonlitigants’ rights as well. For example, the Supreme Court has held that the Establishment Clause

37. An injunction may be “prohibitory” or “mandatory.” A prohibitory injunction bars the defendant from engaging in certain specified acts, while a mandatory injunction compels the defendant to affirmatively perform certain acts. Developments in the Law—Injunctions, 78 HARY. L. REV. 994, 1061 (1965) (footnotes omitted). Semantically, most injunctions may be written in either mandatory or prohibitory terms. See Tom Doherty Assocs. v. Saban Entms., Inc., 60 F.3d 27, 34 (2d Cir. 1995).

38. See DANN R. DOHERY & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 167 (3d ed. 2018); David S. Schoenbrod, The Meaning of an Injunction: A Principle to Resolve Balancing the Equities and Tailoring the Remedy, 72 MINN. L. REV. 627, 694 (1988); see also Bray, supra note 22, at 469; Siddique, supra note 22, at 710–03 (“The geographic scope of an injunction often is, and always should be, limited to only what is necessary to provide complete relief to the plaintiffs.” (footnotes omitted) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979))).


40. Leman v. Kretzmer-Arnold Hinge Last Co., 284 U.S. 448, 451 (1932) (holding that an injunction binds the respondent personally and may “operate[] continuously and perpetually upon the respondent in relation to the prohibited conduct . . . throughout the United States” and not just within the judicial district in which it was issued, re e.g., Walgreens v. MacKay, 763 F.2d 711, 716 (5th Cir. 1985) (“The mandate of an injunction issued by a federal district court was nationwide . . . . A court may therefore hold an enjoined party in contempt, regardless of the state in which the person violates the court’s orders.” (citation omitted))).

41. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 204(b) (AM. LAW INST. 2010) (“Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) (defining indivisibility as “the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them” (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009))).
forbids the government from directly subsidizing sectarian educational activities. When a law or regulation violates the Establishment Clause by impermissibly subsidizing religious education, courts have approved nationwide injunctions completely prohibiting the government from implementing those provisions. In one such case, the court refused to certify a plaintiff class on the grounds that, "[b]y its very nature[,] the relief ordered will benefit the proposed class, whether or not it is certified as such." Because the rights at issue were indivisible, enforcing the plaintiffs’ rights under the Establishment Clause unavoidably enforced third parties’ rights, as well.

The proper geographic scope of a plaintiff-oriented injunction depends on three related factors: the legality constraint, the standing constraint, and the threat constraint. First, the legality constraint permits a court to extend an injunction only to geographic regions where the enjoined conduct would violate, or facilitate violation of, the plaintiff’s rights. For example, a court will generally enjoin a defendant from using a plaintiff’s descriptive trademark only in geographic regions in which the mark has acquired secondary meaning. Likewise, a plaintiff may not enjoin competitors from using a registered mark in places where those competitors had continuously used the mark prior to its registration. In such cases, nationwide injunctions completely prohibiting a defendant from using the marks at issue are generally deemed inappropriate.

The legality constraint plays a particularly important role in federal diversity cases arising under state law because the conduct at issue may be illegal in some states yet permitted in others. Laws such as Illinois’s antidilution statute prohibit conduct that other states allow, or at least refrain from regulating. A nationwide injunction against violating such state statutes—even when the statute

44. Deckert, 485 F. Supp. at 844; see infra Part II.D.2.
45. In re Breweries, Inc. v. ABH, Inc., 230 F. Supp. 662, 665 (M.D. Fla. 1964); see also C&O Co. Props. v. Conn’s Pizza, Inc., 752 F.2d 145, 153 (5th Cir. 1985); cf. Skydive Aztex, Inc. v. Quattrone, 673 F.3d 1105, 1116 (9th Cir. 2012) (affirming district court’s decision to “limit[]” the scope of the injunction to Arizona” rather than granting nationwide relief because “[t]he courts should not enjoin conduct that has not been found to violate any law. Injunctive relief under the Lanham Act must be narrowly tailored to the scope of the issues tried in the case” (citations omitted)).
47. 765 ILL. COMP. STAT. § 103/65 (2017).
itself purports to authorize such relief—is problematic. Of course, the legality constraint does not require that the enjoined conduct actually be illegal. Courts may issue prophylactic injunctions that bar defendants from engaging in otherwise permissible conduct when reasonably necessary to fully enforce a plaintiff's rights. A state generally may not prohibit a defendant from engaging in conduct outside its borders, however, simply to bolster the efficacy of its internal regulations, or even protect its residents when they travel to, or do business in, other states.

Second, the standing constraint focuses on the plaintiff's conduct. It permits a court to extend an injunction to any region in which the plaintiff engages in activity that places it at some risk of harm from the defendant. A court generally will not extend an injunction to areas in which a plaintiff is not present and has no connection, such as by traveling, doing business, engaging in advertising, or owning property there.


50. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) ("A State cannot punish the conduct of a defendant that may have been lawful where it occurred."); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state . . . without throwing down the constitutional barriers by which all the States are restricted within the limits of their lawful authority and upon the preservation of which the Government under the Constitution depends."); Nielsen v. Oregon, 212 U.S. 315, 321 (1908) ("[O]nce a State cannot enforce its opinion against that of the other . . . as to an act done within the limits of that other State."); Huntington v. Attwood, 146 U.S. 657, 669 (1893) ("[L]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."); see also Healy v. Beer Inst., 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."); FTC v. Travelers Health Ass'n, 362 U.S. 293, 302 (1960) (noting "the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's power to regulate any given aspect of extraterritorial activity").

51. See Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.")

52. See, e.g., Three Blind Mice Designs Co. v. Cycr, Inc., 892 F. Supp. 303, 314 (D. Mass. 1995) (denying a nationwide injunction because "plaintiff has not established that it has significantly promoted its marks in any market other than in Massachusetts"); Allan J. Richardson & Assocs., Inc. v. Andrews, 718 S.W.2d 833,
This standing constraint may arise from three different sources: the Constitution, the underlying statute (in statutory causes of action), and traditional equitable principles. Most basically, a plaintiff lacks standing under Article III of the Constitution to seek an injunction restricting a defendant’s conduct—including illegal conduct—in geographic areas in which such conduct would not harm it. Some statutes further limit the scope of injunctive relief a court may issue. For example, the Clayton Act permits a plaintiff to seek an injunction “against threatened loss or damage by a violation of the antitrust laws.” Its plain text permits a court to enjoin only conduct that poses a risk of inflicting “loss or damage” on the plaintiff. If a plaintiff neither does business nor has concrete plans to do business in a particular state or part of the country, then a defendant’s anticompetitive behavior in those regions generally would not cause a risk of loss to the plaintiff and may not be enjoined. Finally, traditional equitable principles counsel that a court should tailor each remedy to the scope of the violation at issue.

In an unfair competition case, for example, a plaintiff that “enjoys a nationwide reputation” fulfills the standing constraint for seeking a nationwide injunction against the defendant. Likewise, when the government obtains an injunction prohibiting private parties from violating the law, it also generally has standing to seek nationwide relief. Advance Business Systems & Supply Co. v. SCM Corp., is a clear example of the standing constraint in action. The district court held that the plaintiff was entitled to an injunction against the defendant’s antitrust violations. Although the plaintiff had sought a nationwide injunction, the court entered an order prohibiting the defendant from entering into illegal tying agreements only in the state of Maryland. That was “the only state where plaintiff [was] franchised to sell [competing] paper, where almost all of its sales [were] made, and the only state where it [had] suffered or [was] threatened with

855–56 (Tex. App. 1986) (affirming a preliminary injunction enforcing a covenant not to compete only within the five states in which the former employee’s office actually did business).
53. See infra notes 149–51.
55. Id.
56. See infra note 38.
60. Id. at 159.
61. Id. at 159–60.
loss or damage by [the defendant's] violation of the antitrust laws. The plaintiff's lack of paper sales outside of Maryland precluded it from asserting standing to enjoin the defendant's anticompetitive behavior elsewhere.

Finally, the threat constraint focuses on the geographic extent of the defendant's behavior. It counsels courts to extend injunctions only to geographic areas in which a defendant's past or likely future conduct poses a risk of violating the plaintiff's rights. A court generally may not extend an injunction to a particular region as a purely prophylactic matter, prohibiting a defendant from acting illegally in areas where there is no reason to believe it has violated, or is reasonably likely to violate, the law.

The threat constraint is simply a corollary of the broader equitable principle that a court may only "restrain acts [that are of the same type or class] as the defendant was found to have committed or is likely to commit." The fact that the defendant has violated a statute in a particular place or manner "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." Under the threat constraint, a nationwide plaintiff-oriented injunction is permissible only where a defendant has engaged, or is likely to engage, in illegal action on a nationwide basis.

The threat constraint frequently plays an important role in limiting the scope of injunctive relief when a company operates retail stores across the nation and a court finds that practices at a particular store violate the law. While a court will enjoin the company from violating the underlying statute at the location at issue in the future, it generally will not extend the injunction nationwide to other states and locations in which the company has not been found to have acted illegally. When a company's operations are primarily controlled

62. Id. at 159.
63. Id.
64. Five Platters, Inc. v. Purdie, 419 F. Supp. 372, 384 (E.D. Md. 1976) ("In view of the pernicious nature of the two competing groups involved, the injunction should be nationwide in scope.").
66. NLRB v. Express Publ'g Co., 312 U.S. 426, 433 (1941).
67. Id. at 435-36.
68. Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 630 (S.D.N.Y. 1985) ("Defendants advertised a nationally franchised business through a national magazine. The harm sought to be prevented is clearly not limited to the New York area, and the injunction must therefore be national in scope."); Ross v. Smith (in re Gavin), 181 B.R. 814, 825 (Bankr. E.D. Pa. 1995) (imposing a nationwide injunction because, while the fraudulent bankruptcy preparer "intends to terminate its Philadelphia operations . . . it has no intention of discontinuing its bankruptcy operations in California or possibly elsewhere").
69. Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 734-35 (5th Cir. 1977) (holding that where an ADEA violation arose from the behavior of a single employee in a single store and there was no evidence of a "discriminatory company policy," the district court erred in "enjoining appellant nationwide"); Hodgson v. Corning Glass Works, 474 F.2d 226, 236 (2d Cir. 1973) ("Absent a showing of a policy of
from its main headquarters, in contrast, courts are more willing to find a threat of future violations throughout all of its locations and are accordingly more willing to grant nationwide injunctions.}

Thus, courts adjudicating nonclass cases should issue plaintiff-oriented injunctions aimed at enforcing and preventing violations of the plaintiffs’ rights. The proper geographic scope of a plaintiff-oriented injunction is a function of three considerations: the legality constraint, the standing constraint, and the threat constraint. When these requirements are satisfied, a court may enter an injunction prohibiting the defendant from violating the plaintiffs’ rights anywhere in the nation or even the world.

In a challenge concerning the validity or meaning of a federal legal provision, a court may issue a nationwide injunction prohibiting the government defendants from violating the rights of the plaintiffs before it anywhere in the nation when those plaintiffs face a more-than-speculative possibility of harm on a nationwide basis. The threat constraint will almost always be satisfied in such cases since the federal government operates on a national basis.

Similarly, the legality constraint will also almost always be satisfied nationally since the U.S. Constitution and federal laws generally apply equally across the nation. One might object that the Supreme Court has recognized the prerogative of each circuit to adopt varying interpretations of the Constitution and federal laws (subject to the Court’s ultimate review). 

Once a federal court has adjudicated a constitutional or legal issue between a plaintiff and the government, however, that ruling is generally binding on both parties as a matter of res judicata and collateral estoppel in all other courts throughout the nation, including jurisdictions that otherwise might have resolved the issue differently.

The primary obstacle to a nationwide plaintiff-oriented injunction against the government in a public law case will typically be the standing constraint. If a plaintiff does not face a realistic likelihood of living, working, or traveling beyond a certain geographic area, a court generally may not issue a prophylactic nationwide injunction regulating the government’s conduct throughout the rest
of the nation. Courts seldom expressly consider the geographic applicability of plaintiff-oriented injunctions, however, and instead simply prohibit the government from applying the challenged legal provision to the plaintiffs without specifying any geographic constraints or restrictions. Even when a court limits an injunction’s geographic applicability, if a plaintiff’s circumstances change and it starts facing a risk of harm in a different part of the country, it can always petition the court to modify the injunction. Thus, when necessary to protect a plaintiff’s rights, a court may issue a nationwide plaintiff-oriented injunction prohibiting the government from enforcing a challenged legal provision against the plaintiff or plaintiffs in the case before it, anywhere in the nation.

B. Plaintiff-Class Injunctions and Rule 23(b)(2)

A second type of nationwide injunction is the nationwide plaintiff-class injunction. Such an order prohibits the government from applying a challenged legal provision against any members of a nationwide plaintiff class certified under Federal Rule of Civil Procedure 23(b)(2). Rule 23(b)(2) permits a court to certify a class whenever the defendant “has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief” for the class is “appropriate.”

As discussed above, traditional equitable principles dictate that a court should tailor injunctive relief to enforce the rights of the plaintiff or plaintiffs before it. Under this principle, when a court certifies a plaintiff class, any injunction should be tailored to enforce the rights of those class members. Accordingly, when a court certifies a nationwide class of all right holders adversely affected by a challenged legal provision, the appropriate remedy is a nationwide plaintiff-class injunction prohibiting the government from enforcing that provision against any class member, anywhere in the nation. The main issue in such cases is not the appropriate scope of injunctive relief, but rather the proper scope of the underlying class.

Approximately a half-century ago, in Califano v. Yakiwski, the Supreme Court held that district courts may certify nationwide classes in lawsuits against agency officials concerning federal legal provisions. The Court’s analysis was

73. See Morley, De Facto Class Actions, supra note 22, at 510–14 (collecting cases).
74. See Sys. Fed'n No. 91 Ry. Emps' Dep't v. Wright, 364 U.S. 642, 647 (1961) ("[A] sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."); see also Fed. R. Civ. P. 60(b)(5) (authorizing a court to modify a judgment when "applying it prospectively is no longer equitable").
76. Id.
77. See supra note 38 (citing sources).
78. See Morley, Nationwide Injunctions, supra note 22, at 646–47.
79. 442 U.S. at 702.
brief. It explained that neither Rule 23 nor "principles of equity jurisprudence" limit "the geographical scope of a class action." 80 The proper scope of a class, and therefore injunctive relief, "is dictated by the extent of the violation established, not by its geographical extent." 81

Notwithstanding Califano, courts should generally certify only district- and circuit-wide classes rather than nationwide classes under Rule 23(b)(2) in constitutional and other public law cases against government defendants, thereby obviating the need to issue nationwide plaintiff-class injunctions. A few years after Califano, the Supreme Court issued United States v. Mendoza, in which it generally prohibited plaintiffs from asserting offensive nonmutual collateral estoppel against the government. 82 In other words, after one plaintiff receives a favorable district court ruling on a legal issue, an unrelated plaintiff may not claim the benefit of that ruling in unrelated litigation. Rather, the government is free to relitigate the same issue in other cases against other plaintiffs. 83 A nationwide class under Califano precludes relitigation of important legal issues to the same extent as the offensive collateral estoppel prohibited by Mendoza. Mendoza's rejection of offensive nonmutual collateral estoppel against the government undermines Califano's endorsement of nationwide plaintiff classes against the government. 84

Additionally, rejecting nationwide classes allows important issues to percolate in the lower courts, giving the Supreme Court the opportunity to assess the consequences of different circuits' competing approaches. 85 Likewise, if a nationwide injunction completely nullifying a federal legal provision is affirmed by a circuit court, the Supreme Court is essentially compelled to hear the case. 86 It becomes much more difficult for the Court to exercise its passive virtues by allowing controversial issues to further develop, become less politically charged, or get resolved through political means. 87 Moreover, the Court must adjudicate the issue based on the fact pattern of the case in which the nationwide injunction was granted, rather than waiting and granting certiorari when the issue is presented in a cleaner context facilitating easier and more accurate adjudication.

Finally, and perhaps most importantly, nationwide plaintiff classes and the resulting nationwide plaintiff-class injunctions are inconsistent with the structure of the federal judicial system. 88 Congress structured the federal judiciary in

80. Id.
81. Id.
83. Id. at 162 ("[N]onmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case." (citations omitted)).
84. See Mosley, Nationwide Injunctions, supra note 22, at 637–43.
85. Id. at 643; cf. Bray, supra note 22, at 461–62.
86. Bray, supra note 22, at 461–62; Mosley, Nationwide Injunctions, supra note 22, at 639–43.
a decentralized, hierarchical manner, designating limited geographic regions in which lower courts may exercise jurisdiction over people and in which their legal opinions have the force of law. Allowing district courts to certify nationwide classes in constitutional and other public law challenges against the government allows them to impose their view of the law throughout the nation. They may apply their conclusions to right holders outside their geographic jurisdiction, whose claims would otherwise be governed by other circuits’ precedent.

Putting aside the proper scope of a class, Rule 23(b)(2) is a poor mechanism for determining whether a court’s rulings should protect right holders other than the named plaintiffs in a case, for three main reasons. First, the Supreme Court, in arguable dicta—along with some commentators—has asserted that Rule 23(b)(2) allows for class certification only to protect indivisible rights. As explained earlier, a right is indivisible if it is impossible to protect that right for only a particular plaintiff without also thereby enforcing the rights of third parties. The classic example is legislative redistricting. If a court concludes that a particular legislative district is unconstitutionally or illegally drawn, it must order a new district for all voters. It cannot mandate a new district just for the plaintiff in the case while retaining the previous district for all other voters in the area.

In arguable dicta in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court, quoting Professor Richard Nagareda, stated that “[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” The Court elaborated, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction.” The Court later cited *Wal-Mart* in the 2018 case *Fontenot v. Rodriguez* as its basis for directing the court of appeals to reconsider the propriety of certifying a Rule 23(b)(2) class to challenge the constitutionality of laws authorizing detention of undocumented immigrants. Professor Maureen Carroll, accepting *Wal-Mart*’s indivisibility requirement, has suggested ways of attempting to understand and apply it.

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89. C.f. *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (“The Judiciary Act has divided the United States into judicial districts. . . . The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district.”).
90. *See Max, Foss & Co. v. Sterner Mfg. Co.*, 177 U.S. 488, 488–89 (1900) (stating that one circuit’s legal conclusions are not binding on other circuits).
91. *See supra note 41* (citing sources).
93. *Id.*
It is far from certain whether the \emph{Wal-Mart} Court was correct in inferring that Rule 23(b)(2) classes are permissible only in cases involving indivisible rights. It is similarly unclear how broadly any such requirement applies and what exactly it demands. The text of Rule 23(b)(2) contains no such “indivisibility” requirement.\footnote{FED. R. CIV. P. 23(b)(2).} The rule was adopted to facilitate civil rights litigation in which numerous people suffer from the same type of discrimination.\footnote{FED. R. CIV. P. 23(b)(2) advisory committee’s note to 1964 amendment, see also 7AAA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1776, at 83–84 (3d ed. 2005) (“Subdivision \(b\)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions. . . .” [The class suit is a uniquely appropriate procedure in civil-rights cases . . . “].”)}. Incorporating an indivisibility requirement could seriously frustrate these goals in many contexts.

Moreover, the plaintiffs in \emph{Wal-Mart} wished to certify a Rule 23(b)(2) class to seek backpay, which would have required individualized monetary payments to each class member.\footnote{\emph{Wal-Mart}, 564 U.S. at 560 (“We also conclude that respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2).”).} As the Court emphasized, “individualized monetary claims belong in Rule 23(b)(3),” which contains additional procedural protections for class members that do not apply in the Rule 23(b)(2) context.\footnote{\textit{Id.} at 362. As discussed below, Rule 23(b)(2) does not require members of a putative class to be afforded either notice of the lawsuit or an opportunity to opt out. FED. R. CIV. P. 23(c).} The Court might be more accepting of a prohibitory injunction ordering a defendant to cease discriminating against (or otherwise violating the rights of) a class of plaintiffs. Unlike with claims for monetary relief, there is no alternate provision within Rule 23 that would provide a superior vehicle for litigating such claims on a class-wide basis.

Additionally, the \emph{Wal-Mart} Court held that class certification is appropriate under Rule 23(b)(2) when an injunction could “provide relief to each member of the class” without requiring each member to receive “a different injunction.”\footnote{\emph{Wal-Mart}, 564 U.S. at 560 (emphasis omitted).} When a legal provision violates multiple plaintiffs’ rights, a single injunction prohibiting the defendant agency or official from enforcing that provision against any class member can remedy the harm. Even if the class members’ rights are divisible, and it would be conceptually possible to enforce only the named plaintiffs’ rights without necessarily enforcing others’ rights as well, an injunction completely barring enforcement of the challenged provision would provide class-wide relief.

\emph{Wal-Mart} also may be read as incorporating an unusually broad definition of indivisibility.\footnote{\textit{Cf.} Carroll, supra note 95, at 63–64.} Generally, a right is deemed divisible if it is possible to en-
force it for some right holders and not others, and indivisible if it can be enforced only on an all-or-nothing, everyone-or-no-one basis.\textsuperscript{102} The \textit{Wal-Mart} Court, however, may have been using the term in a different, broader sense. At several points, the Court explained that Rule 23(b)(2) authorizes class certification where an injunction could “provide relief to each member of the class”\textsuperscript{103} and the relief would “affect the entire class at once, . . . benefiting all its members at once.”\textsuperscript{104} An injunction prohibiting the government from enforcing a challenged legal provision against members of a plaintiff class would satisfy that requirement, benefiting each class member without requiring further individualized treatment such as monetary payments.\textsuperscript{105}

Thus, it is reasonably debatable whether Rule 23(b)(2) actually contains a broad, generally applicable indivisibility requirement. \textit{Wal-Mart} may be read as imposing such a requirement only for classes seeking injunctions ordering monetary relief.\textsuperscript{106} Moreover, the \textit{Wal-Mart} Court may have adopted an unusually broad definition of indivisibility, preserving the availability of Rule 23(b)(2) classes in most constitutional and other public law challenges against the government. Nevertheless, several circuits have invoked \textit{Wal-Mart} to reject Rule 23(b)(2) classes on indivisibility grounds even when the plaintiffs did not seek monetary relief,\textsuperscript{107} calling into question the availability of such classes as a means of protecting divisible rights.

A second major reason why Rule 23(b)(2) classes are problemaic as a means of protecting rights on a class-wide basis is that class members might not be bound by unfavorable rulings. One of the main functions of a class action is to bind class members to the court's judgment as a matter of res judicata and collateral estoppel. In a challenge to the validity or meaning of a legal provision, if the plaintiffs win, all class members receive the benefit of the court's judgment and any resulting injunction.\textsuperscript{108} Conversely, if the government prevails,

\textsuperscript{102} See supra note 41 (citing sources).
\textsuperscript{103} \textit{Wal-Mart}, 564 U.S. at 360.
\textsuperscript{104} Id. at 362.
\textsuperscript{105} See, e.g., Yates v. Collier, 868 F.3d 354, 357–58 (6th Cir. 2017) (affirming certification of Rule 23(b)(2) class where “the same act/misfeasance by Defendants is the source of any injury for the entire General Class”), Parsons v. Ryan, 754 F.3d 637, 687–88 (9th Cir. 2014) (holding, post-\textit{Wal-Mart}, that Rule 23(b)(2)’s “requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole”).
\textsuperscript{106} Courts have already applied \textit{Wal-Mart} to reject Rule 23(b)(2) classes for monetary damages. See, e.g., W. Mogen-E. Lawrence Water & Sewer Auth. v. 3M Co., 737 F. App’x 457, 469 (11th Cir. 2018) (per curiam).
res judicata should preclude any class member from relitigating the same issue in any other court. 109

The Supreme Court has held, however, that at least in the context of claims for monetary damages, res judicata and collateral estoppel do not apply to class members unless they receive notice of the action, affording them an opportunity to attempt to participate in the case or opt out. 110 The Fifth and Fourteenth Amendments’ Due Process Clauses preclude courts from adjudicating class members’ claims for monetary relief in the absence of those minimal procedural protections. 111 The Court has not yet addressed, however, whether notice and opt-out requirements apply to members of Rule 23(b)(2) classes. 112

The Federal Rules of Civil Procedure provide that members of Rule 23(b)(2) classes are not necessarily entitled to receive either notice of the lawsuit or an opportunity to opt out. 113 And lower courts have held that the difficulty or even impossibility of ascertaining, much less contacting, members of a Rule 23(b)(2) class does not preclude class certification. 114 Even if district courts wished to require class representatives to provide notice and an opportunity to opt out to members of putative Rule 23(b)(2) classes, it would often be impracticable or impossible to do so. In challenges to legal provisions, courts typically define Rule 23(b)(2) classes in terms of all people who are, or at some point in

109. Id., see also Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974) (recognizing that it would be “unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one”).
111. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011) (“For a class-action money judgment to bind absentees in litigation, . . . absent class members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (holding, in a case involving a Rule 23(b)(3) class, that “mandatory class actions aggregating damages claims” are subject to the due process restriction “that one is not bound by a judgment in personam in a litigation in which he is not designated a party or to which he has not been made a party by service of process” (quoting Handberg, 311 U.S. at 40)); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 397, 812 (1985) (“[E]very process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by exercising and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”).
112. Shutts, 472 U.S. at 811 n.3 (limiting notice and opt-out requirements to “class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments,” and “intimating no view concerning other types of class actions, such as those seeking equitable relief”).
113. Fed. R. Civ. P. 23(c)(2)(A), cf. Fed. R. Civ. P. 23(c)(1)(B)(v) (authorizing members of classes certified under Rule 23(b)(1) to “seek[ ] exclusion” from the lawsuit); see also Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (“The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.”).
the future will be adversely affected by those provisions. This includes individuals who currently lack standing, whose claims are not yet ripe, and who may not ever exist yet.

For example, in Brown v. Plaza, classes of prisoners with “serious mental disorders” and “serious medical conditions” challenged prison overcrowding in California.\footnote{563 U.S. 493, 500 (2011).} The Supreme Court held that the relief had to include both current and potential future class members and could not be limited only to current prisoners.\footnote{Id. at 511–32 (stating that “[f]uture reservations of standing may be necessary to vindicateсад future class members who will develop serious physical or mental illness”).} Likewise, in a case challenging racial profiling, a district court certified a Rule 23(b)(2) class consisting of “all individuals who travel or will travel I–95” through a certain town.\footnote{Wilson v. Vaiconv Temp., No. 92–6617, 1993 U.S. Dist. LEXIS 9971, at *21–22 (E.D. Pa. July 20, 1993).} In challenges to the constitutionality of an abortion statute, the plaintiff class often will not just include pregnant women who are seeking an abortion in violation of the statute’s restrictions, but also any women who may become pregnant and be burdened by the statute at some point in the future.\footnote{See, eg., Gorza v. Hagan, 304 F. Supp. 3d 145, 150 (D.D.C. 2018) (certifying Rule 23(b)(2) class of “all pregnant [unaccompanied, undocumented immigrant minors] who are or will be in federal custody and, accordingly, are or will be subject to [the government’s] policies or practices”); Planned Parenthood Ark. & E. Okla. v. Gillespie, No. 4:15–cv–00366–KGB, 2016 WL 8928315, at *2 (E.D. Ark. Sept. 29, 2016) (certifying Rule 23(b)(2) class of all “patients who seek to obtain, or desire to obtain, health care services in Arkansas at [Planned Parenthood] through the Medicaid program”); Natl Org. for Women, Inc. v. Scheidler, 172 F.R.D. 551, 563 (N.D. Ill. 1997).}

The inclusion of class members who will be subject to a challenged legal provision at some future time—meaning they lack independently justiciable claims at the time of the lawsuit—conflicts with Professor Nagareda’s conception of class actions as purely procedural devices that allow numerous claims to be tried together without affecting the substantive law that otherwise applies to them. A court’s exercise of jurisdiction over claims of class members who presently lack standing or whose claims are unripe also raises serious questions under Article III that the Supreme Court has not yet directly addressed. And since absent class members are entitled to neither notice nor an opportunity to opt out, due process concerns may frustrate attempts to bind them to the court’s judgment. If absent class members are not subject to res judicata and

\footnote{See Richard A. Nagareda, Aggregation and Its Discontents: Class Settlement Pressures, Class-Wide Arbitration, and C-ERA, 196 COLUM. L. REV. 1872, 1874 (2006); id. at 1877–78 (“The affordance or withholding of aggregate treatment is most problematic from an institutional standpoint when it operates as a backdoor vehicle to restructure the remedial scheme in applicable substantive law.”).}

\footnote{Ryan C. Williams, Due Process, Class Action Opt Outs, and the Right Not to Sue, 115 COLUM. L. REV. 599, 652 (2015) (“[D]eclaratory, mandatory class actions certified under Rule 23(b)(2) thus present the same risk that nonconsenting class members will be erroneously deprived of their control entitlement as is present in the case of mandatory class actions seeking only money damages.”); Weber, supra note 24, at 387 (arguing that Rule 23(b)(2) “violates due process” because “the minimum due process requirements of notice and the opportunity to opt out are conspicuously absent”).}
collateral estoppel and may relitigate an unsuccessful challenge to a legal provision, they should not be permitted to benefit from a favorable ruling. 121

Finally, in challenges to the validity or proper interpretation of legal provisions, the process for certifying a Rule 23(b)(2) class appears to be a largely empty, hollow formality that does not yield any benefit to the litigants themselves, the court, or even putative class members. In facial challenges to statutes, as well as as-applied challenges that are based on broadly applicable legal arguments rather than particular plaintiffs’ unusual factual circumstances, Rule 23(a)’s numerosity, commonality, and typicality requirements will invariably be met, virtually as a matter of law, since all members would be asserting the same claim based on the same analysis. 122 The putative class members themselves are frequently not notified or afforded an opportunity to participate in the case or opt out. 123 And both the parties and the court are often unaware of the identities of most class members; indeed, the classes are often defined in sweeping terms that include future right holders as well. 124 Despite the lack of practical benefits to the Rule 23(b)(2) certification process, the Supreme Court nevertheless places great emphasis on whether plaintiffs have satisfied that formality. 125

As some courts acknowledge frankly, the main goal of many Rule 23(b)(2) classes, particularly in challenges to the validity of legal provisions or other government actions, is not to adjudicate the rights of the party litigants, but rather to bind the government defendant against the “world at large.” 126 Class actions are not the proper tool for that task. Stare decisis is a much more appropriate


122. Fed. R. Civ. P. 23(a); see, e.g., W.A.O. v. Cucinelli, No. 2:19-CV-11696, 2019 U.S. Dist. LEXIS 159922, at *6–7 (D.N.J. Sept. 17, 2019) (“Certification under Fed. R. Civ. P. 23(b)(2) is appropriate in this case because Plaintiffs allege that Defendants’ Policy defects [Special Immigrant Juvenile] classification for all members of the putative class and became an injunction requiring Defendants to suspend that alleged Policy would provide relief to the class as a whole.”); Wagar v. Trump, No. C17-0099-RAJ, 2017 U.S. Dist. LEXIS 95887, at *46 (W.D. Wash. June 21, 2017) (“Plaintiffs allege that CARRP is unlawful and ask the Court to enjoin the Government from submitting putative class members’ immigration applications to CARRP. A single ruling would therefore provide relief to each member of the class. Accordingly, Rule 23(b)(2) is satisfied.”).

123. See infra note 113 and accompanying text.

124. See infra notes 114–18 and accompanying text.

125. Compare United States v. Sanchez-Gomez, 138 S. Ct. 1332, 1338–39 (2018) (holding that a case where individual plaintiffs had sought effectively class-wide relief was nonjusticiable after the plaintiffs’ claims became moot because it had not been brought or certified as a class action), with Geist v. Pugh, 420 U.S. 103, 111 n.11 (1975) (holding that a putative class action suit that had not yet been certified remained justiciable even after the named plaintiffs’ claims became moot).

mechanism for ensuring that right holders within a court’s geographic jurisdiction are protected by its rulings. Stare decisis does not raise the due process concerns of class certification in the Rule 23(b)(2) context. Moreover, by its very nature, stare decisis is inherently consistent with geographic and other limitations on the power of lower courts in a way that nationwide classes are not.

Thus, the Supreme Court should resolve the tension between Calijaro’s embrace of nationwide classes against the government and Mendez’s rejection of offensive nonmutual collateral estoppel against the government. It should permit district courts to certify only district- or circuit-wide classes under Rule 23(b)(2) in cases concerning the validity or proper construction of federal legal provisions or other government actions. And, perhaps most importantly, it should rely on stare decisis, rather than Rule 23(b)(2) classes, as the primary vehicle for extending the benefits of lower courts’ constitutional and other public law rulings to third-party right holders.

C. Associational Injunctions and Informal Plaintiff Classes

When plaintiff entities assert associational standing in challenges to the validity or proper interpretation of a legal provision, courts sometimes issue a type of backdoor nationwide injunction that may be called a nationwide associational injunction. A proper associational injunction is tailored to enforcing the rights of the plaintiff entity’s members. Instead, orders in associational plaintiff cases often prohibit the government from enforcing the challenged provision against anyone, anywhere in the nation, or require the government to construe or apply the provision in a particular way.

Cases based on associational standing are effectively informal class actions in which the plaintiffs need not satisfy the requirements of Rule 23. The Supreme Court has held that a membership organization may sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

127. Modley, De Facto Class Actions, supra note 22, at 339, 544–45.
128. See, e.g., Casa de Md., Inc. v. Trump, No. PWG-19-2715, 2019 U.S. Dist. LEXIS 177797, at *51 (D. Md. Oct. 14, 2019) (‘‘A nationwide injunction is appropriate to provide complete relief to CASA. CASA has over 100,000 members located in Maryland, Virginia, D.C., and Pennsylvanians.’’); Saget v. Trump, 573 F. Supp. 2d 380, 378–79 (E.D.N.Y. 2009) (‘‘Here, a national injunction is warranted in this case. Plaintiffs not only include residents of New York but also individuals and a nonprofit entity based in Florida. Limiting a preliminary injunction to the parties would not adequately protect the interests of all stakeholders.’’).
An entity asserting associational standing acts as a stand-in for its members, asserting those members' rights on their behalf. When the plaintiff association prevails, the proper relief is a plaintiff-oriented injunction tailored to preventing the government from enforcing the challenged legal provision against the organization’s members at the time of judgment. A plaintiff group asserting associational standing should not be permitted to seek broader relief than its members could have received had they sued in their own right. The procedural vehicle of associational standing should not affect the underlying substantive rights of the real parties in interest or relief the court may order. In particular, a court should not issue a nationwide defendant-oriented injunction, completely prohibiting the government defendant from enforcing the challenged provision against anyone, regardless of whether they are affiliated with the organization.

The First Circuit’s ruling in Conservation Law Foundation of New England, Inc. v. Reilly shows the appropriate approach to crafting injunctive relief in associational standing cases. Several plaintiff environmental groups sued, alleging that the Environmental Protection Agency (EPA) had “failed to assess and evaluate federal facilities for hazardous waste” as required by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. They sought a nationwide injunction to compel the EPA to conduct a statutorily required “preliminary assessment” of every potential hazardous waste site across the nation identified in its Federal Agency Hazardous Waste Compliance Docket. The plaintiff groups alleged that some of their members lived near some of the facilities on the Docket that the EPA had not yet evaluated and that at least some of the facilities on the Docket contained unremediated hazardous waste.

The district court held that, because some of the plaintiff groups’ members faced a risk of harm from certain sites, the groups could “pursue the legal rights of the general public and request a remedy for all of the national sites for which the [EPA] is responsible.” It later ordered the EPA to “conduct a preliminary assessment of each facility on the Docket” within eighteen months.

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130. See Shahla v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 24 (2000) (“The Council speaks only on behalf of its member institutions, and thus has standing only because of the injury those members allegedly suffer.”).

131. See infra Part I.D.

132. For examples of such orders, see infra note 128.

133. 950 F.2d 38 (1st Cir. 1991).


135. Id. at 935, 945.

136. Id. at 937.

137. Id. at 940.

Circuit reversed, holding that each “individual member[ ]” for whom the plaintiff groups had introduced evidence possessed standing “with respect to the individual federal facilities that threaten to or actually harm them.”139 Those allegations, however, were “insufficient to warrant the type of nationwide relief” the court awarded.140 The court added, “[P]laintiffs seek relief far beyond any injury they have established. . . . Because plaintiffs have ties to only a few federal facilities, they have failed to carry their burden of showing injury-in-fact sufficient to grant them standing to obtain nationwide injunctive relief.”141 Conservation Law Foundation shows how courts can appropriately tailor the scope of their injunctions in associational standing cases.

More broadly, it may be appropriate to assess the continued need for associational standing. An associational plaintiff acts as a premade class comprised of the right holders whose interests will be litigated in the case. Associational standing is simply a way of allowing a plaintiff entity to shape its own plaintiff class without satisfying Rule 23’s procedures and restrictions. The Court’s persistent formalistic emphasis on Rule 23142 suggests that plaintiffs should not be able to circumvent it by collectively pursuing their claims through a private organization.

Moreover, Rule 17 provides, “An action must be prosecuted in the name of the real party in interest.”143 Associational standing seems to violate this rule, since the real parties in interest are not the association itself but rather its members. Requiring members of the association to litigate directly as either party litigants or class members would not prejudice them. The association would still be able to represent them and conduct the litigation, and a case could proceed along almost the same route whether the plaintiff is the association itself, a class of the association’s members certified under Rule 23, or simply individual members of the association.

While future scholarship should reassess the benefits of, and need for, associational standing, the Court need not go so far as to abolish it. Rather, courts should simply recognize that when entities assert associational standing, they are acting as prefabricated classes litigating on behalf of their members. Accordingly, injunctive relief should be tailored to enforcing the rights of those members as if they had litigated individually or through a formal class action.

139. Conservation Law Found., 980 F.2d at 41.
140. Id.
141. Id. at 45.
D. Defendant-Oriented Injunctions

Nationwide defendant-oriented injunctions are what most commentators refer to when discussing nationwide injunctions, whether by that name or their preferred alternate terminology.144 A nationwide defendant-oriented injunction is an order prohibiting a government agency or official from enforcing a challenged legal provision against anyone, anywhere in the nation. Similarly, statewide defendant-oriented injunctions may be entered against state legal provisions. These orders are “defendant-oriented” because the court’s goal is completely prohibiting the defendant from enforcing the challenged provision, rather than enforcing the rights of the particular plaintiffs before it.145

1. Rationales for Rejecting

The arguments against nationwide defendant-oriented injunctions have been laid out in greater depth in other sources146 and will only be briefly sketched out here. First, as I have argued elsewhere,147 such orders violate Article III. Article III requires a plaintiff to establish standing to seek the particular relief it is requesting from the court.148 A plaintiff generally lacks standing to seek relief on behalf of third-party nonlitigants,149 and a federal court correspondingly lacks jurisdiction to exceed the boundaries of the case or controversy before it by unnecessarily enforcing the rights of third-party nonlitigants.150 Thus, when a court determines that a legal provision is

144. See supra text accompanying notes 27–31.
145. See Mosley, De Facto Class Action?, supra note 22, at 500.
146. Id. at 522–23. See generally Bray, supra note 22; Siddiqui, supra note 22; Wasserman, supra note 22.
148. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (holding that a plaintiff “bears the burden of showing that he has standing for each type of relief sought”); see also Carnes v. Greene, 563 U.S. 692, 723 (2011) (Kennedy, J., dissenting) (“Plaintiffs must establish standing as to each form of relief they request . . . .”); see, e.g., City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that a plaintiff’s standing to seek damages from the defendant did not automatically confer standing to seek injunctive relief, as well).
150. Salazar v. Buono, 559 U.S. 700, 734 (2010) (Scalia, J., concurring) (holding that Article III forbids federal courts from issuing orders that “cover additional actions that produce no concrete harm to the original plaintiff”); Calitri v. Yamasaki, 442 U.S. 682, 702 (1979) (“Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff.” (emphasis added)); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (“[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiff . . . .”); see also Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) (holding that a district court did not certify a class, “the action is not properly a class action” and cannot be treated as such); see e.g., U.S. Dep’t of Def. v. Meinkind, 510 U.S. 939, 939 (1995) (mem.) (staying a lower court injunction insofar as it prohibited the military from applying the challenged regulation to anyone other than the individual plaintiffs); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (declaring that the D.C. Circuit’s nationwide defendant-oriented
unconstitutional, the plaintiff may not seek, and a court may not grant, an injunction that unnecessarily extends beyond protecting that plaintiff’s rights. As the Supreme Court recently reaffirmed in Gill v. Whitford, “[S]tanding is not dispensed in gross; A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”

Second, nationwide defendant-oriented injunctions violate Rule 23 by giving effectively class-wide relief to all right holders without following the process or satisfying the criteria set forth in that rule for certifying a class action. Only last year, in United States v. Sanchez-Gomez, the Supreme Court rejected the Ninth Circuit’s attempt to treat a nonclass case brought by individual plaintiffs whose claims subsequently became moot as a “functional class action.” The Sanchez-Gomez Court expressly declared, “[C]ourts may not ‘recognize . . . a common-law kind of class action’ or ‘create de facto class actions at will.’” Nationwide defendant-oriented injunctions impermissibly treat lawsuits by individual plaintiffs as de facto class actions.

Third, such orders have unfairly asymmetric preclusion consequences. No matter how many times the government prevails at the district court level in defending a legal provision, other plaintiffs remain free to bring identical challenges, either in the same or different circuits. District court rulings generally lack any stare decisis effect, and legal rulings against one plaintiff generally do not bind other similarly situated right holders as a matter of res judicata or collateral estoppel. In contrast, if the government loses even a single case and the court issues a nationwide defendant-oriented injunction, it constitutes a victory for all right holders throughout the nation. The government is completely prevented from enforcing the challenged provision against anyone—potentially even right holders who previously challenged the provision and lost, as well as right holders in circuits that never interpreted the Constitution or challenged the provision differently.

Fourth, nationwide defendant-oriented injunctions raise the same concerns about the structure of the federal judicial system as nationwide plaintiff-class injunctions. By enacting the Evarts Act, Congress made a deliberate deci-

152. Motley, De Facto Class Actions, supra note 22, at 534–35; see also Bray, supra note 22, at 464.
155. Bray, supra note 22, at 464; Motley, De Facto Class Actions, supra note 22, at 531–34.
156. See Taylor, 553 U.S. at 906.
157. See supra notes 88–90 and accompanying text.
sion to limit the consequences of lower courts' rulings, including in constitutional cases. It established neither a centralized intermediate court of appeals nor an integrated system of intermediate appellate courts that act as a single unified circuit. Rather, it separated the courts of appeals into numerous regional circuits, each able to develop its own body of law.

Congress further enhanced the importance of regional courts of appeals in constitutional litigation in the mid-1970s. In 1937, Congress had enacted a statute requiring plaintiffs seeking injunctions against federal laws on the grounds they were unconstitutional to pursue their claims before a three-judge panel of a federal district court, with direct appeal as of right to the U.S. Supreme Court. The Senate Judiciary Committee report accompanying the bill, in language echoing the defenders of nationwide injunctions, explained:

A Federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as 1 year or 2 years or 3 years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality.

... [D]uring these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.

Thus, throughout the mid-twentieth century, constitutional challenges to federal laws bypassed the regional courts of appeals to reach the Supreme Court more quickly. Congress gave the Court jurisdiction to impose uniform constitutional rules across the nation more quickly, protecting all right holders equally.

In 1976, however, Congress abandoned this approach, subjecting virtually all constitutional litigation to the same appellate process as other cases. The Department of Justice supported the amendment in large part because it believed that both the requirement for three-judge district court panels, as well as

161. Same, supra note 13, at 1111-12.
a right of appellate review in the Supreme Court, unnecessarily "waste[d] valuable federal judicial resources." Thus, Congress made a specific, conscious decision to reintegration regional courts of appeals back into the appellate structure for constitutional cases. It made a deliberate trade-off, sacrificing speedier Supreme Court review and national uniformity for the perceived benefits of the regional appellate structure.

Allowing lower court judges to exercise sweeping nationwide authority to completely invalidate federal statutes, executive orders, regulations, and other legal provisions is inconsistent with the decentralized, hierarchical structure of the federal judiciary. Defendant-oriented injunctions permit a single district judge of ostensibly limited geographic jurisdiction to give his or her legal determinations force of law throughout the nation, including for third-party non-litigants in other jurisdictions whose claims would otherwise be governed by the law of other circuits.

Such injunctions also prevent the government from being able to relitigate important constitutional issues in various districts and circuits. As noted earlier, in United States v. Mendoza, the Supreme Court generally prohibited plaintiffs from asserting offensive nonmutual collateral estoppel against the government, specifically to preserve the government's ability to relitigate such issues. Nationwide defendant-oriented injunctions are flatly inconsistent with Mendoza. They treat an adverse district court ruling as binding against the government throughout the nation. Indeed, such orders go even further than the type of offensive collateral estoppel the Mendoza Court rejected, since other right holders are not even required to file their own lawsuits to be protected by a favorable court ruling.

Fifth, injunctions are a form of equitable relief governed by traditional equitable principles dating back to the English Court of Chancery. As Professor

166. See Berger, supra note 22 (outlining how the decentralized structure of the federal judiciary, with district courts of limited geographic jurisdiction and circuits with distinct bodies of precedent, strongly counsels against nationwide injunctions); Morley, De Facto Class Actions, supra note 22, at 555–38.
168. Professor Zachary Chopton has argued that Mendoza was wrongly decided and that the precision principles set forth in Portland Hat Co., Inc. v. Shears, 479 U.S. 322, 331 (1987), should apply to the government as well. Zachary D. Chopton, National Injunctions and Preclusion, 118 Mich. L. Rev. 1, 5, 29 (2019). Professor Alan M. Trammell likewise rejects Mendoza, suggesting that district courts should decide on a case-by-case basis whether the government is precluded from relitigating particular issues based on whether relitigation would increase the likelihood of reaching an accurate outcome. Alan M. Trammell, Precedent and Preclusion, 93 Notre Dame L. Rev. 165, 615–16 (2017). However, the structure of the federal judicial system—particularly in light of Congress's intentional reintegration of regional courts of appeals into the appellate process for constitutional cases—seems to counsel strongly in favor of allowing relitigation and percolation of important public law issues in various circuits. See supra notes 157–66 and accompanying text.
Samuel L. Bray demonstrated in great detail, English Chancery Courts historically did not grant nationwide defendant-oriented injunctions, and American courts seldom did so before the mid-twentieth century. A range of pragmatic considerations further bolster the case against nationwide defendant-oriented injunctions. Professors Bray and Howard Wasserman point out that such orders exacerbate the incentives for, and consequences of, forum shopping. When a public interest group brings a constitutional challenge or other public law case, a right holder can typically be found in just about any judicial district to act as a plaintiff and establish proper venue. The group will generally select the district and division where the judges are most likely to be ideologically predisposed to rule in their favor.

This means that controversial constitutional and other challenges will tend to be adjudicated by ideological outliers toward the extremes of the political spectrum, depending on the nature of the case, rather than a more representative cross section of the federal judiciary. Lower court adjudications will disproportionately reflect such ideologically skewed judicial views, rather than those of the median judge. And nationwide defendant-oriented injunctions allow these judicial outliers to impose their potentially idiosyncratic views throughout the nation, even if only temporarily.

Although appellate review is available, circuits exhibit comparable variation in the ideological and methodological preferences of their judges. Moreover, a district court’s factual findings and discretionary judgment calls can influence and even cabin the appellate court’s conclusions. Thus, allowing ideologically outlying district courts to determine the validity of federal legal provisions for

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176. See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) (“In shaping equity decrees, the trial court is vested with broad discretion; power, appellate review is correspondingly narrow.” (citing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15, 27 n.10 (1971)); John O. McGinnis & Charles W. Maloney, Judging Fact Like Law, 25 CONST. COMENT. 69, 124 (2008) (noting that appellate courts “generally defer to lower courts’ findings of adjudicative fact in all constitutional cases except defamation cases covered by the First Amendment” and “sometimes suggest” that “social fact-finding of lower courts . . . deserve[s] deference” as well (emphasis omitted)).
the entire nation, even if only in the first instance, can skew the development of the law.

Additionally, the attorneys and groups crafting constitutional challenges will generally try to select the most sympathetic plaintiffs with the most compelling factual contexts for invalidating the provision at issue.\footnote{See Lucie E. White, Mobilizing on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88) (explaining that public-interest lawyers often choose clients strategically, based on how the court will view the client’s “story”); see, e.g., William C. Duncan, The Role of Litigation in Gay Rights: The Marriage Experiments, 24 ST. LOUIS U. PUB. L. REV. 113, 115 (2005) (explaining how gay rights advocates “carefully selected” the plaintiffs in their challenge to Massachusetts’s same-sex marriage ban “after an interview process to ensure they would provide a sympathetic face for the legal claims”); Mark V. Tushnet, Litigation Campaigns and the Search for Constitutional Rules, 6 J. APP. PRAC. & PROCESS 101, 109 (2004) (discussing conservative groups’ strategic selection of plaintiffs in challenges to affirmative action).} Controversial, cutting-edge constitutional issues will be presented through handpicked, carefully curated, quite possibly unrepresentative fact patterns. And when a lower court issues a nationwide defendant-oriented injunction, the government is compelled to appeal that particular case to prevent the challenged provision from being completely nullified.\footnote{Cf. United States v. Mendoza, 464 U.S. 154, 161 (1984) (“The application of nonmutual estoppel against the Government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.”.)} Thus, constitutional law will systematically be created in the most compelling and sympathetic cases for invalidation, rather than a more representative cross-section of cases in which an issue may arise.

Another largely overlooked consequence of nationwide defendant-oriented injunctions is that they repeatedly trigger emergency litigation, often involving the Supreme Court. Lower courts’ increased willingness to issue or approve such orders has led to repeated requests for stays and other types of extraordinary relief from the Court\footnote{See Steve J. Vladeck, Comment, The Solicitor General and the Shadow Docket, 133 HARV. L. REV. (forthcoming Nov. 2019) (draft at 13–22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420221.} to prevent federal statutes, regulations, or executive orders from being completely nullified throughout the nation based on the ruling of a single lower court judge or panel.\footnote{See, e.g., Barr v. E. Bay Sanctuary Covenant, No. 19A300, 2019 U.S. LEXIS 4619 (Sept. 11, 2019) (staying nationwide injunction against rule requiring refugees to seek asylum in the first safe country they enter); Trump v. Kaminski, 139 S. Ct. 950 (2019) (mem.) (staying nationwide injunction against prohibition on transgender military service); Trump v. Stockman, 139 S. Ct. 950 (2019) (mem.) (same).} The rights of millions of Americans throughout the nation are repeatedly flicked on and off like a light switch as injunctions are stayed, and those stays, in turn, are vacated or reimposed by the motions and merits panels of courts of appeals, en banc courts, and the Supreme Court itself. Highly controversial, unsettled constitutional issues are briefed and considered in a matter of days. The prevalence of nationwide defendant-oriented injunctions has routinized extraordinary emergency litigation procedures that are ill-suited for politically charged, cutting-edge constitutional issues that lie squarely in the public eye. Thus, for a variety of constitutional, rule-based, fairness-based, structural, historical, and pragmatic reasons, courts
should decline to issue any type of defendant-oriented injunction—especially on a nationwide basis.

2. Responding to the Main Defenses

Lower courts that have entered or approved nationwide defendant-oriented injunctions typically rely on a few recurring arguments. Many emphasize the fact that the challenged legal provision applies on a nationwide basis and a narrower, plaintiff-oriented injunction would leave some right holders unprotected.\(^{181}\) Courts particularly stress the need for uniformity when granting relief in the immigration context.\(^{182}\) These rulings tend to overlook the fact that one of the distinguishing characteristics of the Article III "judicial power" is that it operates upon the litigants involved in the case or controversy before the court, rather than the general public.\(^{183}\)

The propriety of limiting relief to the particular plaintiffs involved in a case is abundantly clear in the context of a damages suit. When a mass tort such as a train wreck occurs, if certain passengers bring a nonclass suit and prevail, they may obtain damages only for themselves, not on behalf of other similarly situated passengers. This principle is likewise apparent in the context of a suit for equitable relief against a private defendant. If a company such as Apple sues Samsung for patent infringement, it may seek an injunction prohibiting Samsung from infringing its patent in the future.\(^{184}\) Apple could not go further, however, to enjoin Samsung from violating other companies’ patents. These same restrictions apply with equal force when litigants seek injunctions against government policies.

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183. See Richardson v. Ramirez, 418 U.S. 24, 36 (1974) ("While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties."); see also Trump v. Hawaii, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring); see infra note 219.

Courts have also declared that a nationwide injunction is the only appropriate relief when a legal provision is found to be facially unconstitutional or invalid.\textsuperscript{185} The distinction between facial and as-applied challenges is a matter of substantive doctrine, however, that governs the showing a plaintiff must make to prevail on the merits.\textsuperscript{186} A determination of facial unconstitutionality is made in the context of a particular case between certain litigants by a lower court of limited authority within the federal judicial structure. The fact that the court rests its judgment on a facial, rather than as-applied, theory does not authorize it to ignore the boundaries of the case or controversy before it to enforce the rights of third-party nonlitigants, especially those in other districts and circuits.

Many courts insist that nationwide defendant-oriented injunctions are generally the proper form of relief in challenges under the APA,\textsuperscript{187} which permits courts to “hold unlawful and set aside” agency action under various circumstances.\textsuperscript{188} A court may “hold unlawful and set aside” agency action within the context of a particular case, however, without necessarily invalidating the challenged provision as applied to third-party nonlitigants throughout the nation.\textsuperscript{189} Moreover, to the extent the APA purports to authorize a federal court to award plaintiffs relief that they lack Article III standing to seek or to go beyond the bounds of the case or controversy before it by enforcing the rights of third-party nonlitigants, the provision may very well be unconstitutional as applied. Nevertheless, even if one concludes that the APA validly empowers federal courts to issue nationwide defendant-oriented injunctions in certain types of cases, then, at a minimum, courts should not claim such sweeping authority for themselves in cases where Congress has not expressly authorized it.

\textsuperscript{185} See, e.g., County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (“[W]here a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate.” (citing Califano v. Yamasaki, 442 U.S. 682, 702 (1979)), rev’d, 929 F.3d 267 (9th Cir. 2019).


\textsuperscript{188} 5 U.S.C. § 706(2) (2012).

\textsuperscript{189} See, e.g., L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) (“The national injunction was too broad. An order declining the hospice cap regulation invalid, enjoining further enforcement against the plaintiff, and requiring the Secretary to recalculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief.”); Va. Soc’y for Human Life v. FEC, 263 F.3d 379, 393 (4th Cir. 2001) (overturning a nationwide defendant-oriented injunction because “[p]reventing the FEC from enforcing 11 C.F.R. § 100.22(b) against other parties in other circuits does not provide any additional relief to the plaintiff.”).
Following the first generation of scholarship identifying the problems with nationwide defendant-oriented injunctions, defenders also rose in response. Most of the academic arguments in favor of such orders center around their utility for third-party nonlitigants, who often are not in a position to quickly and effectively enforce their own rights. Professor Suzette Malveaux, for example, argues that these nationwide injunctions are necessary as “an important check on the executive branch of government” because “[m]any of the current administration’s executive orders target the most vulnerable populations in our society—including various minorities, immigrants, and children.” Such practical considerations do not allow courts to ignore jurisdictional, rule-based, and other limitations on their authority, however.

Professor Amanda Frost has offered an especially compelling and comprehensive defense of nationwide defendant-oriented injunctions, but her arguments ultimately do not provide a sufficient basis for them. First, Professor Frost contends the English judiciary’s “bill of peace” constitutes a historical antecedent for such orders that Article III’s judicial power should be interpreted to include. Bills of peace allowed English courts to adjudicate the rights of members of broadly dispersed groups without formally joining them to a lawsuit through the usual procedures. They do not provide a justification for nationwide defendant-oriented injunctions, however, because courts’ rulings in such cases were equally binding on all parties, including all of the potential right holders or claimants, regardless of whether they won or lost.

With nationwide defendant-oriented injunctions, in contrast, the government faces asymmetric preclusion. A single victory by any plaintiff can result in an order running in favor of all other similarly situated right holders throughout the nation. If a plaintiff loses, however, that ruling does not preclude other right holders from bringing identical claims, whether in the same circuit or more

190. Malveaux, supra note 25, at 62.
191. Id. at 64.
192. Frost, supra note 25.
193. Id. at 1080–81.
194. 1 JOHN NORTON POMERCR, A TREATISE ON EQUITY JURISPRUDENCE § 251 (San Francisco, A. L. Bancroft & Co. 1881).
195. 1 JOSKEP STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 172 (Boston, Hilliard, Gray & Co. 1856); see also 1 NEWBERG ON CLASS ACTIONS § 1.10 (5th ed. 2018); 7A WRIGHT ET AL., supra note 97, § 1751; Stephen C. Yeazell, Group Litigation and Social Control: Toward a History of the Class Action, 77 COLUM. L. REV. 866, 877 (1977); Note, Shareholder Derivative Suits: Are They Class Actions?, 42 IOWA L. REV. 568, 569 (1957); J. Zacharias Claeys, Jr., Notes, Bills of Peace with Multiple Parties, 45 HARV. L. REV. 1297, 1298–99 (1932).
196. Indeed, such injunctions may even protect people who previously litigated the same claims against the government and lost or who live in circuits that have construed the Constitution or federal law in a materially different manner.
favorable jurisdictions. In actuality, the bill of peace is the historical antecedent to the Rule 23(b)(2) class action device—to the extent such orders may bind third parties—not nationwide defendant-oriented injunctions.

Bills of peace are further distinguishable from both nationwide defendant-oriented injunctions and modern class actions because the members of the plaintiff group (the "multitude") usually had some preexisting relationship or commonality with each other apart from the alleged injury giving rise to the lawsuit. The Chancery Court relied on that preexisting relationship as part of its justification for binding members of the multitude to its ruling. The Chancery "felt reasonably confident about the fairness of adjudicating rights of absentees where the absentees belonged to a preexisting group and some members of the group were before the court as litigants." Thus, the bill of peace does not establish that nationwide defendant-oriented injunctions are consistent with traditional equitable practices.

Professor Frost also contends that Article III allows federal courts to issue nationwide defendant-oriented injunctions, but she does not explain how that conclusion is consistent with cases such as Calijano v. Yamashita, Doran v. Salem Inn, Inc., and other precedents discussed above, which provide otherwise. She points to exceptions to Article III’s justiciability requirements, such as the capable-of-repetition-yet-evading-review exception to the mootness doctrine and allowances for third-party standing, but those are just that: exceptions. Attempting to justify nationwide defendant-oriented injunctions as an exception to general Article III principles is a tacit admission that they violate those generally applicable rules.

Moreover, there is no need to create an exception to Article III’s generally applicable justiciability requirements for nationwide defendant-oriented injunctions. Rule 23(b)(2) class actions and district- or circuit-wide stare decis is for lower court opinions are available alternatives that fit much more comfortably with existing precedent.

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197. See supra notes 155–56 and accompanying text.


199. But see supra note 120 and accompanying text.


202. 442 U.S. 682, 702 (1979) ("Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

203. 422 U.S. 922, 931 (1975) ("Neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . . .").

204. See supra notes 148–51.


206. Id. at 1084 (citing Village of Schuylkill v. Citzens for a Better Env’t, 444 U.S. 620, 634 (1980)).
against the backdrop of the federal judicial system. Additionally, the Court’s precedents concerning remedial standing do not suggest that any such exception for defendant-oriented injunctions exists.\(^\text{207}\)

Much of Professor Frost’s analysis centers around injunctions concerning “indivisible rights,” in which it is necessary to enforce the rights of third-party nonlitigants in order to fully enforce the rights of the party plaintiffs before the court.\(^\text{208}\) Examples include redistricting, school desegregation, and certain kinds of prison-reform cases. Her discussion demonstrates the importance and utility of this Article’s proposed taxonomy. Traditional justiciability-related principles confirm that a valid plaintiff-oriented injunction may compel the government to take whatever action is necessary to enforce the rights of the plaintiffs before the court, even if those orders are nationwide in scope and incidentally benefit third parties.\(^\text{209}\) They do not provide any basis for nationwide defendant-oriented injunctions concerning divisible rights, however, where it is possible to enforce a plaintiff’s rights without simultaneously enforcing those of similarly situated nonlitigants.

Professor Frost’s discussion of \textit{Trump v. Hawaii}, the \textit{Travel Ban Case}, confirms the efficacy of plaintiff-oriented injunctions and further shows how this Article’s proposed taxonomy can prevent confusion about remedial alternatives in constitutional and other public law cases.\(^\text{210}\) She argues that a nationwide defendant-oriented injunction completely enjoining the travel ban was “essential” to protect plaintiff State of Hawaii’s interests.\(^\text{211}\) The ban impeded the University of Hawaii’s “ability to recruit” noncitizens as students or faculty.\(^\text{212}\) An injunction limited to the geographic territory of Hawaii would not be effective, Professor Frost reasons, “because the United States does not restrict travel among the fifty states by a noncitizen lawfully residing in one of them.”\(^\text{213}\)

This analysis exemplifies the confusion that arises from the term \textit{nationwide injunction}, with its focus on an order’s geographic reach. Professor Frost implies that the district court’s two main options were either an injunction against the travel ban for anyone traveling to the State of Hawaii or a nationwide injunction suspending the ban throughout the nation.\(^\text{214}\) The real issue, however, was the identities of the people or entities protected by the injunction.

The State of Hawaii claimed that the travel ban impeded its ability to attract teachers and students to its university. The court could have fully vindicated the

\(^{207}\) See supra notes 148–51.

\(^{208}\) See Frost, supra note 23, at 1091–92 (quoting Morley, \textit{De Facto Class Action}, supra note 22, at 491–92); see also \textit{id.} at 1082–84.

\(^{209}\) See supra Part I.A.

\(^{210}\) Frost, supra note 23, at 1090–91.

\(^{211}\) \textit{id.} at 1092.

\(^{212}\) \textit{id.}

\(^{213}\) \textit{id.}

\(^{214}\) See \textit{id.} at 1091–92.
State’s rights by entering a plaintiff-oriented injunction prohibiting the Government from applying the travel ban to any person with a bona fide relationship with the University of Hawai‘i traveling to the United States. Either the potential traveler or the University could have been required to submit an affidavit attesting that the traveler is a student, faculty member, potential applicant, or other affiliate of the University to confirm that person’s entitlement to an exemption from the ban. 215 The applicability of the travel ban would be based not on the airport into which a person was flying or even the state to which that person was traveling, but rather on the person’s relationship to the plaintiff in the case. Far from demonstrating that nationwide defendant-oriented injunctions are necessary to give plaintiffs complete relief, as Professor Frost contends, 216 the Travel Ban Case is a perfect example of how plaintiff-oriented injunctions can be used to enforce divisible rights.

Professor Frost goes on to frame the debate over nationwide injunctions in terms of conflicting perceptions over the proper role of federal courts: a dispute over whether their role and powers should be based on a “law declaration” model or “dispute resolution” model. 217 I share this view, 218 with an important caveat: federal courts do not possess law-declaration authority in the abstract, but rather must exercise that power within the confines of a particular case or controversy. 219 When a court—particularly a lower court—adjudicates the validity or meaning of a legal provision, it is not making a freestanding, abstract determination of general applicability. To the contrary, it is taking a step in its process of reaching a judgment concerning the parties before it. The very definition of the Article III judicial power, set forth in terms of the authority to adjudicate cases and controversies, 220 means courts may not necessarily go beyond the bounds of the matters before them to impose their view of the law on the world at large.

Professor Frost also emphasizes that nationwide defendant-oriented injunctions are often necessary to protect third-party nonlitigants from irreparable injury. 221 As this Article contends, however, the main mechanisms through

216. See Frost, supra note 23, at 1092 (calling the Nationwide Defendant-oriented injunction “essential to protect the plaintiffs’ interests”).
217. See id. at 1087–88.
218. See id.
219. See United States v. Raines, 362 U.S. 17, 20 (1960) (“The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them.”); Liverpool, N.Y. & Phila. S.S. Co. v. Comm’r of Emigration, 113 U.S. 533, 39 (1885) (holding that a federal court “has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies”).
221. Frost, supra note 23, at 1094–95.
which a court’s constitutional and other public law rulings protect the general public are class certification under Rule 23(b)(2) and stare decisis, not injunctions. Whereas the political branches may act directly on the general public, courts’ actions focus primarily on the parties to the cases and controversies they adjudicate, over whom they have acquired personal jurisdiction.222 In addition, the decentralized, hierarchical structure of the federal judiciary reflects Congress’s deliberate decision to limit the effects of lower courts’ rulings rather than maximize protection for third-party nonlitigants.

Finally, Professor Frost contends that nationwide defendant-oriented injunctions are easier to administer than plaintiff-oriented injunctions.223 Although this is correct, such administrative difficulties typically do not affect the proper scope of relief. A plaintiff-oriented injunction leaves the defendant agency or official free to go further than legally required by completely abstaining from enforcing the challenged legal provision against anyone. Indeed, Congress, the President, or the agency may decide to amend or repeal the challenged provision if it would be too difficult, or undermine important policy objectives, to treat certain plaintiffs differently from everyone else.

A broad nationwide defendant-oriented injunction, in contrast, preempts that choice by flatly prohibiting the agency from even attempting to continue administering the challenged provision against third parties. A court should not restrict the government’s enforcement discretion more than necessary to protect the plaintiffs’ rights, particularly if it is purportedly doing so out of concern for the government’s convenience, costs, or administrative burdens. A defendant agency or official should generally be able to make the policy determination of whether the benefits of implementing as much of an enjoined legal provision as possible outweigh the inconvenience of applying different legal regimes to different groups of people—a burden the government already bears when circuit splits arise. Of course, if the government continues enforcing a challenged provision against third parties and winds up violating the plaintiffs’ rights in the process, the court may order broader prophylactic relief by enjoining the provision on a wider scale. Even then, however, the focus is on protecting the rights of the plaintiffs before the court, rather than independently seeking to


223. Frost, supra note 23, at 1098–99 (“Nationwide injunctions are sometimes the only practicable method of providing relief and can avoid the cost and confusion of piecemeal injunctions.”). See also Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 457–58 (E.D.N.Y. 2018) (entering a nationwide defendant-oriented injunction against the Trump Administration’s attempted termination of the DACA program in part due to the potential “administrative problems for Defendants” in complying with a narrower order), cert. granted sub nom. McAleese et al. v. Vidal, 139 S. Ct. 2773 (2019); Basset et al. v. Snyder, 951 F. Supp. 2d 959, 973 (E.D. Mich. 2013) (entering a nationwide defendant-oriented injunction because “[a]n injunction applicable only to the named plaintiffs would be impractical and difficult to enforce”).
vindicating the rights of third-party nonlitigants. Precisely because prophylactic relief restricts the democratically elected branches of government more than the Constitution actually requires, courts may grant it only when the record demonstrates its necessity. Such relief should seldom, if ever, be a first resort.

In short, Professor Frost presents a thorough, well-crafted, powerfully argued defense of nationwide injunctions. Her analysis confirms the need to distinguish among the different categories of such orders. Beyond that, she has reaffirmed that broad nationwide plaintiff-oriented injunctions, which may incidentally benefit third parties, can be necessary to enforce indivisible rights. Nationwide defendant-oriented injunctions, however, remain improper.

E. Private Enforcement Injunctions

The final type of nationwide injunction, what may be called a nationwide private enforcement injunction, is an order prohibiting private enforcement of a federal legal provision against a particular entity. It is the least studied because it rarely, if ever, is issued. When a private actor—a corporation, for example—wishes to challenge the validity of a federal law or regulation, it typically suits the federal official charged with enforcing the measure, in his or her official capacity, for an injunction, a declaratory judgment, or both. Many federal statutes—including consumer-protection laws regulating matters such as telemarketing, robocalling, credit reports, debt collection, and the like—may be enforced by private parties, however. And such statutes often provide for remedies such as attorneys’ fees, statutory damages, or punitive damages beyond compensatory damages.

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224. Indeed, at one point, Professor Frost defends nationwide defendant-oriented injunctions by analogizing them to prophylactic relief. Frost, supra note 25, at 1083. Even prophylactic injunctions, however, seek to enforce a plaintiff’s rights by mandating certain conduct that is not otherwise required or prohibiting certain conduct that is not otherwise illegal in order to deter violations of those rights, identify hard-to-detect violations, or impose standards to help determine what constitutes a violation. See generally Thomas, supra note 49. A prophylactic injunction does not allow a court to extend an injunction to third-party nonlitigants when doing so is not related to protecting a plaintiff’s rights.


In such situations, there is no obvious defendant the corporation can sue to obtain complete pre-enforcement protection—particularly if the statute allows exclusively for private enforcement. The corporation could not sue either the United States or Congress to have the law declared invalid because they are protected by sovereign immunity. Even if the corporation sought an injunction or declaratory judgment against the federal official charged with enforcing the measure (assuming one existed), a favorable judgment would neither bind private right holders as a matter of res judicata nor otherwise preclude them from suing the corporation for any violations of the statute. And the trial court’s ruling would have no precedential effect in any such private litigation, especially in other districts and circuits. Furthermore, if the government declined to appeal, the corporation would have no way of even attempting to obtain a favorable ruling from a court of appeals or the Supreme Court to obtain broader state décisiss protection against private lawsuits. And the statutory remedies may be too severe for the corporation to simply violate the law and adjudicate the validity of its conduct after the fact.

Another potential option would be for the corporation to seek either an injunction or declaratory judgment against a right holder protected by the statute who would be able to sue the corporation for any violations. In other words, rather than violating a federal statute and running the risk of being sued for statutory damages, punitive damages, or attorneys’ fees, the corporation could seek an advance determination of the statute’s validity or proper interpretation by suing a potential future plaintiff.

Even assuming the corporation were able to overcome justiciability restrictions, establish that a live case or controversy exists, and win the case—all substantial hurdles—the resulting judgment would be of little use. Again, under current law, a district court opinion would have no stare décisiss effect, especially in other jurisdictions. And an injunction or declaratory judgment would not be binding on any other right holders, meaning the corporation would still face potentially substantial liability if it violated the law with regard to anyone

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229. Lynch v. United States, 292 U.S. 571, 582 (1934) (“The sovereign’s immunity from suit exists whenever the character of the proceeding or the source of the right sought to be enforced. It applies ... to those [causes of action] arising from some violation of rights conferred upon the citizen by the Constitution.” (citations omitted)).


233. Canseco, 563 U.S. at 709 n.7.


else. Moreover, if the corporation prevailed at the district court level, it would
have no way to force an appeal to generate a favorable precedent with broader
stare decisis effect from higher courts.

To obtain effective protection against an unconstitutional federal legal pro-
vision that creates a private right of action, the corporation would need nation-
wide relief: what we might call a nationwide private enforcement injunction. It
appears there are two ways a corporation could presently attempt to seek such
relief, but both are highly problematic and unlikely to succeed. First, the com-
pany could attempt to bring a pre-enforcement constitutional challenge to the
statute against a nationwide defendant class of all similarly situated right-
holders. 236 Such a nationwide defendant class would raise many of the same con-
cerns as a nationwide plaintiff class. It places a single district court in the posi-
tion of adjudicating the rights of people throughout the nation, including people
outside of its geographic jurisdiction, whose claims would ordinarily be subject
to the law of other circuits. The claim would also face serious justiciability con-
cerns because few, if any, members of the putative defendant class will have
taken any action or advanced a position adverse to the plaintiff. 237

It is also unclear whether a plaintiff may certify a defendant class under
Rule 23(b)(2) to seek injunctive relief. Rule 23 authorizes courts to certify de-
fendant classes in which one or more named defendants are “sued . . . on behalf of”
other similarly situated defendants against whom comparable allegations are
raised. 238 Consistent with this provision, the Advisory Committee note accom-
panying the 2003 amendments to Rule 23 expressly recognizes the possibility
of defendant classes. 239 Courts have split, however, on whether a court may
 certify a defendant class for injunctive relief under Rule 23(b)(2). 240 Several
circuits have concluded that only plaintiff classes may be certified under that

236. The plaintiff would have to notify the Attorney General about the case, FED. R. CIV. P. 5.1(a)(2),
and the government would have the right to intervene in the litigation, if it wished, 28 U.S.C. § 2403(a); FED.
R. CIV. P. 5.1(c).

237. This issue arises frequently in the patent context. An entity engaged in activity that might infringe
another party’s patent cannot seek a declaratory judgment of noninfringement unless the patentee affirm-
vatively takes positions or makes threats that contribute to the controversy. See SanDisk Corp. v. STMicroelec-
tronics, Inc., 480 F.3d 1372, 1380-81 (Fed. Cir. 2007) (suggesting that Article III jurisdiction depends on an
“affirmative act” by the patentee); see also Innovative Therapies, Inc. v. Kinetic Concepts, Inc., 599 F.3d 1377,
1381-84 (Fed. Cir. 2010) (evaluating the patentee’s conduct in determining whether a live controversy existed
between the parties that would allow the court to exercise jurisdiction over the declaratory judgment suit
against the patentee).

238. FED. R. CIV. P. 23(a).

239. FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment, see also 7A WRIGHT ET AL.,
concept of declaratory relief for the individual defendant into Rule 23(b)(2)”); see also 9A WRIGHT ET AL.,
SUTHERLAND’S THE LAW OF RECORDS § 23.44 (3d ed. 1984) (“Since 1966, Rule 23(b)(2) has been used
primarily where the party seeking declaratory relief is a defendant in an action against multiple partici-
pants, the rule being designed to permit certification of such a class”); see also 7A WRIGHT ET AL., SUTHER-
LAND’S THE LAW OF RECORDS § 23.45 (3d ed. 1984) (“Rule 23(b)(2) is designed to permit representa-
tive actions against a defendant on behalf of a group of similarly situated individuals who are not
represented by one or more named parties who . . . share a common question of law.”) (footnote omitted).
provision. For all these reasons, it seems unlikely that an entity can successfully challenge a federal statute creating a private right of action through a lawsuit for injunctive or declaratory relief against a nationwide defendant class of right holders.

A second alternative, which was recently tried unsuccessfully in the Fifth Circuit case *Texas v. U.S. Dep’t of Labor*, would be to leverage a favorable judgment in a lawsuit against the government into a cudgel against private plaintiffs. In 2014, twenty-one states and more than fifty-five business groups sued the U.S. Department of Labor (DOL) in the U.S. District Court for the Eastern District of Texas. They argued that the Obama Administration’s regulations implementing the Fair Labor Standards Act’s overtime provisions were invalid. The court entered a preliminary injunction against the regulations, declaring “A nationwide injunction is proper in this case. The Final Rule is applicable to all states. Consequently, the scope of the alleged irreparable injury extends nationwide. A nationwide injunction protects both employees and employers from being subject to different . . . exemptions based on location.” It later granted summary judgment to the business groups, holding that “the Department’s Final Rule . . . is invalid.”

While the preliminary injunction was in effect, a New Jersey resident who worked at Chipotle filed a putative class action suit against the company in the U.S. District Court for the District of New Jersey for violating the overtime regulation. Neither the employee nor Chipotle had anything to do with the Texas litigation. Nevertheless, Chipotle moved the Texas court to hold the employee in contempt for violating that court’s preliminary injunction against enforcement of the regulation.

The district court granted the motion, holding the employee in contempt. The court noted that the employee knew about the order when he

241. See e.g., Tilley v. TX Cos., 345 F.3d 34, 39–40 (1st Cir. 2003) (“Defendant classes generally lie outside the contemplation of Rule 23(b)(2)’s”), Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987) (holding that the “language” and “drafting history” of Rule 23(b)(2) demonstrate that broad defendant classes are impermissible); Thompson v. Bd. of Educ., 709 F.2d 1200, 1204 (6th Cir. 1983) (holding that Rule 23(b)(2) “contemplates certification of a plaintiff class against a single defendant, not the certification of a defendant class”); Faxon v. Campbell, 612 F.2d 848, 854–55 (4th Cir. 1980) (en banc).
244. 81 FED. REG. 32,391, 32,549–52 (May 23, 2016) (codified at 29 C.F.R. § 541 (2019)).
249. Id at 715.
250. Id at 729.
filed the New Jersey lawsuit.\footnote{Id at 716.} Although the preliminary injunction enjoined only DOL from enforcing the overtime rule, injunctions also apply to nonparties who are in privity with an enjoined entity.\footnote{Id at 720 (citing Regal Knitwear Co. v. NLRB, 324 U.S. 5, 14 (1945)).} The Texas court held that DOL had been defending the overtime rule to enforce the rights of people like the employee throughout the nation. Consequently, the employee was in privity with the Department and subject to the injunction.\footnote{Id at 725–26.} The Texas court commented, "[T]he common knowledge among citizens that the DOL and agencies like it represent the public at large explains the dearth of precedent that factually paralleled this proceeding."\footnote{Id at 725.}

The Texas court went on to conclude that the employee’s New Jersey lawsuit for Chipotle’s alleged violations of the overtime rule violated the preliminary injunction.\footnote{Id at 726.} It held the employee and his attorneys in contempt, ordering them to withdraw the New Jersey lawsuit and reimburse Chipotle for its attorneys’ fees in connection with the contempt motion.\footnote{Id at 729.} The court stayed its ruling pending appeal,\footnote{Nevada v. U.S. Dep’t of Labor, No. 4:16-CV-00731, 2018 U.S. Dist. LEXIS 73780, at *5 (D. Nev. May 1, 2018).} and the U.S. Court of Appeals for the Fifth Circuit reversed it.\footnote{Texas v. U.S. Dep’t of Labor, 929 F.3d 205, 213 (5th Cir. 2019).}

The Fifth Circuit correctly declared that, because the employee was “not in privity with the DOL and not otherwise bound by the injunction, the district court erred in granting Chipotle’s motion for contempt.”\footnote{Id at 213.} This case confirms that even a favorable judgment against the government invalidating a legal provision will not preclude private plaintiffs from continuing to sue under it, especially in other jurisdictions. Without some mechanism akin to a nationwide defendant-class injunction, nothing other than a Supreme Court opinion can protect a private party from federal legal provisions that create private rights of action.

Affording district court rulings district- or circuit-wide stare decisis effect would reduce some of the risk to regulated entities but not completely solve the problem. The corporation would still have to find a defendant (i.e., a right holder under the statute) against whom it could assert a ripe, justiciable claim. And it would not be able to operate safely on a nationwide basis without securing victories in multiple jurisdictions.
One potentially effective solution, which would require some substantial doctrinal shifts, would be to allow a plaintiff to obtain protection against a federal legal provision (including private causes of action) by bringing a declaratory judgment suit against a designated government official in his or her official capacity, such as the Speaker of the House, Attorney General, or President.260 Such officials are ultimately responsible, in some sense, for federal legal provisions, including measures they are not empowered to enforce themselves. Although this approach would rest upon a legal fiction, it is comparable to the other fictions upon which much of modern sovereign immunity doctrine, such as Ex parte Young, is premised.261 These suits would also be an easier vehicle for generating precedents that could be afforded stare decisis effect because the plaintiff would not be singling out an unsuspecting right holder—with whom an Article III controversy may not even exist—to sue. Additionally, the federal government is much better equipped to defend the constitutionality or proper interpretation of federal laws and, in any event, is already entitled to intervene in any such challenges brought against private parties.262

The Court has recognized the importance of providing opportunities for pre-enforcement review when a law authorizes potentially severe consequences like statutory or punitive damages, attorneys' fees, or injunctive relief.263 The lack of an effective vehicle for bringing pre-enforcement challenges to the validity or meaning of federal legal provisions that create private rights of action is an underexplored topic that requires further careful consideration.

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Disaggregating the concept of nationwide injunctions can help courts distinguish the types of orders with nationwide effect that are appropriate for them to issue from those that raise serious constitutional, fairness-related, rule-based, prudential, and structural concerns. This Article’s proposed taxonomy seeks to shift the focus from the geographic applicability of an order to (i) the parties whose rights a court seeks to enforce and (ii) whether the case is a class action:


262. See supra note 236.

### Disaggregating Nationwide Injunctions

<table>
<thead>
<tr>
<th>NATURE OF LAWSUIT</th>
<th>WHOSE RIGHTS ARE BEING ENFORCED</th>
</tr>
</thead>
</table>
| Only Individual Plaintiff(s) | **Plaintiff-Oriented Injunction**  
Valid. May apply nationwide when legality, standing, and threat constraints are satisfied. |
| Associational Plaintiff(s) | **Associational Injunction**  
Valid if the court tailors it to enforcing the rights of the association’s members at the time of judgment as the real parties in interest. |
| Class Action | **Plaintiff-Class Injunction**  
Valid, but courts should certify only district- and circuit-wide classes and rely primarily on stare decisis to protect third parties. |
| **Defendant-Oriented Injunction** | Invalid. |

A valid plaintiff-oriented injunction may resemble a nationwide defendant-oriented injunction when the plaintiff’s rights are “indivisible.”

A plaintiff-class injunction will resemble a nationwide defendant-oriented injunction when the court (improperly) certifies a nationwide class.

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**Private Enforcement Injunction**—An entity seeks to preclude all private right holders throughout the nation from enforcing a challenged legal provision against it. Under current doctrine, there is likely no valid way for a court to issue such orders.

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As this taxonomy demonstrates, not all so-called nationwide injunctions are the same or subject to the same constraints. Orders of nationwide applicability are appropriate only when necessary to protect the rights of the plaintiffs before the court, because either the plaintiffs face potential violations of those rights across the nation, or their rights are indivisible from those of third-party nonlitigants not before the court.
II. POTENTIAL REFORMS

Both Congress and the courts can prohibit inappropriate nationwide injunctions in public law litigation through a variety of reforms. This Part discusses potential changes to the U.S. Code, Federal Rules of Civil Procedure, and various judicial doctrines that would ensure lower courts tailor their remedies to enforcing the rights of the plaintiffs before them.

A. Prohibiting Nationwide Defendant-Oriented Injunctions

Perhaps the most obvious reform is to expressly prohibit courts from issuing nationwide defendant-oriented injunctions for the reasons discussed above.\(^\text{264}\) Of the various types of orders that might be classified as nationwide injunctions, these are the most problematic. Such injunctions may be prohibited through any number of mechanisms. Most basically, circuit courts of appeals and, ultimately, the Supreme Court can simply hold that such injunctions are inappropriate under Article III, Rule 23, or traditional equitable principles.\(^\text{265}\)

The Court recently had an opportunity to do so in *Trump v. Hawaii*, the *Travel Ban Case*; Justice Clarence Thomas’s concurrence forcefully rejected their propriety.\(^\text{266}\) This term, the Supreme Court is hearing consolidated appeals\(^\text{267}\) from several courts that approved nationwide defendant-oriented injunctions against the Trump Administration’s termination of President Obama’s DACA program—though the litigation focuses on the legality of the termination, rather than the proper scope of relief.\(^\text{268}\) The Seventh Circuit was poised to consider the matter en banc in the sanctuary cities litigation but called off its hearing when the district court replaced its preliminary injunction with a permanent injunction.\(^\text{269}\) The propriety of nationwide relief in that case remains at issue as the Department of Justice appeals the permanent injunction.\(^\text{270}\) Such suits offer the most obvious and immediate method of limiting the scope of

\(^ {264} \) *See infra* Part I.D.

\(^ {265} \) *See supra* notes 148–71 and accompanying text.


\(^ {267} \) *See* Dept’t of Homeland Sec. v. Regents of the Univ. of Cal., 139 S. Ct. 2779 (2019) (mem.).


\(^ {269} \) *See* Brief for the Petitioners at I, Dept’t of Homeland Sec. v. Regents of the Univ. of Cal., Nos. 18-587, 18-588, & 18-589 (U.S. filed Aug. 19, 2019).


nationwide defendant-oriented injunctions in public law cases. Indeed, the Supreme Court's rejection of nonmutual collateral estoppel against the Government in United States v. Mendez is an important component of the argument against nationwide injunctions.\footnote{272} It would be particularly appropriate for the Court itself to address Mendez's impact.

Alternatively, the judiciary likely could resolve the issue through its rule-making powers. The Rules Enabling Act specifies that rules must be procedural\footnote{273} and may not “abridge, enlarge or modify any substantive right.”\footnote{274} Federal Rule of Civil Procedure 65 generally governs the procedures through which courts grant injunctive relief. With the exception of the requirement that a plaintiff show “immediate and irreparable injury, loss, or damage” to obtain an ex parte temporary restraining order,\footnote{275} Rule 65 does not provide substantive standards governing injunctions.\footnote{276}

Consistent with the Rules Enabling Act's restrictions, I propose Rule 65(g):

> The court may issue an injunction or similar form of relief to protect or enforce a person's rights only if that person is a party to, or real party in interest in, the case under Rules 14, 17, 19–20, or 22–25, and that person moves under this Rule for injunctive relief. Any injunction or similar form of relief shall be tailored to enforcing the rights of the moving party.

This proposed rule is expressly cast in procedural terms, tying the availability of injunctive relief to a party's involvement in the case as a litigant, whether directly or as a member of a class.\footnote{277}

\footnotesize{274} Id. § 2072(b).
\footnotesize{275} FED. R. CIV. P. 65(b)(1)(A).
\footnotesize{276} Modley, supra note 169, at 252–53.
\footnotesize{277} The proposed rule complements Rule 65(d)(2)(C), which provides that a third-party nonlitigant is bound by an injunction only if it acts “in active concert or participation” with an enjoined party or its agents and receives notice of the order. FED. R. CIV. P. 65(d)(2)(C). To the extent the Supreme Court continues to accept the validity of Rule 65(d)(2)(C), it supports the notion that the Rules Enabling Act allows the promulgation of rules governing an injunction’s applicability beyond the immediate parties to a case.

Rule 65(d)(2)(C) raises serious questions under the Rules Enabling Act, however, since the Act authorizes the promulgation of only procedural, and not substantive, rules. 28 U.S.C. § 2072(a)–(b); see Hanna v. Plumer, 380 U.S. 469, 471 (1965) (holding that a federal court may not apply a federal rule of procedure if it “transgresses . . . the terms of the Enabling Act”). The Court has explained, “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress . . . .” Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). The issue of which third-party nonlitigants are bound by an injunction—particularly entities who neither are in privity with an enjoined party nor had notice and an opportunity to be heard in the underlying proceedings—seems to be a matter of substantive law rather than procedure. The Rule especially appears to regulate substantive rights as applied to prophylactic injunctions, which may prohibit third-party nonlitigants from engaging in acts that are otherwise legal or require them to perform actions that are not otherwise legally mandated. See Thomas, supra note 49, at 322, 326. Thus, Rule 65(d)(2)(C) may violate the Rules Enabling Act.

Moreover, if the applicability of injunctions to third-party nonlitigants is a matter of substantive law, then a federal court cannot apply the same rule across the board to all cases that come before it. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Rather, federal substantive law would govern the scope of injunctive relief in cases arising under federal law, while state substantive law would apply in cases arising under state
Addressing the issue of nationwide injunctions through the rulemaking process allows broad public participation through the submission of comments to the Civil Rules Advisory Committee. It also establishes a consistent nationwide standard, rather than leaving room for circuit splits, and ensures the rule is crafted outside the context of a particular case, in which the nature of the underlying rights or identities of the litigants may color the Court's consideration of the issue.

Rather than waiting for the judiciary to address the issue, either through precedent or the rulemaking process, Congress itself could simply enact a law regulating or prohibiting nationwide injunctions. The U.S. House Judiciary Committee's Subcommittee on the Courts, Intellectual Property, and the Internet has already held a hearing on the subject and reported a bill, the "Injunctive Authority Clarification Act of 2018," which provides:

No court of the United States (and no district court of the Virgin Islands, Guam, or the Northern Mariana Islands) shall issue an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.

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law. Cf. Modley, supra note 169. Although Rule 65(d)(2)(C) would be unenforceable under either of these approaches, very little would actually change. Rule 65(d)(2)(C) codifies the traditional equitable principles that would presumptively govern federal-question cases in its absence. See Regal Knitwear Co. v. NLRB, 324 U.S. 58 (1945) (holding that the provision presently codified at Rule 65(d) "is derived from the common law doctrine that ... defendants may not nullify a decree by carrying out prohibited acts through aids and abettors, although they were not parties to the original proceeding"); see also Chase Nat'l Bank v. City of Norwalk, 291 U.S. 403, 416–17 (1934). Thus, even without the rule, federal courts adjudicating federal-question cases would continue to presumptively apply injunctions to third parties acting in concert with the defendant or its agents. Likewise, nearly every state in the nation has adopted the same principle as a matter of state law, whether as a rule of procedure, see, e.g., Ala. R. Civ. P. 65(d)(2); statute, see, e.g., Ga. Code Ann. § 9-11-65 (2019); or judicial precedent, see, e.g., Dalton v. Meister, 267 N.W.2d 526, 530–31 (Wis. 1978). Federal courts would therefore continue to apply it in diversity cases and other matters arising under state law, as well. Of course, the choice between federal and state standards could still be significant to the extent that federal and state courts disagree over whether certain jurisdictions between an enjoined party and a third-party nonlitigant rise to the level of acting in concert with each other. Cf. Michael T. Modley, Beyond the Elements: Erie and the Standards for Preliminary and Permanent Injunctions, 52 Ala. L. Rev. 437, 474–80 (2018) (explaining how federal and state courts may interpret and apply principles governing injunctive relief differently).

It does not appear that any Rules Enabling Act challenges have yet been brought against Rule 65(d)(2)(C). Even if Rule 65(d)(2)(C) is vulnerable to such a challenge, however, the proposed Rule 65(g) above governing the scope of injunctive relief does not give rise to comparable concerns. Whereas Rule 65(d)(2)(C) goes beyond the parties before the court to extend an injunction to third-party nonlitigants, the proposed Rule 65(g) instead reinforces other rules of civil procedure by confirming that a court may enforce the rights only of the litigants before it.

278. See 1 GUIDE TO JUDIcIARY POLICY § 4.04(b) (2011).
This proposal is a well-crafted solution, though it raises three potential concerns. First, it may be underinclusive because it is tailored only to orders that “restrain the enforcement” of legal authorities such as statutes and regulations. Courts may issue other types of nationwide injunctions, however, such as injunctions requiring government defendants to affirmatively enforce certain legal authorities, to construe or enforce legal authorities in a particular manner, or to refrain from giving legal effect to other types of official action. For example, a nationwide injunction prohibiting the government from complying with President Trump’s attempt to rescind the DACA program may instead be cast as a nationwide injunction affirmatively compelling the government to implement the program. The statute’s phrasing unnecessarily raises questions about its scope and creates the opportunity for motivated lower courts to evade its restrictions.

Second, uncertainty may exist about whether third-party nonlitigants are “represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.” The statute would be more effective if Congress adopted a more concrete, specific standard. Finally, the proposal does not address the issue of public-interest groups using associational standing as a backdoor mechanism for evading limits on nationwide injunctions.

To address these concerns, Congress should instead consider the following language as a starting point:

(a) Unless otherwise required by the U.S. Constitution or some other provision of applicable law, any injunction issued by a U.S. district court shall be tailored to enforce only the rights of the moving parties (including real parties in interest under Rule 17(b) and members of a class certified under Rule 23) and shall not be unnecessarily extended further to enforce the rights of third-party nonlitigants.

(b) In any case in which a plaintiff entity asserts associational standing, the “moving parties” for purposes of Subsection (a) shall be deemed to be that entity’s members who had been harmed, or faced an imminent likelihood of harm, due to the legal provision or provisions at issue as of the time the court issues the injunction.

Regardless of the phrasing of the proposal, however, the legislative process has become so stultified that it seems the least likely route for reform in the foreseeable future.

281. H.R. 6730 § 2.
282. See supra note 268.
283. H.R. 6730 § 2.
284. See supra Part I.C.
B. Limiting the Geographic Scope of Rule 23(b)(2) Plaintiff Classes

Any attempt to address the issue of nationwide injunctions must likewise contend with the proper scope of class actions under Rule 23(b)(2). If courts are prevented from issuing nationwide defendant-oriented injunctions in which they nullify legal provisions on behalf of all right holders without formally certifying a plaintiff class, the natural alternative is for district courts to simply certify nationwide classes under Rule 23(b)(2) before issuing such injunctions. As discussed earlier, virtually any facial challenge to a legal provision, as well as any as-applied challenge that relies primarily on generally applicable legal arguments rather than the unusual circumstances of particular litigants, would likely satisfy the requirements for Rule 23(b)(2) class certification as a matter of law.286

And nothing about the process of certifying a Rule 23(b)(2) class either provides any meaningful benefits to the court, the parties, or the putative class members, or helps identify certain cases that would be especially appropriate for nationwide relief.

Consequently, the Supreme Court should reconsider Califano v. Yamasaki, which authorized district courts to certify nationwide classes and grant nationwide relief in challenges relating to federal legal provisions.287 Indeed, the Court subsequently barred litigants from asserting offensive nonmutual collateral estoppel against the Government in United States v. Mendoza to protect the government’s power to relitigate important issues in multiple jurisdictions.288 Mendoza also emphasized the limited powers of the lower federal courts, particularly in public law cases, within our hierarchical, decentralized judicial system.289 Califano minimizes these considerations.

Alternatively, either the Civil Rules Advisory Committee or Congress could tackle the issue through the rulemaking or legislative processes, respectively. Rule 23 authorizes federal courts to certify classes; restrictions on their geographic scope would constitute procedural amendments permitted by the Rules Enabling Act.290 And federal law already regulates class actions in various respects.291 I propose the following measure, which could be substantively adopted as either a rule or a statute:

[Rule 23(c) / 28 U.S.C. § 1716]

Unless otherwise required by the U.S. Constitution or some other provision of applicable law, in a lawsuit against a federal agency or a federal official in his or her official capacity, when a district court certifies a class pursuant to

286. See supra note 122 and accompanying text.
289. Id.
291. Id. §§ 1711–15.
Federal Rule of Civil Procedure 23(b)(2) in which the class representative challenges the validity, proper interpretation, or application of a federal statute, regulation, executive order, policy, agency issuance, or other legal provision, the class shall be comprised only of members who reside within the federal circuit in which the court sits, or who would allegedly suffer adverse consequences from the challenged legal provisions, activities, events, conduct, or transactions within that circuit.

This proposed amendment is expressly limited to public law cases against government defendants concerning the validity, proper construction, or application of federal enactments to ensure it does not have unexpected adverse consequences in purely private disputes. This amendment would resolve the longstanding tension between Calijano and Mendoza, prevent courts from circumventing restrictions on nationwide defendant-oriented injunctions; ensure percolation of important constitutional and statutory issues across different circuits; and reinforce both the decentralized, hierarchical structure of the federal judiciary, as well as geographic limitations on the legal applicability of lower courts' rulings.

C. State Decisis for District Court Rulings

The reforms suggested in the previous Parts would greatly limit the power of lower courts, particularly district courts, to grant relief in public law cases. Taken to the extreme, these proposals would require every right holder throughout a state, the nation, or, in some cases, even the world to separately challenge an allegedly invalid legal provision, either personally or as part of a class, to obtain relief. Such an approach raises substantial practical and fairness concerns.

One of the points that defenders of nationwide injunctions typically overlook, however, is that injunctions are not courts’ only tools for protecting the rights of third-party nonlitigants. When a court interprets a legal provision or holds it invalid, its judgment and any injunction are typically accompanied by a written opinion. The holdings in such opinions presently have nationwide stare decisis effect when issued by the Supreme Court, circuit-wide stare decisis effect when issued by a circuit court, and no such effect at all when issued by a district court.292 In addition to establishing the law that future courts must apply, circuit court and Supreme Court opinions also generally render the law “clearly established” for Bivens293 and § 1983294 purposes, meaning government officials may be held personally liable for acting contrary to them.295

The most efficient way to allow third-party nonlitigants to benefit from district court rulings is to accord them some degree of stare decisis effect. At a minimum, a district court’s rulings could be afforded stare decisis effect throughout that district. Alternatively, since all district courts within a circuit are engaged in the same activity—attempting to apply the law of the circuit—
a district court ruling could instead be given circuit-wide stare decisis effect. With circuit-wide stare decisis, as few as twelve lawsuits—one in each numbered geographic circuit as well as the District of Columbia Circuit—would be needed to adjudicate the rights of everyone throughout the nation, regardless of whether the cases are appealed. Circuit-wide stare decisis for district court rulings would avoid the need to endlessly relitigate the same legal issues and allow substantial numbers of third-party nonlitigants to benefit from district courts’ public law rulings. At the same time, the geographic limits of this stare decisis effect would promote a reasonable amount of relitigation of important issues among different circuits and reinforce the limited scope of lower courts’ authority.

One might object that affording circuit-wide stare decisis effect to district court rulings would prevent intracircuit percolation. Courts of appeals would be deprived of the opportunity to consider how different district courts have addressed an issue and assess the practical consequences of various approaches. The Supreme Court, however, would retain its ability to watch issues percolate among the circuits and consider the legitimacy and practical effects of various circuits’ approaches. Moreover, courts of appeals may not receive the same benefits from a multiplicity of district court rulings that the Supreme Court does from the opportunity to consider multiple appellate rulings. Whereas courts of appeals are institutionally structured to produce thorough, researched opinions on complex questions of law, district courts focus much more on case-processing and factual development. Moreover, because litigants generally may appeal to circuit courts as of right, they frequently adjudicate important issues even when only a single district court within their jurisdiction has considered it.

Extending circuit-wide stare decisis effect to all district court rulings would carry other, more substantial drawbacks, however. It would substantially increase the amount of case law each district court must treat as binding and may increase the time required to adequately research legal issues, thereby increasing litigation costs. Moreover, allowing a district court’s ruling to have the force of

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296. See Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam) (discussing “usual law-of-the-circuit procedures”); see also Olde Time Ice Cream v. Birmingham, 936 F.2d 1481, 1485 (11th Cir. 1992) (holding that the district courts within each circuit must apply “the law of the circuit”).


law outside its geographic jurisdiction may be inconsistent with Congress’s decision to separate the country into individual judicial districts. And district courts may not have the time or institutional capacity to ensure that their opinions are researched comprehensively and crafted precisely enough to constitute binding law for other district judges across an entire circuit, particularly when trial counsel perform a cursory job of briefing the issues.299

Whether district court rulings are treated as binding on other district judges across the district or circuit, stare decisis is a far more appropriate vehicle than injunctions for protecting third-party nonlitigants.300 Unlike nationwide defendant-oriented injunctions, allowing third parties to take advantage of stare decisis does not raise Article III concerns about a plaintiff’s standing or the scope of the controversy before the court. And all right holders within the district or circuit would be subject to the court’s ruling, regardless of whether the plaintiff wins or loses. Fairness concerns about asymmetric claim preclusion are therefore likewise absent.301

Stare decisis is even superior to Rule 23(b)(2) class actions as a mechanism for extending the consequences of district court rulings beyond the named parties to a case. By its very nature, stare decisis allows all right holders within a court’s jurisdiction—known and unknown, present and future—to take advantage of its ruling. Rule 23(b)(2) classes in public law cases are effectively a clumsy, unnecessary, doctrinally problematic means of attempting to achieve the same effect. As discussed earlier, their class definitions are often vague and overbroad, including unknown, unidentifiable, and even future right holders, many of whom lack standing at the time to be included in a federal lawsuit.302 Neither the court, the named parties, nor the class members obtain any benefit from requiring plaintiffs to go through the formality of Rule 23(b)(2) class certification before a district court’s ruling may protect other right holders within its jurisdiction. Granting stare decisis effect to district court rulings, together with the stare decisis effect already afforded appellate courts’ rulings, obviates the need for such procedural machinations.

There are at least two major potential objections to relying on stare decisis as a replacement for nationwide defendant-oriented injunctions and nationwide plaintiff-class injunctions. First, most obviously, the effects of a district court’s


300. See Bray, supra note 22, at 474 (“Precedent should be the ordinary way one case ripples out to others.”); Joseph W. Mead, Stare Decisis in the Inferior Courts of the United States, 12 NEV. L.J. 787, 809–10 (2012) (proposing a more elaborate system of stare decisis for district courts and examining the rationales and counterarguments).

301. Cf. supra notes 155–56 and accompanying text.

302. See supra notes 115–18 and accompanying text.
ruling would be limited to the district or circuit in which the court sits. As discussed earlier, however, limiting the effects of lower courts’ rulings—particularly in public law cases involving the validity of congressional or presidential action—is consistent with the decentralized, hierarchical structure of the federal judicial system.  

Second, and perhaps more importantly, district and circuit court opinions, on their own, provide less protection than temporary restraining orders and preliminary injunctions. Government agencies and officials cannot be held in contempt for acting contrary to a judicial opinion (or even declaratory judgment), even if that opinion is regarded as binding law within the jurisdiction. They are subject to the possibility of civil or criminal contempt only after a district court has entered an injunction against them. Thus, even when a court rules that certain government conduct is unconstitutional or unauthorized, third-party nonlitigants who are not protected by an injunction remain vulnerable to “fast” violations of their rights, in which there is not time to obtain a preventive injunction from a court, and “slow” violations, in which they face lengthy and burdensome administrative exhaustion requirements before being able to go to court to obtain an injunction. To prevent such harms, a court may require a case to proceed as a district- or circuit-wide Rule 23(b)(2) class action (although still not a nationwide class action) when the nature of the right at issue subjects plaintiffs to such risks. Across the wide run of cases, however, stare decisis, rather than injunctive relief, is likely to sufficiently protect third parties’ rights without disturbing the surrounding fabric of the law.

D. Other Doctrinal Reforms

To fully resolve the issue of nationwide injunctions, several other complementary doctrinal changes are necessary, as well. Most basically, federal agencies should engage in intracircuit acquiescence, applying each circuit’s binding precedents to matters that fall within that court’s appellate jurisdiction. The Supreme Court, for its part, should reject the “necessity” doctrine, which provides that district courts should generally decline to certify class actions in challenges to governmental policies or issuances. The Court must likewise repudiate the “one good plaintiff” rule, which specifies that so long as any plaintiff in a case has standing, a court need not confirm whether the other plaintiffs have standing, as well. Finally, Congress must be attentive to how venue rules can give

303. See supra notes 88–90 and accompanying text.
305. See Steffel v. Thompson, 415 U.S. 452, 471 (1974) (holding that, in the absence of an injunction, noncompliance with a court’s judgment does not subject a party to contempt).
307. See supra Part II.B.
effectively nationwide effect to rulings of the U.S. District Court and U.S. Court of Appeals for the District of Columbia.

1. Intracircuit Acquiescence

For stare decisis to function effectively as a vehicle for protecting the rights of third-party nonlitigants, federal agencies and officials must be willing (or required) to engage in “intracircuit acquiescence.” Intracircuit acquiescence is an agency policy of accepting a circuit court’s ruling as binding law within that circuit, or for matters involving right holders within that circuit, even in the absence of an injunction expressly ordering the agency to comply. Nonacquiescence, in contrast, is an agency’s insistence on continuing to apply its own regulations, policies, or interpretations of a federal statute, even after a circuit court has rejected them, to matters appealable to that court. When an agency refuses to acquiesce in a judicial ruling, it typically complies with the court’s judgment and provides the relief the court orders for the parties involved in that case, but declines to apply that precedent to similarly situated third-party nonlitigants.

Some scholars have vigorously defended the prerogative of agencies to engage in intracircuit nonacquiescence to courts of appeals’ rulings. Essentially adopting a strong departmentalist view of constitutional interpretation, these authors argue that federal agencies have a strong interest in applying their policies as uniformly as possible across the nation and maintaining their role as the “primary policymakers” as authorized by Congress. Rejecting this position, others have argued that due process, equal protection, separation-of-powers, and fundamental rule-of-law concerns require federal agencies to abide by a circuit court’s rulings when dealing with people within that court’s geographic jurisdiction.

A compelling argument in support of intracircuit acquiescence arises from, surprisingly, the Ex parte doctrine. Ex parte held that a jurisdiction’s law may be set forth either in statutes or court rulings and is equally valid and binding regardless of the form it takes. When a court reviews an agency action, it is determining whether the agency followed the applicable rules of decision, not changing

310. See, e.g., Estreicher & Revesz, supra note 26, at 683.
311. Id. at 759–60.
66

2. The Necessity Doctrine

Circuits that have adopted the "necessity doctrine" should abandon it or, at the very least, limit it to cases involving indivisible rights. The necessity doctrine provides that certifying a Rule 23(b)(2) class is unnecessary where an injunction issued to an individual plaintiff would have the same effect as a class-wide injunction. Numerous circuits, with the notable exception of the Seventh Circuit, have adopted this policy. The Sixth Circuit previously embraced the necessity doctrine but, encouragingly, has more recently expressed skepticism about it. A few circuits grant district courts discretion to apply the

314. See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (holding that, in reviewing agency action, a "court must consider whether the [agency]’s decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").
318. Id. at 1019.
320. Sm. v. Kan. Health Care Ass’n v. Kan. Dept. of Soc. & Rehab. Servs., 51 F.3d 1536, 1548 (10th Cir. 1999) (citing Evens v. Bowen, 853 F.2d 1532, 1533 n.6 (10th Cir. 1988), rev’d on other grounds, 491 U.S. 83 (1990)); Soto-Lopez v. N.Y.C. Civic. Serv. Comm’n, 840 F.2d 162, 168–69 (2d Cir. 1988) (citing Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973)); Washington v. Finley, 664 F.2d 913, 928 (4th Cir. 1981) ("[i]f so far as the interests of the putative class members in this type 23(b)(2) class action seeking only injunctive relief are concerned, noncertification as a class action is likely to be of no practical consequence."); see also Blake v. N. States Power Co., 454 F.2d 566, 572 (8th Cir. 1972) ("[T]his action should not be maintained as a class action because the determination of the constitutional question can be made by the Court . . . regardless of whether this action is treated as an individual action or as a class action. No useful purpose would be served by permitting this case to proceed as a class action.").
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Disaggregating Nationwide Injunctions

2019

...other side, when they conclude that class certification would serve no useful purpose.\textsuperscript{323} Other circuits apply the doctrine only when the plaintiff seeks to enforce an indivisible right, for which it is impossible to enforce one person’s rights without simultaneously enforcing those of other right holders.\textsuperscript{324}

The Second Circuit is among the jurisdictions that applies the doctrine broadly, holding that class certification is generally unnecessary in constitutional challenges to government enactments.\textsuperscript{325} The court explained,

\begin{quote}
[When it has been held unconstitutional to deny benefits to otherwise qualified persons on the ground that they are members of a certain group, the officials have the obligation to cease denying those benefits not just to the named plaintiffs but also to all other qualified members of the group.\textsuperscript{326}

The court added that ordering such broad “injunctive relief is appropriate without the recognition of a formal class,” because “it would be . . . unthinkable to permit the officials to ‘insist on other actions being brought.’”\textsuperscript{327} The U.S. District Court for the Eastern District of New York implicitly invoked the doctrine in denying the plaintiffs’ motion for class certification as moot after entering a nationwide defendant-oriented injunction against the Trump Administration’s attempt to rescind the Obama-era DACA program.\textsuperscript{328}

This analysis perfectly encapsulates the fundamental flaw with the necessity doctrine: it presupposes that district courts may issue nationwide defendant-oriented injunctions in nonclass cases, even if they involve divisible rights. If district courts instead must tailor their relief to the particular plaintiffs in a case, however, then the proper scope of an injunction will almost always depend on whether a case has been brought solely by individual plaintiffs or instead is certified as a class action.\textsuperscript{329} Consequently, if a Supreme Court holding, new statute, or new Federal Rule of Civil Procedure bars district courts from issuing

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\textsuperscript{323} See, e.g., Gayle v. Warden Monmouth Cty. Corr. Inst., 838 F.3d 297, 310 (3d Cir. 2016) (“The circumstances in which class-wide relief offers no further benefit to putative class members, however, will be rare, and courts should exercise great caution before denying class certification on that basis.”).

\textsuperscript{324} See, e.g., Hernandez v. Reno, 91 F.3d 776, 781 & n.17 (5th Cir. 1996).

\textsuperscript{325} Soto-Lopez, 840 F.2d at 168 (“Relief of general application . . . is not limited to class actions. When a state statute has been ruled unconstitutional, state actors have an obligation to desist from enforcing that statute.”).

\textsuperscript{326} Id.

\textsuperscript{327} Id at 168-69 (quoting Vulcan Soc’y of N.Y.C. Fire Dept., Inc. v. Civ. Serv. Comm’n, 490 F.2d 387, 399 (2d Cir. 1973)).


\textsuperscript{329} A possible exception is when a court issues an injunction to enforce indivisible rights, in which upholding a particular plaintiff’s rights requires the concurrent enforcement of third parties’ rights, as well. Some courts, however, have expressed skepticism over whether third-party nonlitigants—essentially, third-party beneficiaries—may enforce injunctions to which they are not parties. See, e.g., Wis. Right to Life, Inc. v. Schofer, 366 F.3d 485, 490 (7th Cir. 2004) (holding that an injunction prohibiting enforcement of a state
nationwide defendant-oriented injunctions, they will have to jettison the necessity doctrine as well.

The necessity doctrine also overlooks two other key distinctions between individual suits and class actions. First, class certification affects application of the mootness doctrine. In a nonclass suit, if the plaintiff’s claim becomes moot, the court generally must dismiss the case for lack of subject-matter jurisdiction\(^{330}\) unless an exception to the mootness doctrine applies.\(^{331}\) If a class is certified, however, the case may proceed even if the plaintiff’s claim is mooted.\(^{332}\) The \textit{Sanchez-Gomez} Court unanimously reaffirmed the importance of such procedural formalities.\(^{333}\) The Court’s attribution of legal significance to class certification, even in constitutional challenges, is inconsistent with the premise underlying the necessity doctrine that class certification is often irrelevant in such cases.\(^{334}\)

Second, the necessity doctrine also ignores class certification’s impact on the scope of preclusion. As discussed above, if a government defendant wins a case brought by an individual plaintiff, the judgment does not preclude other right holders from relitigating the same claim, potentially even in the same circuit.\(^{335}\) Members of a certified class, in contrast, are bound by the judgment in a class action and generally precluded from raising the same claims in subsequent litigation.\(^{336}\) A district court’s decision as to whether to certify a class determines the preclusive scope of its judgment.\(^{337}\) Thus, the necessity doc-

\(^{330}\) ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.1, at 137–38 (7th ed. 2016).
\(^{332}\) Sosa v. Iowa, 419 U.S. 393, 399–402, 402 n.11 (1975); \textit{see also} Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (noting that a putative class action remains justiciable, even after the named plaintiff’s claim becomes moot, if the nature of the issue prevented the court from ruling on the class certification motion in time).
\(^{334}\) See Ball v. Wagers, 795 F.2d 579, 581–82 (6th Cir. 1986) (holding that the district court’s refusal to certify a class due to the necessity doctrine was erroneous because, once the plaintiff’s claim became moot, the case’s continued justiciability hinged on whether a class had been certified).
\(^{337}\) See Washington v. Finlay, 664 F.2d 913, 928–29 (4th Cir. 1981) (holding that, after declining to certify a class action at the outset of a case, the district court could not change its mind at the end of the case and certify a class in conjunction with its dismissal of the action, because such belated certification would preclude subsequent independent litigation by the class members).
trine’s foundation is already fundamentally flawed; the elimination of nationwide defendant-oriented injunctions would add yet another compelling reason to abandon it.

3. Examining Plaintiffs’ Standing

An even more broadly accepted doctrine is the notion that, in a multi-plaintiff case, a court may proceed to the merits after confirming that at least one plaintiff has standing, without separately confirming the standing of each of the other plaintiffs, as well. Professor Aaron-Andrew P. Brulh recently demonstrated that this “one-plaintiff rule” is invalid. He explains, “Given that judgments operate for and against specific people, it follows that each person invoking this judgment-issuing power must have standing.” If courts no longer issue nationwide defendant-oriented injunctions and instead must tailor each injunction to enforcing the rights of the particular plaintiffs before them, it will be even more important to determine whether each plaintiff in a case has standing. Greater precision in crafting relief will require equivalent precision in determining which plaintiffs’ claims are justiciable.

4. Reconsidering Federal Venue

If nationwide defendant-oriented injunctions are eliminated, stare decisis will replace injunctive relief as the primary mechanism for giving third-party nonlitigants the benefit of favorable court rulings. Congress will therefore have to consider whether to amend—and the Supreme Court will have to decide whether to reinterpret—the federal venue statute to prevent litigants from using the federal district and circuit courts for the District of Columbia to obtain effectively nationwide relief.

Certain types of issues, primarily involving administrative law, are already centralized in the D.C. federal courts. And plaintiffs are already free to bring

338. See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977) (“[T]he existence of at least one individual plaintiff who has demonstrated standing . . . . [W]e therefore need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.”), see also Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (“Only one of the petitioners need have standing to permit us to consider the petition for review.”).


340. Id. at 419.

341. See id. at 512–13 (explaining how the “one plaintiff” rule can make courts more willing to issue broad, nationwide defendant-oriented injunctions). Even in cases involving indivisible rights, where the plaintiffs’ identities would not affect the scope of the relief, courts should still confirm each plaintiff’s standing to ensure it is a proper party because only parties are bound by res judicata, id. at 507. Similarly, only parties are entitled to appeal and seek court costs and attorneys’ fees, id. at 508–09. It also tends to be easier for them to enforce injunctions, id. at 507 & n.123.

most other types of public law challenges in those courts, as well. The federal venue statute, 28 U.S.C. § 1391(e)(1), provides that, when a plaintiff sues a government agency or official in his or her official capacity, the suit may be filed in any district in which the plaintiff resides (if no real property is involved), any defendant resides, or "a substantial part of the events or omissions giving rise to the claim occurred." This provision makes venue proper in the District of Columbia for most challenges concerning the validity or proper construction of federal level provisions "due to legal residence of federal defendants or the making of policy decisions there."344

If nationwide defendant-oriented injunctions (and nationwide plaintiff-class injunctions) are eliminated, plaintiffs seeking to nullify federal legal provisions on a nationwide basis are likely to sue in the U.S. District Court for the District of Columbia as a next-best alternative. If a plaintiff persuades the D.C. district court that a provision is invalid (or that it should interpret the provision advantageously) and that ruling is given stare decisis effect,345 then any other right holder anywhere in the nation would be able to claim the benefit of that precedent simply by suing in the same court.

While the D.C. district court would not be issuing a nationwide injunction, its precedents would be applicable to right holders nationwide by virtue of § 1391(e)(1)'s venue provisions. And even if the district court's rulings are not afforded stare decisis effect, the same analysis would apply once the D.C. Circuit declared a legal provision invalid.346 The D.C. district court would be bound to follow that ruling, and § 1391(e)(1) would allow any right holder, anywhere in the nation, to sue there. Conversely, if the D.C. federal courts uphold a legal provision's validity, right holders living in other jurisdictions would retain the ability to invoke venue in their home districts (or even some other district, if relevant events occurred there) to seek more favorable rulings.347

Accordingly, courts should consider whether to reinterpret § 1391(e)(1), and Congress should assess whether to amend it. They could clarify that the "events or omissions giving rise to the claim"348 are deemed to occur where the right holder will suffer adverse consequences from the challenged governmental activity, rather than the location where the government adopted or issued the policy. Congress should likewise reconsider laying venue where a federal

344. Hurdleston, supra note 25, at 248.
345. See supra Part II.C.
346. The D.C. Circuit's rulings, of course, have both a horizontal stare decisis effect on subsequent panels of the same court, see, e.g., Soutas v. Smolko, LLC v. NLRB, 849 F.3d 1147, 1155 (D.C. Cir. 2017), as well as a vertical stare decisis effect on the U.S. District Court for the District of Columbia, see Michael T. Mostey, Vertical Stare Decisis and Three-Judge District Courts, GEO. L.J. (Forthcoming 2020).
348. Id. § 1391(e)(1)(B).
agency or official resides\textsuperscript{349} because that provision is likely to have a similar centralizing effect on public law litigation once nationwide injunctions are abolished.

Spreading constitutional and other challenges concerning federal legal provisions across the various districts in which plaintiffs live or will suffer adverse consequences\textsuperscript{350} would help prevent the D.C. federal courts from imposing their views of the Constitution across the nation. Although Congress intentionally conferred such nationwide primacy on the D.C. federal courts over administrative law,\textsuperscript{351} there is no evidence that Congress intended for them to play a comparable role over constitutional law, as well. Once nationwide injunctions have been cabined, reforming § 1391(e) would be the next step toward reinforcing the decentralized structure of the federal judiciary, in which important issues percolate across different circuits and the impact of lower courts’ rulings is limited.

Attorney Kate Huddleston is one of the few scholars who has considered the relationship between nationwide injunctions and the federal venue statute.\textsuperscript{352} She approaches the issue from a different perspective, however. Huddleston contends that, without nationwide injunctions, only litigants with substantial resources could afford to invoke § 1391(e)(1) to take advantage of favorable precedents in the D.C. federal courts, rather than litigating in their home districts.\textsuperscript{353} Thus, forum shopping would still occur but only for more privileged litigants.\textsuperscript{354} Huddleston contends that nationwide defendant-oriented injunctions allow all right holders throughout the nation, regardless of their financial resources, to benefit from favorable rulings, particularly those from the D.C. federal courts. Amending the federal venue statute to limit the range of constitutional challenges that may be brought in the U.S. District Court for the District of Columbia would largely address these fairness concerns by limiting the ability of all plaintiffs to assert venue there.

\textsuperscript{349} Cf. id. § 1391(e)(1)(A).

\textsuperscript{350} Cf. id. § 1391(e)(1)(B)–(C).


\textsuperscript{352} Huddleston, supra note 25, at 252–53.

\textsuperscript{353} Id. at 252 (“Because of venue rules, the absence of formal nationwide injunctions would not preclude the functional equivalent of forum shopping in lawsuits over particular federal governmental actions, at least for those with the resources and sophisticated legal representation to reach forums with favorable judgments and venue based on defendants’ characteristics.”).

\textsuperscript{354} Id. at 253.
III. Conclusion

Nationwide injunctions have become a ubiquitous and highly controversial weapon in the federal judiciary's remedial arsenal. It is important to distinguish among the various types of orders that might be termed "nationwide injunctions" and identify the circumstances under which each is appropriate. This Article's recommended taxonomy seeks to reduce confusion, provide a consistent vocabulary, and ensure that the judiciary's response to each type of order is tailored to the unique issues and concerns it raises.

Federal courts should avoid issuing nationwide defendant-oriented injunctions in which the court completely enjoins a government defendant from enforcing a challenged legal provision against any right holder, anywhere in the nation, when doing so is unnecessary to enforce the rights of the plaintiffs before it. Such orders raise serious questions under Article III and Rule 23, give rise to unfairly asymmetric preclusive effects, and are inconsistent with both the structure of the federal judiciary and the evolution of federal jurisdictional statutes in the twentieth century. They also lead to extreme forum shopping and unnecessary emergency appeals.

At a minimum, if a court wishes to protect the rights of third-party nonlitigants, it should certify a plaintiff class under Rule 23(b)(2) and issue an injunction protecting its members' rights. Such classes should be limited to right holders of a particular district or circuit, however. Although a nationwide plaintiff-class injunction would avoid many of the problems with nationwide defendant-oriented injunctions, they remain inconsistent with the structure of the federal judicial system, allowing lower court judges to give their legal conclusions the force of law across the nation, well beyond the bounds of their respective jurisdictions.

Such injunctions likewise preclude relitigation of important constitutional issues, despite the Supreme Court's holding in United States v. Mendenhall that a district court's rulings do not preclude the government from relitigating the same issues against other litigants in other jurisdictions. They also prevent intercircuit recitation, depriving the Supreme Court of the opportunity to assess different circuits' approaches and select the best vehicle in which to address controversial issues. Thus, notwithstanding Califano v. Yamasaki, district courts should generally certify only district- or circuit-wide classes under Rule 23(b)(2) in public law challenges.

Because Rule 23(b)(2)'s requirements will almost always be virtually automatically satisfied as a matter of law in most challenges to legal provisions, requiring plaintiffs to go through the formality of the class-certification process

355. See supra Part I.
should not impose unreasonable burdens. In the context of a motion for a temporary restraining order or preliminary injunction, which are typically adjudicated before the court certifies a plaintiff class, the court could simply decide whether class certification is likely in the course of determining the plaintiff’s likelihood of success on the merits.358

More importantly, however, we should stop viewing injunctions as the primary judicial tool for protecting the rights of third-party nonlitigants. If district court rulings are afforded stare decisis effect on either a district- or circuit-wide basis, favorable rulings in constitutional and other public law cases can protect the rights of third-party nonlitigants in the same way that court of appeals and Supreme Court precedents already do. Most constitutional restrictions that presently bind government actors are embodied in precedent rather than injunctions. Empowering district courts to issue precedential rulings within limited geographic regions is a simple, elegant solution that offers a different type of protection than broad injunctions, yet it avoids the myriad constitutional, rule-based, fairness-related, structural, prudential, and other problems with most types of nationwide injunctions.

DISAGGREGATING THE HISTORY OF NATIONWIDE INJUNCTIONS: A RESPONSE TO PROFESSOR SOHONI

Michael T. Morley

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DISAGGREGATING THE HISTORY OF NATIONWIDE INJUNCTIONS: A RESPONSE TO PROFESSOR SOHONI

Michael T. Morley*

INTRODUCTION

One of the most important issues in the ongoing controversy over nationwide injunctions is whether Article III of the U.S. Constitution allows federal courts to issue them. Scholars debate whether a plaintiff has standing to seek, and a federal court has power to issue, an injunction specifically crafted to protect the rights of third-party nonlitigants—many of whom are invariably outside the court's jurisdiction—when doing so is unnecessary to protect the rights of the plaintiffs before the court.¹

In a recent article in the Harvard Law Review entitled The Lost History of the "Universal" Injunction (hereafter, "Lost History"), Professor Mila Sohoni contends that the "Article III objection to the universal injunction should be retired" because "Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century."² Her article discusses fifteen main examples of cases from various federal courts from between 1894³ and 1943⁴ in which she contends that "nationwide" or "universal" injunctions were issued. All of these cases predate the U.S. Court of Appeals for the D.C. Circuit's ruling in Wirtz v. Baldwin Electric Co.,⁵ which is sometimes identified as the first known nationwide injunction.⁶ Based on these examples, Lost History concludes that the Article III judicial power "includes the power to issue injunctions that protect those who are not plaintiffs" in a case, including nationwide injunctions.

⁵ 337 F.2d 518 (D.C. Cir. 1963).
and that arguments to the contrary constitute "a sharp departure from precedent."  

Before responding to Last History, a quick note on terminology is in order. 

The terms "nationwide injunction" and "universal injunction," despite their ubiquity, are ambiguous. These concepts embrace up to five different categories of orders, each raising distinct jurisdictional, rule-based, fairness-related, prudential, and structural concerns. These categories include:

- **Plaintiff-Oriented Injunction**—An order in a nonclass case prohibiting the defendant from enforcing a challenged legal provision against the plaintiff or plaintiffs before the court, regardless of where such violations occur. 

- **Plaintiff-Class Injunction**—An order prohibiting the defendant from enforcing a challenged legal provision against any members of a plaintiff class that includes all right holders within a particular geographic area, potentially including the entire nation. 

- **Associational Injunction**—An order in a case brought by a plaintiff entity asserting associational standing on behalf of its members that prohibits the defendant from enforcing a challenged legal provision against anyone, potentially anywhere in the nation. 

- **Defendant-Oriented Injunction**—An order in a nonclass case brought by individuals or entities asserting organizational standing that prohibits the defendant from enforcing a challenged legal provision against anyone, potentially anywhere in the nation, including third-party nonlitigants, when doing so is unnecessary to protect the rights of the plaintiffs before the court. 

- **Private Enforcement Injunction**—An order attempting to prohibit all potential plaintiffs throughout a designated area, potentially including the entire nation, from bringing a private right of action under a challenged legal provision against a particular person or entity. 

The type of nationwide or universal injunction at the heart of most debates over the issue may be referred to as a defendant-oriented injunction—the fourth category set forth above. A defendant-oriented injunction is an order issued in a nonclass case that completely prohibits the government defendants from enforcing the challenged legal provision against anyone, anywhere—including third-party nonlitigants who may be outside the court's geographic jurisdiction—when doing so is unnecessary to protect the rights of the plaintiffs before the court. This is the type of order that Last History seeks to defend.

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7. Id. at 927–28. 
9. Id. \[ Illustration: Illustration of a map with various regions marked. \]
10. Id.; see id. supra note 1, at 490–91. 
11. Subsidiary, supra note 2, at 922.
This Article will use the term defendant-oriented injunction to avoid conflating such orders with other types of nationwide or universal injunctions.

This Article demonstrates that the Article III objection to defendant-oriented injunctions, nationwide and otherwise, survives Last History’s critique for three main reasons. Part I explains that the only case discussed in Last History in which the Supreme Court expressly addressed the validity of nationwide defendant-oriented injunctions, Perkins v. Lukens Steel Co.,12 rejected them. Perkins’s express consideration of such orders carries far greater weight than the inferences that Last History invites readers to draw from a small group of other cases that do not analyze the issue or assess potential Article III considerations.

Part II shows that only four of the cases Last History discusses (including Perkins) actually involve defendant-oriented injunctions.13 Most of the other orders it cites, in contrast, have materially different characteristics and are properly classified in distinct categories within the taxonomy summarized above. They do not support the notion that early twentieth-century federal courts issued broad nationwide or statewide defendant-oriented injunctions aimed at enforcing the rights of third-party nonlitigants.

Part III demonstrates that, even treating all fifteen of Last History’s orders as relevant examples, they do not suggest that the Supreme Court has historically embraced universal or defendant-oriented injunctions. In nearly all of the cases that Last History relies upon, the scope of the orders was neither contested by the parties nor expressly considered or addressed by the Supreme Court. To the contrary, in several cases, the government either explicitly or implicitly agreed to the requested relief on an interim basis, alleviating the need for the Court to consider their propriety. In others, the Court either affirmed the lower court’s judgment in a terse per curiam opinion as short as a single sentence, or reversed the district court’s merits ruling, eliminating its opportunity to consider remedial issues. Additionally, for most of the cases involving challenges to state legal provisions, the scope of injunctive relief was largely irrelevant as a practical matter, rendering potential technical violations of Article III academic. Little, if anything, can be gleaned from a handful of cases in which a trial court issued a broad injunction without explanation, and its scope was neither contested, expressly addressed by the Supreme Court, nor of any practical consequence.

Thus, the limited number of nationwide defendant-oriented injunctions that Last History cites does not suggest that the Supreme Court either approved of their use or that the federal judiciary had a practice of issuing such orders in the early twentieth century.

13. See infra note 29.
I. Nationwide Defendant-Oriented Injunctions and the Supreme Court

Lost History invites the reader to draw inferences about the federal judiciary's position in the early twentieth century concerning the Article III validity of defendant-oriented injunctions primarily from federal courts' actions in cases in which the parties did not litigate the proper scope of relief.\textsuperscript{14} As discussed later, in many of these cases, the government was willing to voluntarily refrain from enforcing the challenged legal provisions against anyone until the Supreme Court reviewed their validity.\textsuperscript{15} And the scope of the injunctions in many other cases made no practical difference under the circumstances, regardless of any technical Article III problems with the courts' orders.\textsuperscript{16} In contrast, in the only case that Lost History discusses in which the Supreme Court expressly grappled with the proper scope of relief, \textit{Perkins v. Lukens Steel Co.}, the Court repeatedly expressed Article III objections to nationwide defendant-oriented injunctions.\textsuperscript{17}

In Perkins, the Secretary of Labor had issued an order setting the minimum wage that federal contractors were required to pay iron and steel workers in a particular region of the nation.\textsuperscript{18} Seven steel companies challenged the order. The D.C. Circuit held that the region the Secretary had designated was too broad and issued a preliminary injunction prohibiting him from enforcing the wage order against anyone.\textsuperscript{19}

On appeal, the Supreme Court framed the issue primarily in terms of the scope of the injunctive relief that the plaintiffs had sought:

\begin{quote}
We must, therefore, decide whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials who do the Government's purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in this entire nation-wide industry.\textsuperscript{20}
\end{quote}

The Court later re-emphasized that the seven plaintiffs "did not merely pray relief for themselves against the Secretary's wage determination," but rather sought to restrain the government from mandating that minimum wage in its contracts "with any other steel and iron manufacturers throughout the United States."

\textsuperscript{14} See infra Part III.
\textsuperscript{15} See Schorns, supra note 2, at 946 & n.175, 948 & n.190, 955 & n.229.
\textsuperscript{16} See infra notes 118--131 and accompanying text.
\textsuperscript{17} 310 U.S. at 120--23, 129.
\textsuperscript{18} Id. at 116--17.
\textsuperscript{19} Schorns, supra note 2, at 984.
\textsuperscript{20} Perkins, 310 U.S. at 117 (emphasis added).
\textsuperscript{21} Id. at 120--21.
The Court concluded that such a sweeping injunction exceeded the bounds of "any controversy that might have existed between the complaining companies and the Government officials." It explained that the lower court's order prohibited the government from applying the challenged order "to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief." The Court further held that the plaintiffs lacked standing to challenge the Secretary's wage determination, pointing to the plaintiffs' request that the order "be suspended as to the entire steel industry." Article III did not empower particular iron and steel companies to enforce the rights of the public at large or to have an administrative action completely invalidated as to the world.

Lost History attempts to downplay Perkins's significance. It points out that the plaintiffs would have lacked standing under the Court's reasoning, even if they had sought a narrower injunction enforcing only their own rights. But that analysis does not account for the other, independent aspects of the Court's ruling. The Court expressly declared that the plaintiffs' request for industry-wide relief went beyond the scope of the Article III controversy before the Court. And it identified one of the main issues before the Court as whether a federal court may enjoin executive officials from enforcing an order "not merely" as to the litigants before it, but rather an entire industry. Thus, Perkins cannot be cabin'd in the manner Lost History suggests. Rather than bolstering the article's thesis, the case demonstrates that the Supreme Court has consistently rejected nationwide defendant-oriented injunctions—including in challenges to administrative agency action—as far back as 1940.

II. DISAGGREGATING THE HISTORY OF NATIONWIDE INJUNCTIONS

Most of the orders that Lost History analyzes are not the type of defendant-oriented injunctions at the heart of ongoing debates over nationwide or universal injunctions. Rather, they have materially different features and are properly classified in distinct categories. Accordingly, most of the examples presented in Lost History do not bolster its thesis that nationwide or universal injunctions have a "more venerable lineage than heretofore recognized."
Of the fifteen injunctions that Last History examines, only four qualify as defendant-oriented or universal injunctions. The Supreme Court expressly overturned one of those orders in Perkins v. Lackens Steel Co. The government had consented to another in Journal of Commerce v. Commercial Bulletin v. Burdick, alleviating the need for the Court to consider its propriety. And the other two were statewide defendant-oriented injunctions against state laws. Their scope was not contested before the Court, not expressly addressed by the Court, and under the circumstances of those cases, irrelevant as a practical matter. Thus, even Last History’s strongest examples provide scant support for the notion that federal courts in the early twentieth century viewed defendant-oriented injunctions as consistent with Article III.

The remainder of this Article will proceed through each part of Last History, discussing the examples presented there. The orders that Last History analyzes throughout its Part II appear to be traditional—and completely appropriate—plaintiff-oriented injunctions, tailored to enforcing only the rights of the particular plaintiffs before the court. In Reagan v. Farmers’ Loan & Trust Co., railroad shareholders sued the Texas Attorney General and state railroad commissioners on the railroad’s behalf to enjoin them from enforcing certain rates the commission had issued. The district court entered a broad injunction prohibiting those state officials, as well as “all other individuals, persons, or corporations,” from suing that particular railroad for violating either the commission’s rate order or the state railroad act. The Supreme Court reversed the decree insofar as it completely prohibited the railroad commission from enforcing the act in any way against the railroad. The Court affirmed the order “so far only as it restrains the defendants from enforcing the rates already established.”

The Court’s ruling in Reagan did not mention whether the injunction, as modified, would restrict the conduct of third-party nonlitigants such as private shippers. Last History states, “The most sensible reading of that language in the context of this case is that the Court had affirmed the portion of the decree restraining even nonparties from enforcing the rates ....” To the

30. 310 U.S. at 133; see supra Part I.
31. 229 U.S. at 600; see infra notes 97, 100–101 and accompanying text.
32. See infra Part III.
33. Morely, supra note 8, at 9; see also Morley, supra note 1, at 490–91.
34. 154 U.S. 362 (1894), discussed in Schouls, supra note 2, at 937.
35. Id. at 370, quoted in Schouls, supra note 2, at 937.
36. Id. at 413.
37. Id. (emphasis added).
38. Schouls, supra note 2, at 939 (quoting Reagan, 154 U.S. at 413).
contrary, the best reading appears to be that the Supreme Court did exactly what it said: it restrained "the defendants," rather than affirming an injunction against the world. This interpretation leads to an outcome similar to that of the Court imposed in Lost History's next example from four years later, Smyth v. Ames.39 The Smyth Court affirmed a comparable injunction against railroad rates in a different state that "did not expressly reach beyond the defendant officials to enjoin nonparties."40 Thus, on their face, the Court's rulings in Reagan and Smyth expressly affirmed injunctions that barred only the defendants in those cases from enforcing the challenged state legal provisions against the plaintiffs' railroads.

Even if Lost History's proposed interpretation of Reagan were correct, however, and the Court had prohibited the general public from attempting to enforce the challenged rate order against the railroad, that injunction would still constitute a traditional plaintiff-oriented injunction, rather than a defendant-oriented injunction. As Lost History acknowledges in a footnote, even the original district court order in Reagan prohibited enforcement of the state railroad act and challenged rate order against only the particular railroad on whose behalf the plaintiff shareholders had sued.41 As in Smyth,42 the order as upheld by the Reagan Court did not reach further to protect the rights of other railroads or prohibit enforcement of the underlying state laws against other entities.43

Alternatively, under Lost History's interpretation of the order in Reagan, it could properly be deemed a private enforcement injunction: an order completely prohibiting anyone, including potential private plaintiffs, from enforcing a legal provision against a particular entity.44 The focus of such an injunction—the protection of that entity's rights—is appropriate and in accordance with traditional equitable notions.45 The main difference between a private enforcement injunction and a plaintiff-oriented injunction is that the former seeks to protect an entity from the public at large, while the latter protects that entity only from the defendants, their agents, and accomplices.46

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39. 169 U.S. 466 (1898).
40. Smyth, supra note 2, at 933 (emphasis omitted) (citing Smyth, 169 U.S. at 476-78).
41. Id. at 937 n.101 ("The Reagan injunction does not reach beyond the plaintiff. ... "); see Reagan, 154 U.S. at 370 (enjoining "all other individuals. . . or corporations" from "instituting or prosecuting any suit or suits against the said railroad company" for exceeding the rates specified in the challenged order (emphasis added)).
42. Smyth, 169 U.S. at 476-77, 550 (affirming injunction prohibiting the state Board of Transportation or Attorney General from pursuing administrative proceedings "against said railroad companies" for violations of the challenged statute); cf. Am. v. Union Pac. R.R., 64 F. 165 (C.C.D. Neb. 1894).
43. See Reagan, 154 U.S. at 413 (ordering modifications to the lower court's injunction, which protected only the railroad on whose behalf the lawsuit had been filed); see also Smyth, supra note 2, at 937-38 (discussing the lower court's injunction).
44. See Morley. supra note 6. at 41.
45. Cf. id. at 11 & n.38; Bray, supra note 1, at 469.
Whether the Reagan Court erred in enjoining private lawsuits by third parties against the plaintiff railroad is an issue distinct from the propriety of defendant-oriented injunctions. It depends on the proper interpretation of the traditional equitable principles, presently codified at Federal Rule of Civil Procedure 65(d)(2), specifying the range of third parties whose conduct may be enjoined by a court. 47 The debate over defendant-oriented injunctions, in contrast, concerns the range of third parties whose rights may be protected by a court.

The fact that courts generally refuse to issue private enforcement injunctions48 is yet another reason why the Supreme Court’s ruling concerning the injunction in Reagan should be taken at face value, as limiting the conduct only of the defendants in the case, rather than extending to all of the plaintiff railroad’s potential customers, as well. Only last year, the U.S. Court of Appeals for the Fifth Circuit rejected a district court’s attempt to enjoin third parties an injunction that invalidated a U.S. Department of Labor regulation. In 2014, several states sued the Department of Labor in a Texas federal district court, seeking an injunction that barred the Department from enforcing its recently promulgated regulation concerning overtime pay.49 After the injunction was in place, a New Jersey resident sued his employer, Chipotle, for violating the overtime regulation; neither litigant had been involved in the Texas litigation.50

The Texas district court held the employee in contempt.51 Federal Rule of Civil Procedure 65(d)(2)(C) provides that an injunction applies not only to the named party and its agents, but also to anyone else with notice of the injunction who acts “in active concert or participation” with them.52 Citing that rule, the Texas court held that the employee knew about the injunction, and by invoking the Department of Labor’s invalidated regulation, acted in concert with the Department.53 The Fifth Circuit reversed, holding that the employee was “not in privity with the [Department] and not otherwise bound by the injunction.”54 The court made clear that a ruling holding a legal provision unconstitutional in litigation between a private plaintiff and a government agency does not, in itself, impact the rights of third parties, particularly those in other jurisdictions where

47. Id.; see Regal Knitswear Co. v. NLRB, 324 U.S. 5 (1945) (holding that the provision presently codified as Rule 65(d) is derived from common-law doctrine that . . . defendants may not enjoin decrees by carrying out prohibited acts through others and abstain, although they were not parties to the original proceeding).
48. See Morley, supra note 8, at 41.
51. Id. at 727.
52. FED. R. CIV. P. 65(d)(2)(C).
54. Texas, 929 F.3d at 213.
that ruling lacks stare decisis effect.\textsuperscript{55} Indeed, the district court itself had recognized the “dearth of precedent” supporting its ruling when it held the employee in contempt.\textsuperscript{56}

Thus, even if \textit{Last History}'s interpretation of the Supreme Court’s conclusion in \textit{Regan} is correct, it does not appear to reflect a broad practice of issuing private enforcement injunctions. Regardless, such private enforcement injunctions are materially different from defendant-oriented injunctions—the type of order at issue in current disputes over nationwide injunctions. As noted earlier, private enforcement injunctions focus on protecting the rights of the plaintiff before the court from violations by any third parties, rather than protecting the rights of third-party nonlitigants.

In Part III of \textit{Last History}, the only order that constituted a bona fide defendant-oriented or universal injunction was issued in \textit{Journal of Commerce \& Commercial Bulletin v. Bartleman}.\textsuperscript{57} In contrast, the injunctions in the other cases discussed in that Part—\textit{Hill v. Wallace}\textsuperscript{58} and \textit{Board of Trade of the City of Chicago v. Cynamon}\textsuperscript{59}—were not defendant-oriented injunctions. In \textit{Hill}, the plaintiffs were members of the Chicago Board of Trade who sued to challenge the federal Future Trading Act on behalf of all board members “who may wish to join and share in the relief granted.”\textsuperscript{60} They sought an injunction to prohibit both the board’s directors from complying with the Act and federal officials from implementing and enforcing it against the board or its members.\textsuperscript{61} \textit{Last History} presents \textit{Hill} as an example of a defendant-oriented or universal injunction because both the preliminary and permanent injunctions that the Supreme Court entered barred enforcement of the challenged statute against not only the individual plaintiffs, but all other members of the Chicago Board of Trade as well.\textsuperscript{62}

The order was not a defendant-oriented injunction, however, because as \textit{Last History} acknowledges, it did not bar the government from “enforcing the Future Trading Act against other boards of trade or their members.”\textsuperscript{63} It is more

\textsuperscript{55} \textit{Id}.
\textsuperscript{56} \textit{Novak II}, 321 F. Supp. 3d at 725.
\textsuperscript{58} 257 U.S. 310 (1921) (\textit{Hill I}) (granting modified injunction pending appeal), vacating 257 U.S. 615 (1921) (\textit{Hill I}) (granting unopposed motion for injunction pending appeal), discussed in \textit{Sohnbi}, supra note 2, at 940–43. \textit{Hill} is the only case in Part III in which the plaintiffs prevailed on the merits and the Court replaced its preliminary injunction with a comparable permanent injunction. \textit{Hill v. Wallace}, 259 U.S. 44, 72 (1922) (\textit{Hill II}), cited in \textit{Sohnbi}, supra note 2, at 950–51.
\textsuperscript{60} \textit{Hill III}, 259 U.S. at 45.
\textsuperscript{61} \textit{Id} at 48–49.
\textsuperscript{62} \textit{Sohnbi}, supra note 2, at 950–52.
\textsuperscript{63} \textit{Id} at 951.
properly characterized as a plaintiff-class injunction, protecting the rights of the class of rightholders on whose behalf the suit was brought, consistent with Rule 38 of the Equity Rules of 1912.64 Rule 38 provided, “When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”65

Equity Rule 38 was an antecedent to the modern rules governing class actions,66 particularly Federal Rule of Civil Procedure 23(b)(2).67 Rule 23(b)(2) allows courts to certify plaintiff classes to seek injunctions without providing notice or an opportunity to opt out to class members.68 Despite the substantial procedural differences between Equity Rule 38 and the modern Rule 23, the injunction in Hill is part of the “lineage” of modern plaintiff-class injunctions, rather than defendant-oriented injunctions.69 The order in Hill protected only members of the plaintiff class, to which the individual plaintiffs belonged, rather than the public at large.

The injunction in Clyne, in contrast, is properly characterized as an associational injunction, rather than a defendant-oriented or universal injunction. A court enters an associational injunction in cases where an entity asserts associational standing to protect the rights of its members.70 The plaintiff in Clyne was the Chicago Board of Trade. It challenged the constitutionality of the federal Grain Futures Act, seeking an injunction against the statute’s enforcement.71 Without objection by the government, the Supreme Court entered a stay pending appeal that enjoined the U.S. Attorney for the Northern District of Illinois:

from attempting to enforce the act of Congress entitled the “Grain Futures Act” during the pendency of this cause in this Court and for twenty days thereafter, and also from at any time prosecuting criminally, or otherwise, under said act any member of the Board of Trade of the City of Chicago, or any customer of any such member for, or by reason of, any violation by him

65. Id.
70. See Socolar, supra note 2, at 924.
or them of any provision of said act committed during the pendency of this cause in this Court or twenty days thereafter . . . .

Thus, the injunction specifically prohibited the U.S. Attorney from prosecuting the Board of Trade’s members or those members’ customers for violating the challenged Act. The board had associational standing to enforce its members’ rights. And those members’ rights would have been undermined just as much whether the government attempted to enforce the allegedly unconstitutional statute directly against them, or indirectly, by prosecuting their customers.

*Lust History* interprets this injunction differently, arguing that it prohibited the U.S. Attorney from enforcing the Act against anyone in his jurisdiction. Although that interpretation is certainly possible, it is unlikely the Court would have specifically referred to the board’s members and customers in its order if it had intended to enjoin enforcement of the law against the world at large. Moreover, that interpretation introduces an unexplained internal inconsistency into the order. Under *Lust History’s* proposed view, the Court completely enjoined enforcement of the Grain Futures Act against anyone, but then also specifically prohibited criminal prosecutions only of the board’s members and customers. It is unclear why the Court would have provided different levels of protection to different groups of people. The most plausible construction of the injunction is that the entire order protected the parties the Court expressly identified: the Chicago Board of Trade’s members and their customers. Viewed from that perspective, *Clyne* was a typical, and appropriate, associational injunction.

In any event, *Clyne* is of very limited value in determining the Court’s understanding of Article III’s limits on injunctive relief, since the interlocutory injunction was unopposed, and the Court did not address its scope. And the Court did not revisit the issue after ruling on the underlying appeal, since it ultimately upheld the Grain Futures Act’s validity. Thus, it appears that *Hill* and *Clyne* neither involved defendant-oriented injunctions nor support their modern use.

In Part IV of *Lust History*, all of the cited cases (with the exception of *Pierce v. Society of Sisters*76) were also proto-class actions under Equity Rule 38, leading to plaintiff-class injunctions.77 In that respect, they were structurally comparable.

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72. Id. at 704.
73. Schorn, supra note 2, at 935–94.
74. See *Clyne*, 266 U.S. at 704–05.
75. Board of Trade v. Olsen, 262 U.S. 1, 40–43 (1923).
76. Board of Trade v. Olsen, 262 U.S. 1, 40–43 (1923).
to the order in *Harlow v. Wallace.* In three of these cases, the Court reversed the lower courts on the merits, and thus did not even approve the injunction.97 Finally, Part V presents *Hague v. Committee for Industrial Organization*98 as a case in which the Court affirmed an injunction that "reached beyond the plaintiffs."99

To the contrary, *Hague* is another example of a conventional plaintiff-oriented injunction.

The local ordinance challenged in *Hague* prohibited the public distribution of printed literature within the municipality.82 The ordinance also required speakers to obtain a license from the chief of police to hold public meetings at which they would advocate obstructing the government or changing it through unlawful means.83 After holding the ordinance unconstitutional, the *Hague* plurality held that the plaintiffs were entitled to an order prohibiting the defendants from "interfering with the right of the respondents, their agents and those acting with them, to communicate their views as individuals to others on the streets in an orderly and peaceable manner."84 Critically, the Court did not hold that the injunction must completely prohibit the defendants from enforcing the challenged provisions against anyone.85 To the contrary, the order it required was tailored to enforcing the rights of the party plaintiffs; it protected third parties only insofar as they were acting in concert with those plaintiffs. Thus, the order paralleled Rule 65(d)(2)(C), which applies injunctions not only to defendants but others acting in concert with them.86

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78. See supra note 60–69 and accompanying text.
79. Jackson, 289 U.S. at 542–45; Rast, 240 U.S. at 368 (1916); Taussig, 249 U.S. at 385.
80. 307 U.S. 496, 518 (1939) (plurality opinion).
81. *Hague,* supra note 2, at 988.
83. Id.
84. Id. at 517.
85. The plurality’s opinion effectively precluded the respondents from enforcing the challenged ordinance against anyone, but it did so as a matter of stare decisis, rather than through an injunction. See *Morley,* supra note 8, at 53–56; see also *Michael T. Morley,* *Nationwide Injunctions, Rule 65(d)(2)(C), and the Remedial Powers of the Lower Courts,* 97 B.U.L. REV. 615, 652 (2017).
86. *FED. R. CIV. P. 65(d)(2)(C).* In the final example that *Last History* provides, *West Virginia State Board of Education v. Barnett,* the parties did not contest the scope of the district court’s injunction, and the Court did not expressly consider or address it. See *Harlow,* supra note 2, at 990–91 (citing *W. Va. St. Bd. of Educ. v. Barnett,* 319 U.S. 624, 642 (1943)).
Lost History underscores the importance of distinguishing among the different types of orders that could be, or have been, classified as nationwide or universal injunctions. Plaintiff-oriented injunctions, plaintiff-class injunctions, associational injunctions, defendant-oriented injunctions, and private enforcement injunctions51 are distinct categories of orders which each raise very different jurisdictional, rule-based, prudential, fairness-related, and structural concerns, and require different treatment by courts.52 Because of the important differences among the various categories of injunctions, orders that fall within other categories cannot be used as precedents to support the constitutionality of defendant-oriented injunctions. Only a few of the orders that Lost History discusses properly be considered defendant-oriented injunctions. And, as discussed in the next Part, those examples provide little guidance concerning Article III’s limits on the permissible scope of injunctive relief.

III. DRAWING THE RIGHT INFERENCES

Even if all of the orders that Lost History discusses were properly deemed defendant-oriented or universal injunctions, they provide limited insight into whether the Supreme Court viewed such relief as constitutionally valid in the early twentieth century for four reasons. First, the piece presents a handful of examples of alleged universal injunctions despite the deluge of constitutional litigation that occurred in the wake of Ex parte Young54 throughout the Lochner Era,55 and at the dawn of the New Deal.56 It is difficult to conclude that Lost History’s sporadic examples represent an implicit, largely unacknowledged consensus that defendant-oriented or universal injunctions were constitutionally permitted.57

87. See supra note 33 and accompanying text.
88. See supra note 64 and accompanying text.
89. See supra note 70 and accompanying text.
90. See supra note 70 and accompanying text.
91. See supra note 44 and accompanying text.
92. Morey, supra note 9, at 9–10.
95. See, e.g., S. REP. NO. 75–711, at 27–28 (1937) (describing repeated federal injunctions against New Deal initiatives).
96. Cf Solone, supra note 2, at 979 (claiming that these cases show it was “well understood that when a federal district court declared a state law unconstitutional, it could properly enjoin the law’s enforcement against nonparties”).
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Second, in all of the examples in Part II—Journal of Commerce & Commercial Bulletin v. Burleson,97 Hill v. Wallace,98 and Board of Trade of the City of Chicago v. Clyde99—the requests for interlocutory injunctions were unopposed.100 Indeed, in Burleson, the plaintiffs contended that the government had affirmatively "agreed not to enforce the Act against the plaintiffs or other newspaper publishers throughout the country pending the Court’s decision."101 Accordingly, these authorities offer little insight into whether the Supreme Court viewed defendant-oriented injunctions—nationwide or otherwise—as permissible under Article III.

The government’s acquiescence to motions for interlocutory relief effectively rendered them consent decrees. Because a consent decree is a “hybrid” of an injunction and contract,102 the government may agree to relief through a consent decree that a court would otherwise lack power to order.103 In Local No. 93, International Association of Firefighters v. City of Cleveland—citing cases dating back to the 1880s and 1920s—the Supreme Court identified four requirements for federal consent decrees: the “dispute” must be “within the court’s subject-matter jurisdiction,”104 the “decree must come[] within the general scope of the . . . pleadings,”105 the decree “must further the objectives of the law upon which the complaint[s] is[are] based,”106 and it must not be “unlawful.”107

Local No. 93 suggests that, so long as a court has subject-matter jurisdiction over a case, the government may agree to a consent decree crafted to protect the rights of third-party nonlitigants, regardless of whether the plaintiffs had Article III standing to seek such relief.108 Indeed, even in cases without such consent-based orders, the government sometimes voluntarily agreed to refrain

97. 229 U.S. 600 (1913), cited in Soboni, supra note 2, at 945–46.
98. Hill II, 257 U.S. 610 (1921), vacating Hill I, 257 U.S. 610 (1920), cited in Soboni, supra note 2, at 948–49. Hill is the only case out of these examples in which the Supreme Court entered a permanent injunction after final judgment. See Hill I, 259 U.S. 44, 72 (1922).
100. Local No. 93, Int'l Ass’n of Firefighters v. Cleveland, 478 U.S. 501, 519 (1986).
101. Ruiz v. Innates of Suffolk Cty. Jail, 552 U.S. 567, 580 (2002); United States v. Armour & Co., 402 U.S. 673, 682–83 (1971); see also Local No. 93, 478 U.S. at 525 (“[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”).
102. Local No. 93, 478 U.S. at 525.
103. Id. (quoting Pac. R.R. v. Ketchum, 101 U.S. 280, 297 (1879)).
104. Id. (citing EEOC v. Safeway Stores, Inc., 811 F.2d 795, 799 (10th Cir. 1979); Citizens for a Better Env’t v. Gormach, 718 F.2d 1117, 1125, 1126 (D.C. Cir. 1983)).
105. Id. at 526.
106. See id. at 528.
from enforcing the challenged legal provisions. 109 I have elsewhere critiqued the standards that courts apply in approving consent decrees in public-law cases involving governmental litigants, 110 but Local No. 93 reflects the law as it presently stands. Thus, these consent-based injunctions do not necessarily provide any insight into the federal judiciary’s early understanding of Article III.

Third, in nearly all of the examples that Last History cites, the scope of injunctive relief was neither litigated by the parties nor expressly examined by the Court from either a jurisdictional, equitable, or substantive perspective. 111 In several of these cases, the Supreme Court reversed the lower courts’ rulings on the merits, and thus did not even implicitly endorse the scope of the injunctions those courts had issued. 112 In others, the Court issued only terse, nonsubstantive per curiam opinions, 113 sometimes as short as a single sentence. 114 Indeed, in the only case in which the Court expressly addressed the scope of relief, Perkins v. Lehman Steel Co., 115 it objected to nationwide defendant-oriented injunctions. 116

The Supreme Court has repeatedly cautioned that litigants may not infer jurisdictional conclusions based on its actions in cases which do not expressly discuss those jurisdictional issues. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." 117 The opinions that Last History

109. See Seibert, supra note 2, at 955 n.229.
112. Jackson, 283 U.S. at 542–43; Tannor, 240 U.S. at 386; Rast v. Van Derman & Lewis Co., 240 U.S. 342, 347 (1916); see also Lewis Pubg’g Co. v. Morgan, 229 U.S. 288, 316 (1913) (affirming district court’s dismissal despite entering a preliminary injunction pending appeal, reported at 229 U.S. 288); Bd. of Trade v. Olsen, 262 U.S. 1, 45 (1922) (affirming district court’s dismissal despite entering a preliminary injunction pending appeal, reported at 262 U.S. 1). See also supra Part I.
113. Althea, 284 U.S. at 576.
114. Langer v. Grandin Farmers’ Co-op Elevator Co., 202 U.S. 605, 605 (1906); Bishop, 284 U.S. at 598.
116. See supra Part I.
117. Ann. Christian Sch. Teachers Org. v. Winn, 563 U.S. 125, 144 (2011); see also Hagan v. Leasure, 415 U.S. 528, 539 n.5 (1974) ("[I]n cases where questions of jurisdiction have been passed on in prior decisions and attacks, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this..."
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cites did not hold that defendant-oriented injunctions that unnecessarily protect the rights of third-party nonlitigants are permissible. Nor did those opinions address the Article III concerns with such orders.

Finally, about half of Last History's examples involve injunctions prohibiting state officials from enforcing state statutes. The circumstances of those cases made the scope of the injunctions irrelevant as a practical matter, regardless of their technical Article III violations. Accordingly, it would have been unlikely for litigants to bother raising the issue or for the Supreme Court to adjudicate it.

Throughout most of the twentieth century, when a plaintiff sought a preliminary injunction (and, later, a permanent injunction) in federal court against a state law on constitutional grounds, the case had to be heard by a three-judge panel of the district court. The court's ruling was directly appealable, as of right, to the U.S. Supreme Court, bypassing the intermediate court of appeals. The preliminary injunction hearing in Pierre v. Society of Sisters, for example, was held before a three-judge district court comprised of the only two district judges of the U.S. District Court for the District of Oregon, Judges Charles E. Wolverton and Robert S. Bean. They were joined by Circuit Judge William Bell Gilbert, one of only three circuit court of appeals judges on the Ninth Circuit at the time. Although the breadth of the statewide defendant-oriented injunction that the panel issued was technically improper, it was irrelevant as a practical matter, since any subsequent federal challenge would have been heard by a three-judge court comprised of the same two Oregon judges, along with Judge Gilbert or one of his two Ninth Circuit colleagues. And the appeal in Pierre went directly to the U.S. Supreme Court, whose ruling would be binding across the state (and nation) as a matter of stare decisis. Thus, the litigants had no real incentive to raise Article III concerns about the scope of injunctive relief before either the three-judge district court or the Supreme Court itself.

The same is true of nearly all of the other challenges to state legal provisions that Last History cites. In West Virginia State Board of Education v. Barnett, the

Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.


119. Id.


121. 268 U.S. 516 (1925), affg 296 F. 928, 931 (D. Or. 1924) (three-judge court).

122. Judgeships on the U.S. Court of Appeals for the Ninth Circuit were created by the Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 827 (Mar. 3, 1891).

123. Pierre, 268 U.S. at 516; see also Morley, supra note 118, at 727–33.

district court panel was comprised of both district judges of the U.S. District Court for the Southern District of West Virginia\textsuperscript{125}—Ben Moore and Harry Watkins—as well as Fourth Circuit Judge John Parker.\textsuperscript{126} Any subsequent federal challenge to the state’s flag-salute requirement would have unavoidably been heard by the same two district judges. Likewise, in Jackson v. State Board of Tax Commissioners, a constitutional challenge filed in the U.S. District Court for the Southern District of Indiana,\textsuperscript{127} the three-judge district court panel was comprised of the Southern District of Indiana’s sole district judge,\textsuperscript{128} Robert Bledsoe; the Northern District of Indiana’s sole district judge,\textsuperscript{129} Thomas Slick; and Seventh Circuit Judge William Sparks.\textsuperscript{130} Yet again, in any subsequent challenges, one of the two district judges would definitely have been included on the panel, and the other was virtually certain to have been included.

When these rulings are viewed in historical context, Article III concerns about the scope of injunctive relief become largely academic. As late as 1920, there were only 97 federal district court judges across the entire nation,\textsuperscript{131} which at the time was comprised of 48 states. Due to federal law’s three-judge district court and direct appeal requirements, as well as the general dearth of district court judges in most jurisdictions in the early twentieth century, all district court panels hearing constitutional challenges to a particular state legal provision were likely to be comprised of at least a majority of the same judges. Defendants knew that, even if injunctions were narrowly tailored to only the particular plaintiffs in a case, those judges would issue the same rulings in any future cases to come before them. Thus, these cases provide scant support for the notions that defendant-oriented or universal injunctions were generally accepted as consistent with Article III in the early twentieth century, or that the Supreme Court had approved of them.

CONCLUSION

Last History provides intriguing new insight into the early twentieth-century history of federal injunctions in constitutional cases. It does not provide reason to believe, however, that federal courts at the time had a general practice of issuing broad, defendant-oriented injunctions in constitutional cases. Nor does

\begin{thebibliography}{99}
\bibitem{125} Act of June 25, 1921, ch. 30, § 1, 42 Stat. 67, 67 (1921) (authorizing first judgeship for the Southern District of West Virginia); Act of June 22, 1936, ch. 495, 49 Stat. 1805, 1805 (1936) (authorizing second judgeship there).
\bibitem{126} Barnett, 47 F. Supp. at 252.
\bibitem{127} 38 F.2d 652 (S.D. Ind. 1930) (three-judge court), aff’d, 288 U.S. 527 (1931).
\bibitem{128} Act of Apr. 21, 1928, ch. 393, § 80, 45 Stat. 437, 437 (1928) (authorizing a single judgeship for each of Indiana’s two federal judicial districts).
\bibitem{129} Id.
\bibitem{130} Id., 38 F.2d at 653.
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it demonstrate the existence of a consensus that Article III allows such relief. Most of the orders in the cases that Lost History discusses were appropriately tailored to enforcing the rights of the plaintiffs in the case, members of plaintiff classes under Equity Rule 38, or members of a plaintiff association asserting associational standing. In most of these cases, the court did not expressly consider or address the propriety of a broad defendant-oriented injunction. Indeed, in several cases, the government implicitly or expressly consented to the requested relief. In the one case in which the Supreme Court directly reviewed the propriety of a nationwide defendant-oriented injunction, it held that the injunction exceeded the bounds of "any controversy that might have existed between the complaining companies and the Government officials."  

In addition, in constitutional challenges to state laws like Pierce v. Society of Sisters and West Virginia State Board of Education v. Barnett, Irritants’ failure to contest, and the Supreme Court’s failure to address, the scope of the district courts’ injunctions were understandable due to the jurisdictional context in which those matters were litigated. Such cases were heard by three-judge district court panels, with direct appeal as of right to the U.S. Supreme Court. Because most federal judicial districts in the early twentieth century had only one or two judges, all constitutional challenges to a particular state law would be heard by a panel comprised of mostly the same judges. Whether the court issued a plaintiff-oriented injunction or a defendant-oriented injunction was largely irrelevant, because any future case would almost certainly be heard by a majority of the same judges, likely leading to the same outcome. And once the Supreme Court adjudicated the appeal, its opinion applied to all rightsholders throughout the state and nation as a matter of stare decisis, regardless of the scope of any injunction.

Lost History implicates another, more fundamental question about not only defendant-oriented injunctions, but justiciability doctrine more broadly. The
article seeks guidance about whether Article III allows courts to grant relief to third-party nonlitigants based on federal courts’ rulings “in the period from 1800 to 1943.” 140 It is far from clear what significance such rulings should have in modern constitutional jurisprudence. On the one hand, that period is over a century removed from the Founding Era, offering very little insight into the original public meaning of Article III, 141 or even the manner in which early courts may have liquidated the meaning of that provision. 142 On the other hand, many scholars have argued that standing doctrine has dramatically evolved over the course of the twentieth century. 143 Regardless of early twentieth century practice, modern Supreme Court doctrine reflects a plaintiff-centric conception of standing that is inconsistent with defendant-oriented injunctions. 144 Thus, even if some federal courts experimented with broad nationwide or statewide defendant-oriented injunctions in the early twentieth century, that does not suggest they are consistent with Article III doctrine as it has evolved over the decades since. In short, while Last Hurrah presents a useful perspective on the evolution of equitable remedies, it neither demonstrates the historical legitimacy of defendant-oriented injunctions, nor lays to rest the compelling Article III objections against them.

140. Solom, supra note 2, at 929.

142. See William Brade, Constitutional Litigation, 71 STAN. L. REV. 1, 4 (2019) (arguing that postenactment historical practice can be used to fix the meaning of vague constitutional provisions).


144. See, e.g., Hollingsworth v. Perry, 570 U.S. 695, 705 (2013) (“To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way.”) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 n.1 (1992)); Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (holding that a plaintiff “bears the burden of showing that he has standing for each type of relief sought”); Califano v. Yamasaki, 442 U.S. 602, 702 (1977) (“Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”); Donziger v. Republic of Peru, 422 U.S. 628, 631 (1975) (“[I]n other declaratory or injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . . .”); see also Salazar v. Buono, 559 U.S. 705, 734 (2010) (Scalia, J., concurring) (holding that Article III forbids federal courts from issuing orders that “cover additional actions that produce no concrete harm to the original plaintiff.”); U.S. Dep’t of Def. v. Mandel, 510 U.S. 939, 939 (1995) (mem.) (staying a lower court injunction “so far as it prohibited the military from applying the challenged regulation to anyone other than the individual plaintiff”).
NATIONWIDE INJUNCTIONS, RULE 23(B)(2), AND THE REMEDIAL POWERS OF THE LOWER COURTS

MICHAEL T. MORLEY

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INTRODUCTION

In constitutional and other public law cases in recent years concerning a wide range of controversial issues, public attention has focused not only on the courts’ legal conclusions, but also on the scope of their rulings—in particular, whether a single district court judge sought to enforce his or her interpretation of the law across the country through a nationwide injunction.¹ For example, in Texas v.

United States; the District Court for the Northern District of Texas entered a preliminary injunction prohibiting the federal government from enforcing new guidance from the U.S. Department of Education, concerning transgender students’ right to use the bathrooms of their choice, against any school in the nation. The case was filed on behalf of a coalition of several states, but was not a class action.

Conversely, when the District Court for the District of Columbia determined that it was unconstitutional for the National Security Agency (“NSA”) to collect metadata about every phone call made in the country (including the phone number dialed, as well as the date, time, and duration of the call), it enjoined the NSA from collecting such information only concerning the five individual plaintiffs in the case.

Disputes over the proper scope of injunctive relief repeatedly arose in challenges relating to the Patient Protection and Affordable Care Act (“ACA”) as they made their way to the Supreme Court. In Halbig v. Burwell, the Court of Appeals for the District of Columbia Circuit held that an Internal Revenue Service (“IRS”) regulation providing subsidies to people who purchase health insurance through exchanges established by the federal government was invalid. The plaintiffs, all from states in which the federal government had

actions has thwarted many key parts of President Obama’s agenda, and “some aspects of Hillary Clinton’s platform”).


3 Id. at *1 (granting a nationwide preliminary injunction that prohibits various agency officials from enforcing an order requiring schools to "immediately allow students to use the bathrooms, locker rooms and showers of the student’s choosing, or risk losing Title IX-linked funding").

4 Id. ("Plaintiffs are composed of 13 states and agencies represented by various state leaders . . .").


8 26 C.F.R. § 1.36B-2(a)(f) (2016) (describing the eligibility for tax credits for individuals who are enrolled in a qualified health plan through an Exchange).

9 Halbig, 758 F.3d at 412 ("[S]ection 36B unambiguously forecloses the interpretation embodied in the IRS Rule and instead limits the availability of premium tax credits to state-established Exchanges"). The court held that the subsidies violated the ACA, which provided that only people who purchased health insurance through an exchange “established by [a] State” qualified for a subsidy. Id. at 411. The Supreme Court rejected the Court of Appeals
established exchanges, wished to avoid receiving subsidies so they would not become subject to the ACA’s individual mandate to purchase health insurance, as well as employers in such states who did not wish to offer it. The court “vacate[d] the IRS’s regulation” and precluded its application to anyone, anywhere in the nation.11

In Florida ex rel. Bondi v. United States Department of Health and Human Services,12 in contrast, the District Court for the Northern District of Florida held that the ACA’s individual mandate exceeded Congress’s authority under the Commerce Clause and was not severable from the rest of the statute.13 The court declined to issue an injunction against the ACA, however, on the basis that “declaratory relief is adequate and separate injunctive relief is not necessary.”14

The recent change in presidential administrations, from President Obama to


10 Halbig, 738 F.3d at 393. The court held the individuals had standing to challenge the regulation because the ACA imposed penalties on anyone who refused to purchase health insurance, and could do so for less than eight percent of their projected household income, taking into account any tax credits or subsidies the ACA provides. Id. at 395-96 (citing 26 U.S.C. § 5000A(c)(1)(A)-(B) (2012)). Without the challenged subsidy, the plaintiffs’ incomes would have been too low to subject them to penalties for refusing to purchase health insurance. Id. at 396 (“[B]ut for federal credits [the plaintiff] would be exempt from the individual mandate because the unsubsidized cost of coverage would exceed eight percent of his income.”). They had standing to challenge the validity of the subsidy on the grounds that its availability subjected them to those penalties. Id. Comparable penalties for employers likewise hinged on the availability of the subsidies. Id. at 395.


13 Florida, 780 F. Supp. 2d at 1298, 1305-07. The District Court for the Eastern District of Virginia similarly held that the individual mandate violated the Commerce Clause but declined to issue an injunction. Commonwealth ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 706, 788, 798 (E.D. Va. 2010), vacated, remanded, 656 F.3d 253 (4th Cir. 2011).

14 Florida, 780 F. Supp. 2d at 1305. The Commerce Clause challenge was brought by: individuals who did not wish to purchase health insurance, the National Federation of Independent Business, which asserted associational standing on behalf of its members who similarly did not wish to purchase health insurance, and two states that had enacted laws declaring that the mandate violated citizens’ rights. Id. at 1270-73.
President Trump, vividly illustrates how activities from both sides of the political spectrum may take advantage of nationwide injunctions. A single judge from the District Court for the Southern District of Texas entered a nationwide preliminary injunction completely prohibiting the Obama Administration from enforcing its Deferred Action for Parents of Aliens (“DAPA”) program and expanding its Deferred Action for Children of Aliens (“DACA”) program. These programs would have suspended the deportation of various classes of undocumented immigrants and authorized them to work legally in the United States. The lawsuit challenging the programs was filed by a coalition of twenty-six plaintiff states, but was not a class action. An equally divided Supreme Court ultimately affirmed the injunction.

Similarly, at the outset of the Trump Administration, the states of Washington and Minnesota obtained a nationwide injunction against President Trump’s executive order temporarily prohibiting people from certain terror-prone countries from entering the United States. The Court of Appeals for the Ninth Circuit held that such nationwide relief was appropriate because a “fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.”

Controversies concerning the proper scope of lower courts’ powers in resolving constitutional, statutory, and administrative cases have long been neglected in both academic literature and public debate. For articles specifically addressing the proper scope of district courts’ remedial powers, see Morley, supra note 25, at 553 (arguing that courts should require a case to proceed as a Rule 23(b)(2) class action if it determines that it would have to grant relief to all right holders, rather than just the particular plaintiffs in a case), and see also Maureen Carroll, Aggregation

12 86 F. Supp. 3d 591, 677-78 & n.111 (S.D. Tex. 2015) (“[T]his temporary injunction enjoins the implementation of the DAPA program that awards legal presence and additional benefits to the four million or more individuals potentially covered by the DAPA Memorandum and to the three expansions/additions to the DACA program . . . .”, aff’d 809 F.3d 134 (5th Cir. 2015), aff’d 136 S. Ct. 2271 (2016), reh’g denied, No. 15-674, 2016 U.S. LEXIS 4754 (U.S. Oct. 3, 2016).
13 Id. at 608-14.
14 Id. at 607-08.
22 For articles specifically addressing the proper scope of district courts’ remedial powers, see Morley, supra note 25, at 553 (arguing that courts should require a case to proceed as a Rule 23(b)(2) class action if it determines that it would have to grant relief to all right holders, rather than just the particular plaintiffs in a case), and see also Maureen Carroll, Aggregation
however, address most important legal issues long before they reach the Supreme Court. Due to both the Supreme Court’s limited adjudicative capacity and its stringent requirements for granting certiorari, many important rulings of the lower courts may persist for years before the Supreme Court reviews them. Moreover, because many critical decisions concerning the scope of relief in a case are discretionary, the district court’s determinations are particularly


As a result of the Social Security Administration’s general refusal during the Reagan Administration to apply circuit court rulings to people living within that circuit, other than the parties immediately involved in a case, a body of literature arose examining agency nonacquiescence in lower court rulings. See, e.g., Matthew Diller & Nancy Morawetz, Intricately Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revez, 99 YALE L.J. 801, 821 (1990) (arguing that courts have the final word on whether an “agency has complied with its statutory mandate”); Samuel Estreicher & Richard L. Revez, Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679, 683 (1989) (arguing that nonacquiescence can be justified “as an interim measure that allows the agency to maintain a uniform administration of its governing statute at the agency level, and only while federal law on the subject remains in flux”); Deborah Maranville, Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism, 39 YALE L. REV. 471 (1986) (analyzing the doctrinal approaches to nonacquiescence); Joshua I. Schwartz, Nonacquiescence, Crowell v. Benson, and Administrative Adjudication, 77 GEO. L.J. 1815, 1819, 1821-35 (1989) (suggesting that divergent opinions regarding the lawfulness of nonacquiescence reflect an underlying separation of powers question about the justification for administrative agency adjudication). The issue largely faded from view in the decades that followed. Other commentators have debated the legal effects of judicial rulings and whether other branches of government are required to follow them. See infra note 156 and accompanying text (giving an explanation for the deference owed to a trial court on appeal); see also Joseph W. Mead, stare Decisis in the Inferior Courts of the United States, 12 REV. L.J. 787, 794-804 (2012).

23 Sup. Ct. 10.


25 District courts have broad discretion over whether to grant injunctive relief, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006), and over the terms of any injunction, see United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 495 (2001). Courts also have discretion over whether to certify plaintiff classes to seek relief and how to determine the scope of any such classes, Californio v. Yamasaki, 442 U.S. 682, 703 (1979), and, in some jurisdictions, whether to grant relief to third-party nonparties in nonclass cases, see Michael T. Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 HARV. J.L. & PUB. POL’Y 487, 494 (2016).
important in determining the consequences of a case.

This Article offers a new perspective on nationwide injunctions, focusing on the proper role within our hierarchical judicial system of the lower courts, which exercise jurisdiction over limited geographic areas. It contends that the two major lines of Supreme Court precedent which establish the scope of lower court power may not contradict each other in ways that have been previously overlooked. When these precedents are untangled, a compelling case emerges that nationwide classes should be certified, and nationwide injunctions granted, in constitutional and statutory challenges to federal statutes, regulations, and other policies—if at all—only under certain narrow circumstances.

It is important to begin by clarifying the meaning of the phrase “nationwide injunction” as used in this Article. In one sense, most federal injunctions could be considered “nationwide” because the defendant is generally prohibited from violating the plaintiff’s rights anywhere—not just within the geographic jurisdiction of the issuing court. When a federal court enjoins a defendant from infringing a plaintiff’s patent, for example, the defendant may not manufacture infringing goods anywhere in the nation. So long as an injunction is adequately tailored to prevent violations of the plaintiff’s rights, concerns about its geographic scope are unlikely to arise.

The phrase “nationwide injunction” also may refer to a Defendant-Oriented Injunction: an order issued by a federal court in a case brought by individual plaintiffs or entities (i.e., a nonclass case) completely prohibiting a defendant government agency or official from enforcing an invalidated federal statute, regulation, or policy against anyone, anywhere in the nation. In cases involving indivisible rights, in which it is impossible to enforce only the plaintiffs’ rights without also necessarily enforcing other peoples’ rights, such as a redistricting or school desegregation case, an order crafted to enforce the plaintiffs’ rights often will be effectively indistinguishable from a Defendant-Oriented Injunction.

Most cases, however, involve divisible rights, in which the court can fully

20 Much of the analysis in this Article is equally applicable to state courts.
27 See Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (“[T]he District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.”).
28 Leman v. Kretzer-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932) (holding that an injunction in a patent infringement suit “bound the respondent personally . . . not simply within the District of Massachusetts, but throughout the United States”).
29 See Lewis v. Casey, 518 U.S. 343, 357 (1996) (“The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (holding that, in “any equity case, the nature of the violation determines the scope of the remedy”).
30 See Morley, supra note 25, at 490-91.
31 See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04(a)-(b) (2010) [hereinafter ALI AGGREGATE LIMITATION].
enforce particular plaintiffs’ rights without necessarily enforcing third parties’ rights. I have argued elsewhere that courts should decline to issue Defendant-Oriented Injunctions in nonclass cases due to jurisdictional, procedural, and other important concerns. Rather, a Plaintiff-Oriented Injunction, tailored to enforcing only the rights of the plaintiffs before the court, is the appropriate type of relief in nonclass cases. In a challenge to the constitutionality or validity of a federal legal provision, the court should determine at the outset of the case whether, should the plaintiffs prevail, it would be required to issue a Defendant-Oriented Injunction due to Equal Protection, severability, or other restrictions. If a Defendant-Oriented injunction would be necessary, the court should require the case to proceed as a Rule 23(b)(2) class action; otherwise, the case may proceed as a nonclass suit in which the plaintiffs may seek a Plaintiff-Oriented Injunction. This principle raises the question of how broadly the Rule 23(b)(2) class should be defined—whether it should include all right holders in the judicial district, circuit, or nation.

Finally, “nationwide injunction” may refer to an injunction prohibiting enforcement of a federal statute, regulation, or policy in a case in which a nationwide class of all right holders has been certified under Rule 23(b)(2). When a plaintiff class is comprised of all right holders, a Plaintiff-Oriented Injunction focused on protecting the plaintiffs’ rights is effectively equivalent to a Defendant-Oriented Injunction completely barring the government defendants from enforcing the challenged provision. This Article examines nationwide injunctions in this sense of the term. Because courts must ensure that an injunction is sufficiently broad to protect the plaintiffs’ rights, the validity of a nationwide injunction in this sense of the phrase depends on the propriety of certifying a nationwide class under Rule 23(b)(2). This Article treats these issues as inextricably intertwined.

This Article explores problems with nationwide injunctions from three different, though related, perspectives. Part I begins by explaining that nationwide injunctions are inconsistent with the structure of the federal judicial system. This Part examines the largely unrecognized inconsistencies between the Supreme Court’s ruling in Califano v. Yamasaki, which held that a single district court judge may enjoin his or her view of the law across the nation by certifying a nationwide class of plaintiffs to challenge a federal regulation, and

32 Morley, supra note 25, at 494-97.
33 See supra note 29; see also Morley, supra note 25, at 550-53.
34 Morley, supra note 25, 553-56.
36 Morley, supra note 25, at 553.
37 Id. at 555-56.
39 Id. at 701-02 (explaining that the district court “has the discretion . . . to certify a class action for the litigation”).
United States v. Mendoza,\(^40\) in which the Court substantially limited the res judicata effect of lower courts’ judgments in public law cases by prohibiting third parties from invoking nonmutual collateral estoppel against the Government.\(^41\) This Part shows that the same structural considerations underlying Mendoza should lead the Court to reconsider Calitri’s approval of nationwide classes.

Part II assesses the issue through the lens of class action law. Class certification is merely a procedural vehicle for aggregating numerous plaintiffs’ claims and should not change the body of substantive law used to adjudicate them. This Part explains that, when a district court certifies a nationwide class in a challenge to a federal statute, regulation, or policy, it generally applies the binding precedents of its own circuit to adjudicate the claims of all right holders across the nation. Certifying a nationwide class in such cases therefore deprives both the government and residents of other circuits of their respective rights to have those persons’ claims be adjudicated according to the law of their respective circuits. This Part further demonstrates that Rule 23’s standards and procedures for certifying classes in suits for injunctive relief are almost completely inapposite for determining whether a district court’s legal rulings should be given nationwide effect.

Part III focuses on the powers of district courts themselves. It begins by exploring the three main components of a judicial ruling: judgments, injunctions, and opinions. This Part contends that, in light of the strict limitations on the geographic enforceability of lower courts’ opinions as a matter of stare decisis, there is no basis for allowing those courts to give the legal conclusions contained within those opinions the force of law throughout the country by certifying nationwide classes.

Part IV offers a new approach to nationwide class certification and nationwide injunctions, arguing that such relief should be treated as presumptively inappropriate. It identifies four situations in which a nationwide class may potentially be defensible: (1) the plaintiffs are asserting rights that are “clearly established” by Supreme Court precedents and about which reasonable jurists cannot differ; (2) the plaintiffs assert indivisible rights; (3) the plaintiffs’ claims are based on the allegedly unconstitutional burdens the challenged provisions impose; or (4) it would be inappropriate to enjoin the challenged provision only against certain right holders under traditional severability standards.

This Article seeks to initiate a new conversation concerning the proper scope of lower courts’ remedial powers. This Article is my fourth piece examining this issue. I began by arguing that, contrary to conventional wisdom, a lower court’s decision about whether to issue an injunction has a tremendous effect on the


\(^{41}\) Id. at 162 (holding that “nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case” in part because the economy interests that normally justify collateral estoppel are “outweighed by the constraints which peculiarly affect the Government”).
impact and efficacy of its ruling, particularly in public law cases where a right holder faces exhaustion requirements for seeking judicial relief or “fast-moving” constitutional violations.\textsuperscript{42} I advocated eliminating unnecessary or arbitrary barriers to the availability of injunctive relief. My next work examined the circumstances under which courts may issue injunctions, offering suggestions for reduction. Building on these pieces, I then explored challenges posed by courts that issue statewide or nationwide injunctions outside the context of class action cases, even when such broad relief is unnecessary to remedy the harm to the particular plaintiffs before them.\textsuperscript{44} This Article takes the next step, exploring the scope of a lower court’s power to certify a nationwide class and issue a nationwide injunction.

I. THE ROLE OF LOWER COURTS IN THE FEDERAL JUDICIAL SYSTEM

The propriety of nationwide injunctions is primarily a structural issue concerning the proper role of lower courts of limited geographic jurisdiction within a hierarchical judiciary. The Supreme Court has offered conflicting visions of the proper structure of the federal judiciary that complicates the question. On the one hand, in \textit{Califano}, the Court embraced a sweeping view of lower courts’ powers, authorizing them to certify nationwide classes in challenges to federal legal provisions.\textsuperscript{45} Yet only a few years later, in \textit{Mendoza}, the Court emphasized the need to limit the effects of district court rulings by prohibiting plaintiffs from asserting nonmutual collateral estoppel against the Government.\textsuperscript{46} The Court has neither recognized nor resolved the tension between these lines of authority. The concerns identified in \textit{Mendoza}, however, call into question \textit{Califano}’s embrace of nationwide class certification.

\textsuperscript{42} See generally Michael T. Morley, \textit{Public Law at the Cathedral: Enjoining the Government}, 35 \textit{Cardozo L. Rev.} 2453 (2014) arguing that “a constitutional or statutory right receives the greatest available level of protection when it is secured by an injunction” and, particularly in public law cases where injunctions are highly important, the plaintiff’s path to injunctive relief should be made easier by relaxing nonmutual requirements for injunctive relief.

\textsuperscript{43} See generally Michael T. Morley, \textit{Enforcing Equality: Statutory Injunctions, Equitable Balancing Under eBay, and the Civil Rights Act of 1964}, 2014 \textit{U. Ill. L. Rev.} 177 (arguing that “the standard governing the issuance of injunctions for statutory violations, including in the civil rights context, should depend on the nature of the injunction the plaintiff seeks”)

\textsuperscript{44} See generally Morley, supra note 25 (explaining that courts should be careful in determining the scope of a judgment, particularly in constitutional cases, to avoid “inappropriately providing ‘overrelief’ to plaintiffs in nonclass cases” and offering potential approaches to guide courts in crafting proper remedies).

\textsuperscript{45} Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (“Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule.”).

A. Califano and Nationwide Class Certification

*Califano* expressly affirmed the power of district courts to issue nationwide injunctions against federal agencies.\(^{47}\) The plaintiffs alleged that the Fifth Amendment’s Due Process Clause requires the Social Security Administration (“SSA”) to provide claimants with the opportunity for an oral hearing before reducing their benefits to recoup overpayments.\(^{48}\) The district court certified a nationwide class under Rule 23(b)(2)\(^{49}\) “comprised of ‘all individuals eligible for [old-age and survivors’ benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing.’”\(^{50}\)

The Supreme Court upheld certification of the nationwide class.\(^{51}\) It began by observing that Rule 23, which authorizes class certification, applies in challenges to executive actions.\(^{52}\) “[T]he class-action device,” the Court observed, “saves the resources of both the courts and the parties by permitting an issue potentially affecting every [claimant] to be litigated in an economical fashion under Rule 23.”\(^{53}\) The Court further observed that a nationwide class of all potentially affected claimants is consistent with “principles of equity jurisprudence, since the scope of injunctive relief [remains] dictated by the extent of the violation established,” regardless of the “geographic extent of the plaintiff class.”\(^{54}\)

The SSA had objected that certifying a nationwide class would “foreclose[] reasoned consideration of the same issues by other federal courts and artificially increase[] the pressure on the docket of the Court.”\(^{55}\) The Court acknowledged that “nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in

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\(^{47}\) *Califano*, 442 U.S. at 705 (holding that a district court did not abuse its discretion by granting nationwide injunctive relief against a federal agency).

\(^{48}\) Id. (“[P]laintiffs alleged that the Secretary’s recoupment procedures were contrary to both § 204 and the Due Process Clause of the Fifth Amendment. They requested . . . declaratory and mandamus relief that would require the Secretary to provide notice and an opportunity for a hearing before recoupment began again.”).

\(^{49}\) FED. R. CIV. P. 23(b)(2) (authorizing class certification when Rule 23(a)’s requirements are satisfied and “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole”).

\(^{50}\) *Califano*, 442 U.S. at 689 (alterations in original). The class excluded residents of two states in which similar classes had been certified on a statewide basis. Id.

\(^{51}\) Id. at 706.

\(^{52}\) Id. at 700 (“In the absence [express Congressional intent] . . . class relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government . . . ”).

\(^{53}\) Id. at 701.

\(^{54}\) Id. at 702.

\(^{55}\) Id. at 701-02.


certain cases, the pressures on this Court’s docket.” It nevertheless refused “to adopt the extreme position that such a [nationwide] class may never be certified.”

Caldwell offers scant guidance to lower courts for determining the propriety of nationwide class certification when a plaintiff challenges a federal statute, regulation, or policy. The Court recognized that “[i]t often will be preferable to allow several courts to pass on a given claim in order to gain the benefit of adjudication by different courts in different factual contexts.” It directed lower courts to “take care to ensure that nationwide relief is indeed appropriate,” and that “certification . . . would not improperly interfere with the litigation of similar issues in other judicial districts.” It nevertheless emphasized that Rule 23 grants district courts broad discretion over the proper scope of classes, and did not identify any other factors district courts should weigh when determining the “appropriate” scope of a class.

Caldwell’s approval of nationwide classes allows a single district court to enforce its view of the law throughout the entire nation. A court may compel the Government to apply a legal provision in a particular manner, or prohibit it from enforcing the provision at all, with regard to any potentially affected person, including those who live in other judicial districts and even other circuits. Everyone potentially affected by the challenged provision is bound by the district court’s ruling as a matter of res judicata because, as members of a plaintiff class, they are parties to the lawsuit. Paradoxically, despite the potentially dramatic and widespread effects of a district court’s ruling, any opinion accompanying that ruling lacks any precedential value. Applying Caldwell, circuit courts have been most willing to affirm nationwide classes and injunctions in challenges to regulations concerning federal benefits such as Social Security and Medicare.

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50 Id. at 702.
51 Id. at 702-03.
52 Id. at 702.
53 Id.
54 Id. at 702-03.
55 Cooper v. Fed. Res. Bank, 467 U.S. 867, 874 (1984) (“[A] judgment in a properly entertained class action is binding on class members in any subsequent litigation.”); Hansberry v. Lee, 311 U.S. 52, 41 (1940) (“[T]he judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”). As discussed below, putative class members generally are not permitted to opt out of classes seeking injunctive or declaratory relief under Rule 23(b)(2). See infra note 130 and accompanying text (explaining that, because notice to putative class members is optional under FED. R. CIV. P. 23(c)(2)(A), they are not given an opportunity to opt out); see also Ryan C. Williams, Due Process, Class Action Opt-Outs, and the Right Not to Sue, 115 COLUM. L. REV. 599, 605 (2015).
56 See infra Section III.C (explaining that district court opinions lack precedential value).
57 See, e.g., Linquist v. Bowen, 813 F.2d 884, 887 (8th Cir. 1987); Burnet v. Brown, 794
One of the main reasons courts issue nationwide injunctions is to protect the rights of all similarly situated right holders. The Equal Protection Clause\textsuperscript{64} and equal protection component of the Fifth Amendment’s Due Process Clause\textsuperscript{65} generally prohibit the government from discriminating among people with regard to their fundamental constitutional rights.\textsuperscript{66} Some commentators have argued that allowing a court to issue injunctions or declaratory judgments enforcing constitutional rights only for the particular plaintiffs in a case and not otherwise, similarly situated right holders would violate these equal protection restrictions.\textsuperscript{67} Congress generally may not enact laws allowing only certain people to exercise their constitutional rights or establishing special remedies for violations of certain people’s rights based solely on where they live. The Constitution arguably should not be read as permitting courts to effectively create such a scheme by extending injunctive relief only to particular plaintiffs, or giving only certain parties the benefit of their interpretation of the law.\textsuperscript{68} Under this view, the Fifth Amendment’s equal protection restrictions bind all branches of the federal government equally.

This argument proves far too much, however. If valid, it would render unconstitutional the structure of the judicial system, in which power is shared among coordinate courts of limited geographic jurisdiction. Any time a court

\textsuperscript{64} U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

\textsuperscript{65} Id. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .") Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the Fifth Amendment implicitly incorporates the Fourteenth Amendment’s Equal Protection restrictions).

\textsuperscript{66} See Harper v. Va. Bd. of Elections, 383 U.S. 663, 669-70 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.")

\textsuperscript{67} See Diller & Morawetz, supra note 22, at 825-27 (explaining that agency intracircuit nonacquiescence to judicial rulings creates equal protection and due process issues because it causes disparities between claimants in different jurisdictions). Samuel Figler, Executive Agency Nonacquiescence to Judicial Opinions, 61 Geo. Wash. L. Rev. 1664, 1675 (1993) ("Critics of intracircuit nonacquiescence also assert that the practice violates the Fifth Amendment’s Equal Protection Clause.").

\textsuperscript{68} Cf. Stieberber v. Heckler, 615 F. Supp. 1315, 1363 (S.D.N.Y. 1985) ("[T]he arbitrary distinctions created by the Secretary’s non-acquiescence policy, regarding those claimants who obtain a disability determination in accordance with circuit court precedents and those claimants who do not, cast serious doubts on the validity of the Secretary’s non-acquiescence policy.") vacated on other grounds sub nom. Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986); Lopes v. Heckler, 572 F. Supp. 26, 30 (C.D. Cal. 1983) (holding that a “dual system of law,” in which an agency refuses to apply judicial rulings beyond the parties to a case, “is prejudicial and unfair”), aff’d in part, rev’d in part, 725 F.2d 1489 (9th Cir.), vacated on other grounds, 469 U.S. 1082 (1984).
invalidated (or perhaps even interpreted) a statute or regulation, the ruling would have to be applied throughout the nation in order to avoid equal protection violations. Under this view, not only is 
Mendoza\textsuperscript{69} wrong, but the opposite conclusion is constitutionally compelled, at least in constitutional cases: third-party nonlitigants must be able to assert nonmutual collateral estoppel against the Government, to prevent the court in which they are litigating from reaching a different legal conclusion and violating their right to equal protection under the law.\textsuperscript{70} Equal protection, however, has never been understood as requiring instant nationwide application of every district court constitutional ruling.\textsuperscript{71} Moreover, \textit{Califano} itself did not mention equal protection concerns. Consequently, it appears unlikely that nationwide injunctions are necessary to avoid equal protection problems in challenges—including constitutional challenges—to the validity of federal statutes, regulations, or policies.

B. 
\textit{Mendoza and Restricting the Power of Lower Courts}

\textit{Mendoza}, decided only a few years after \textit{Califano}, offers a starkly different assessment of the proper role of lower courts in the federal judicial system. \textit{Mendoza} held that, when a federal court decides an issue adversely to the Government—including constitutional and statutory issues—the ruling binds the Government as a matter of res judicata only with regard to the other litigants in that case.\textsuperscript{72} The Government is not bound by that ruling in subsequent cases.

\textsuperscript{69} See infra Section 1.B.

\textsuperscript{70} See Estricher & Revesz, supra note 22, at 733 ("This litigant equality argument, in its strong form, would doom not only intracircuit nonacquiescence but also other features of our legal system where differential access to litigation resources may spell different outcomes.").

\textsuperscript{71} Schwartz, supra note 22, at 1828 n.37 (pointing out that "[c]urrent case law provides scant support at best" for an equal protection argument). Indeed, comparable equal protection issues would arise when some state courts enforced federal constitutional rights that other state courts refused to recognize.

\textsuperscript{72} United States v. \textit{Mendoza}, 464 U.S. 154, 163 (1984) ("The doctrine of res judicata . . . prevents the Government from relitigating the same cause of action against the parties to a prior decision . . . ."); see also 18 \textit{CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE} § 4465.4 (2d ed. 2002) ([A] seemingly broad rule prohibiting use of nonmutual offensive preclusion against the government was announced in \textit{United States v. Mendoza}."); cf. 18 \textit{JAMES WILMOORE ET AL., MOORE'S FEDERAL PRACTICE} § 132.04[2][c][v] (3d ed. 2016) (suggesting that nonmutual collateral estoppel may be available against the Government in certain types of cases).

The Supreme Court previously had held that the Government is subject to mutual collateral estoppel, meaning that it generally is precluded from relitigating an issue against the same litigant, even in a different court. \textit{Montana v. United States}, 440 U.S. 147, 152-53 (1979) (precluding the government from relitigating an issue that was "determined adversely" to the government in a "prior state proceeding"); see also \textit{United States v. Stauffer Chem. Co.}, 464 U.S. 165, 173 (1984) (holding that estoppel applies "where the Government is litigating the same issue arising under virtually identical facts against the same party"). The Court explained that mutual collateral estoppel arises naturally from a court’s "central . . . purpose"
involved other people.72 To the contrary, the Government remains free to relitigate against other litigants the same constitutional or statutory issues that it previously lost.73

The *Mendoza* Court exempted the Government from nonmutual offensive collateral estoppel for four main reasons. First, the Government is involved in far more litigation than any other entity, and is therefore much more likely to be involved in repeat litigation raising the same issues than private parties.74 Second, the Court wanted to facilitate development of the law. Precluding the Government from relitigating lower court rulings in subsequent cases involving different litigants “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.”75 It would be impossible for circuit splits to develop on issues, precluding

of conclusively resolving disputes within its jurisdiction. *Montana*, 440 U.S. at 153. Collateral estoppel protects litigants “from the expense and vexation attending multiple lawsuits, conserve judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.* at 153-54 (footnote omitted).

*Mendoza* affirmed that the Government is subject to mutual collateral estoppel, despite its unique characteristics as a sovereign. *Mendoza*, 464 U.S. at 164. The Court explained that mutual collateral estoppel does not raise the same concerns about freezing development of the law as its nonmutual analogue because the Government remains free to relitigate issues against other parties. *Id.* Moreover, “stopping the Government spares a party that has already prevailed once from having to relitigate.” *Id.*

72 *Mendoza*, 464 U.S. at 158 (“[N]onmutual offensive collateral estoppel is not to be extended to the United States.”). But see Note, Collateral Estoppel and Nonacceptance: Precluding Government Relitigation in the Pursuit of Litigant Equality, 99 Harv. L. Rev. 847, 848 (1986) (“Although a rule requiring the application of nonmutual offensive collateral estoppel against the government in all cases would be inappropriate, courts should have discretion to preclude relitigation whenever they can thereby further the goals of litigant equality.”).

73 *Mendoza* has been applied to federal agencies and officials sued in their official capacities, as well as states. Hercules Carriers, Inc. v. Fla., Dep’t of Transp., 768 F.2d 1558, 1579 (11th Cir. 1985) ("[T]he rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is equally applicable to state governments.”), and state agencies, Idaho Potato Comm’n v. G&T Terminal Packaging, Inc., 425 F.3d 708, 713-14 (9th Cir. 2005) (*Mendoza*’s rationale applies with equal force to [an] attempt to assert nonmutual defensive collateral estoppel against [a] state agency.” (citing Coeur D’Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 689-90 (9th Cir. 2004))).

74 *Mendoza*, 464 U.S. at 159-60 (observing that, because the government is involved in more litigation than “even the most litigious private entity[,] . . . the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues”); see also id. at 162-63 ("The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government.”).

75 *Id.* at 160.
the Supreme Court from seeing the practical consequences of different possible interpretations of the law in different jurisdictions.  

Third, the Court wanted to protect the Government from having to “appeal every adverse decision in order to avoid foreclosing further review.” 77 The Court placed great weight on preserving the Government’s discretion to decide whether to appeal adverse judgments. 78 Mendoza emphasized that “the conduct of Government litigation in all its myriad features” is not “a wholly mechanical procedure which involves no policy choices whatever.” 79 Finally, the Court wanted to limit the ability of a presidential administration to bind its successors to a particular view of the Constitution or a federal statute based solely on a district court ruling. If the Government were subject to nonmutual offensive collateral estoppel, one administration would be able to give a district court decision nationwide effect simply by declining to appeal it. 80 Because “policy choices ... made by one administration” are “often reevaluated by another administration, courts should be careful when they seek to apply expanding rules of collateral estoppel to Government litigation.” 81

Mendoza and Califano offer squarely conflicting views of the proper scope of lower courts’ powers. Mendoza extols the virtues of allowing various courts to address an issue so the Supreme Court can see the consequences of different possible rules or interpretations before definitively imposing one on a nationwide basis. Califano, in contrast, empowers a district court to impose its ruling nationally, foreclosing contrary approaches. 82 It is primarily concerned with securing adequate relief for all adversely affected people and avoiding disparities in the enforcement of statutory or constitutional rights. 83 Mendoza

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77 Id. ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").
78 Id. at 161.
79 See id. ("[T]he Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal.").
80 Id. at 161.
81 Id. at 161-62; cf. Michael T. Morley, Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases, 16 U. Pa. J. Const. L. 637, 689-91 (2014) (arguing that courts should be cautious in approving consent decrees to ensure that a presidential administration does not use them to improperly entrench its preferred constitutional interpretations and policies without allowing a court to pass on the merits of the underlying issues).
82 Mendoza, 464 U.S. at 161-62.
83 This outcome also occurs when a court does not certify a class, but grants effectively classwide relief by issuing a Defendant-Oriented Injunction that completely prohibits the government defendants from enforcing the challenged provision against anyone, rather than just the plaintiffs in the case. See infra notes 185-187 and accompanying text.
84 See Lisa A. Kloppenberg, Measured Constitutional Steps, 71 Ind. L.J. 297, 339, 350 (1996) (explaining that affording narrower scopes to court rulings leads to “less uniformity in
sought to preserve the Government’s flexibility in determining which cases to appeal. Calijano effectively compels the Government to appeal every adverse ruling by allowing a single trial court to completely bar enforcement of a law or regulation throughout the nation. The Mendoza Court also was concerned about preventing the executive branch from manipulating the judiciary by declining to appeal an adverse ruling so that it would bind the Government, including subsequent administrations, in any future litigation anywhere in the nation. But Calijano allows for that result. If the Government declines to appeal a ruling in a case involving a nationwide plaintiff class, a legal provision may be completely invalidated across the entire country.

Mendoza’s rejection of offensive nonmutual collateral estoppel enables federal agencies to engage in intercircuit nonacquiescence. “[A]n agency engages in intercircuit nonacquiescence when it refuses to follow, in its administrative proceedings, the case law of a court of appeals other than the one that will review the agency’s decision.”86 Scholars who have studied the issue have almost unanimously concluded that intercircuit nonacquiescence is both constitutionally permissible and consistent with the structure of the federal court system and limited powers of lower courts.

Samuel Estreicher and Richard Revesz have argued that, “[g]iven the lack of intercircuit stare decisis, and the reasons underlying our system of intercircuit dialogue, an agency’s ability to engage in intercircuit nonacquiescence should not be constrained.”86 Others have agreed that an “agency’s refusal to acquiesce nationwide in the decision of a nonreviewing circuit does not threaten the ability of the reviewing court to ensure application of the law that it deems correct.”87 To the contrary, intercircuit nonacquiescence, like Mendoza’s prohibition on the invocation of nonmutual collateral estoppel against the Government, allows the Supreme Court to assess the practical consequences in the various circuits of different interpretations of the law,88 prevents the Government from having to

the content of federal constitutional law.” “Lessened judicial guidance on constitutional issues,” and the “failure to secure rights”), Nancy Morawetz, Underinclusive Class Actions, 71 N.Y.U. L. Rev. 402, 420-21 (1996) (“The principal harm caused by defining a class narrowly is the potential of denying similarly situated persons the same opportunity for relief in similar claims.”).

85 Estreicher & Revesz, supra note 22, at 687 (emphasis omitted).
86 Id. at 735-36. They further point out that “[a] bar against intercircuit nonacquiescence would be worse than the adoption of intercircuit stare decisis. If the ruling of one court of appeals effectively binds others, it makes little sense to create a system in which the binding rule is always the one adverse to the agency.” Id. at 741; cf. Ross E. Davies, Remedial Nonacquiescence, 89 Iowa L. Rev. 65, 68 (2003) (“Reasonable minds can and do differ on whether traditional nonacquiescence...is good or bad for the rule of law generally and for parties subject to agency and court authority in particular.”).
87 Schwartz, supra note 22, at 1856.
88 See Davies, supra note 86, at 74-75 (observing that the “percolation” theory...is the most widely acknowledged, though not necessarily widely popular, justification of nonacquiescence” (footnotes omitted)).
appeal every adverse ruling, and reinforces limits on lower courts’ geographic jurisdictions.

Other doctrines complement Mendoza by imposing further limitations on the legal effects of lower court rulings. For example, district court rulings are not afforded any stare decisis effect. They are not binding in any jurisdiction, including within the district that issued them, and usually cannot give rise to “clearly established” law for purposes of § 1983 or Bivens. Even circuit court rulings leave government litigants substantial latitude to relitigate the same legal issues against other people. As with district court rulings, a future plaintiff may not preclude the Government from relitigating an issue adjudicated in a circuit court ruling as a matter of nonmutual offensive collateral estoppel. And while a circuit court ruling is binding as a matter of both horizontal and vertical stare decisis within that court’s geographic jurisdiction, it lacks binding force anywhere else in the country.

Federal statutes, in contrast, convey mixed messages about the proper role of the lower courts. Throughout much of the twentieth century, Congress prohibited individual federal judges from enjoining federal laws; only three-judge panels were permitted to adjudicate claims for injunctive relief against allegedly unconstitutional federal statutes. This requirement was an extension

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89 See infra note 204 and accompanying text.

90 Academics have long debated whether judicial opinions interpreting the Constitution and federal laws are intrinsically binding on other branches of the Government. The Court famously proclaimed that the judiciary has the power “to say what the law is.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). And the Court has unambiguously reaffirmed this power. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .”). Larry Alexander and Frederick Schauer have forcefully defended this concept of judicial supremacy, arguing that the judicial power should be construed as allowing the Supreme Court to play a “settlement function” in binding other governmental institutions to its interpretation of the law. Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1377 (1997) (arguing that, for the Supreme Court to be able to fulfill its “settlement function,” its interpretation of the law must be “authoritative and supreme”). Others advocate for a type of departmentalism, contending that government actors are bound by judgments in cases to which they are parties, but are not otherwise required to follow judicial opinions. See William Baude, The Judgment Power, 96 Geo. L.J. 1807, 1812-13 (2008); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L. Rev. 43, 62 (1993) (“Insofar as nonjudicial actors are concerned, judicial opinions are simply explanations for judgments . . . .”); cf. Edward A. Hartnett, A Matter of Judgment, Not a Matter of Opinion, 74 N.Y.U. L. Rev. 123, 126, 153-54 (1999) (arguing that opinions are not binding on other branches of government, but declining to take a position on whether the president may ignore an erroneous judgment).

91 See infra notes 201-202 and accompanying text.

92 28 U.S.C. § 2282 (1970) (repealed 1976) (“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under
of an earlier provision,\textsuperscript{93} adopted as a response to \textit{Ex parte Young},\textsuperscript{94} mandating that three-judge panels adjudicate suits seeking injunctions against state laws.\textsuperscript{95} In 1976, Congress eliminated the three-judge court requirement in nearly all cases.\textsuperscript{96} The burdens this restriction imposed on both district court judges and the Supreme Court—which was generally required to review such courts’ rulings on direct appeal, rather than as a discretionary matter through the usual \textit{certiorari} process—\textsuperscript{97} outweighed its perceived benefits.\textsuperscript{98}

On the one hand, Congress’s decision to allow single judges to enjoin federal laws can be seen as an expression of confidence in their competence to properly adjudicate such matters, without the involvement of multiple other judges. Conversely, the 1976 amendments can instead be interpreted as underscoring the importance of limiting the reach of any single district court’s constitutional rulings, precisely because each district judge now acts alone and the right of direct appellate review in the Supreme Court no longer exists.

To determine the propriety of nationwide classes and injunctions, it is necessary to determine which of the Supreme Court’s competing conceptions of the proper role of lower courts is more accurate. Though \textit{Mendoza} seems to

\textsuperscript{93} Michael E. Solimine, \textit{Congress, Ex parte Young, and the Fate of the Three-Judge District Court}, 70 U. PITT. L. REV. 101, 113-18 (2008) (detailing the history of the requirement that lawsuits seeking injunctions against state laws be heard by three-judge district courts).

\textsuperscript{94} 209 U.S. 123, 166-68 (1908) (holding that, while the Eleventh Amendment confirms states’ sovereign immunity from suit, plaintiffs may seek injunctions against state officials to prevent them from enforcing unconstitutional state laws).

\textsuperscript{95} Act of June 18, 1910, ch. 309, \textsection 17, 36 Stat. 539, 557 (providing that an application for an interlocutory injunction against enforcement of a state law by a state official “shall be heard and determined by three judges”); \textit{see also} Act of Feb. 13, 1925, ch. 229, \textsection 238, 43 Stat. 936, 938 (codified at 28 U.S.C. \textsection 380 (2012)) (requiring three-judge panels for a final hearing in a suit seeking to enjoin enforcement of a state law).

\textsuperscript{96} See Act of Aug. 12, 1976, Pub. L. No. 94-381, \textsection 1, 90 Stat. 1119, 1119 (repealing 28 U.S.C. \textsection 2282, which required three-judge panels for constitutional challenges to federal laws). Three-judge courts are currently required only in a few types of cases, such as constitutional challenges to the “apportionment of congressional districts” or state legislatures, 28 U.S.C. \textsection 2284(a), actions under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, \textsection 403(a)(1), (a)(3), 116 Stat. 81, 113-14 (codified at 52 U.S.C. \textsection 30110 note (2012)), and litigation under \textsection 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, \textsection 5(a), 79 Stat. 437, 439 (codified as amended at 52 U.S.C. \textsection 10304(a)).


\textsuperscript{98} See Michael E. Solimine, \textit{The Fall and Rise of Specialized Federal Constitutional Courts}, 17 U.PA. J. CONST. L. 115, 125-26 (2014) (“Whatever the benefits of the three-judge district court to litigants, particularly plaintiffs, many other influential observers eventually concluded that they were outweighed by the administrative burdens of the court.” (footnote omitted)).
undermine Califano’s holding, the Court has neither revisited nor expressly questioned Califano in the decades since. Unlike Califano, Mendoza speaks directly to the structure of the federal judicial system, particularly the role of lower courts within that system. And Mendoza’s conception of the judicial system is buttressed by other doctrines limiting the effects of district court rulings. The compelling considerations that led the Mendoza Court to refrain from subjecting the Government to nonmutual offensive collateral estoppel likewise counsel strongly against allowing courts to certify nationwide classes in cases concerning the validity or proper interpretation of federal laws, regulations, or policies.

II. THE LAW GOVERNING CLASS ACTIONS

The certification of nationwide classes and issuance of nationwide injunctions in cases concerning the validity or proper interpretation of federal legal provisions also raise troubling questions under the various statutes, rules, and other principles governing class actions. Most basically, class certification is a purely procedural means of aggregating existing claims to facilitate their adjudication without changing the substance of class members’ rights.99 A court may not use a class action to “alter unilaterally class members’ preexisting bundle of rights.”100

When a district court certifies a nationwide class under Rule 23(b)(2), however, it applies the law of its circuit to plaintiffs in other jurisdictions whose claims would otherwise be subject to adjudication under the law of their respective circuits, which may be materially different. Using the vehicle of a nationwide class action to make a particular circuit’s precedents legally enforceable by (or against) all right holders across the country may violate the Rules Enabling Act, which prohibits a court from using a procedural rule such as Rule 23 to modify litigants’ substantive rights.101 At the very least, allowing a district court to enter injunctions concerning people who live in jurisdictions where neither that court’s opinions, nor the opinions of the Circuit Courts of Appeals which that district court must apply, are the applicable law raises serious concerns that counsel against nationwide Rule 23(b)(2) class actions. Rather than simply providing a means for the enforcement of people’s rights, certification of nationwide Rule 23(b)(2) classes in challenges to federal laws, regulations, or policies invariably changes the body of law that is used to determine most class members’ rights, prejudicing either the government or those class members, depending on the case.

More fundamentally, none of the standards or procedures set forth in Rule 23

99 Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 COLUM. L. REV. 149, 157 (2003) (arguing that a class action is a vehicle for adjudicating the rights of each class member that “preexist the class action itself”).

100 Id. at 181.

are well suited to be used as the basis for determining whether a district court’s ruling should have nationwide effect. Because Calvisano does not impose substantial limits on a district court’s ability to certify a nationwide class, Rule 23(b)(2) is the main restriction on that power. That rule, however, does not meaningfully limit a court’s discretion to certify classes in legal challenges relating to the validity or proper interpretation of a federal legal provision. Moreover, class certification under Rule 23(b)(2) does not yield any tangible benefit that makes it a reasonable basis for affording nationwide effect to a district court’s rulings. Class definitions in Rule 23(b)(2) cases often are extremely broad and based on criteria that make it impracticable or impossible to identify members of the class. In many cases, the class may be defined simply in terms of anyone who is, or will be, adversely affected by the legal provision at issue. And putative class members are not even necessarily entitled to notice of a class certification motion or an opportunity to opt out.102

In short, certification under Rule 23(b)(2) is a formalistic gesture that neither limits the scope of a court’s discretion nor guarantees due process for putative class members. Our judicial system is structured to prevent a district court’s legal and constitutional rulings from having nationwide effect as a matter of stare decisis.103 Rule 23(b)(2) is far too insubstantial to constitute a reason for departing from that baseline and allowing a single judge to adjudicate the claims of all right holders throughout the nation in a single, bet-the-farm proceeding.

A. Judicial Discretion to Certify Nationwide Classes Under Rule 23(b)(2)

Rule 23(b)(2) allows a court to certify a class when the usual requirements for class certification—numerosity, commonality, typicality, and adequacy of representation—104 are satisfied, and “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”105 In contrast to plaintiffs pursuing class certification under Rule 23(b)(3) to recover damages, a putative representative of a Rule 23(b)(2) class need not also demonstrate that a class action “is superior to other available methods for fairly and efficiently adjudicating the controversy.”106

Rule 23(b)(2) is most frequently invoked in litigation concerning civil rights and government benefits,107 including institutional reform cases in which the plaintiffs seek an order compelling improvements to a government institution

102 See infra note 130 and accompanying text.
103 See infra Section III.C (discussing the limited legal effects of district court opinions).
104 Fed. R. Civ. P. 23(a) (enumerating the general requirements for class certification).
107 Weber, supra note 106, at 351.
such as a school, hospital, or prison.\textsuperscript{108} Many commentators have argued that Rule 23(b)(2) actions promote the interests of both governmental defendants and the public at large.\textsuperscript{109} They contend that a Rule 23(b)(2) class seldom allows plaintiffs to win broader relief than they could have obtained in a nonclass suit, yet it offers successful defendants the protection of res judicata against future claims by any class members.\textsuperscript{110}

While Rule 23 imposes substantial obstacles to class certification in many types of cases,\textsuperscript{111} its requirements will almost always be satisfied in challenges to the validity or proper interpretation of legal provisions. Virtually any challenged legal provision will adversely affect enough right holders to satisfy Rule 23(a)(1)’s numerosity requirement.\textsuperscript{112} Indeed, many courts have held that the numerosity requirement is relaxed in Rule 23(b)(2) cases.\textsuperscript{113} Moreover, even if a legal provision affects only a few people at any given time, it can nevertheless satisfy the numerosity requirement because, as it remains on the books over the years, it will affect a potentially limitless number of future right holders.\textsuperscript{114}

Rule 23(a)’s commonality and typicality requirements\textsuperscript{115} will likewise be satisfied in the overwhelming majority of constitutional challenges, including facial challenges, as-applied challenges that are based primarily on legal arguments, and as-applied challenges based on recurring factual situations that do not allow for substantial variation among claimants. Many of the most common constitutional challenges to legal provisions rest on arguments and considerations that are completely unrelated to the circumstances of the particular plaintiff asserting the claim. For example, a statute may be

\textsuperscript{108} Id. at 363, 365.
\textsuperscript{109} See, e.g., Wilton, supra note 22, at 602.
\textsuperscript{110} Maureen Carroll, \textit{Class Action Moose}, 65 Duke L.J. 843, 860 (2016) (recognizing that, in a Rule 23(b)(2) class action, “[i]f the court decides in favor of the defendant, all class members are bound to that result”); Wilton, supra note 22, at 598, 600-03 (“Plaintiffs in most social reform cases will be able to obtain the identical declaratory or injunctive relief and attorneys’ fees award in both individual and class action suits. . . . On the other hand, the preclusive effect of the doctrine of res judicata operates as a serious threat to the class plaintiff if the defendant wins a class action suit.”).
\textsuperscript{111} See, e.g., Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359-60 (2011) (reversing class certification in employment discrimination lawsuit because class members lacked commonality).
\textsuperscript{112} FED. R. CIV. P. 23(a)(1) (allowing class certification only if, among other things, “the class is so numerous that joinder of all members is impracticable”).
\textsuperscript{113} See, e.g., Sweda v. United States, 101 F. App’x 649, 653 (9th Cir. 2004) (“Because plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed . . . .”).
\textsuperscript{114} See \textit{William B. Rubenstein, Newman on Class Actions} § 3:15 (5th ed. 2011) (noting that a plaintiff may satisfy the numerosity requirement by encompassing future class members within the class definition).
\textsuperscript{115} FED. R. CIV. P. 23(a)(2)(3) (setting forth the commonality and typicality requirements, respectively, for class certification).
overbroad,\textsuperscript{115} be enacted for an impermissible purpose,\textsuperscript{117} fail to further a legitimate,\textsuperscript{118} important,\textsuperscript{119} or compelling government interest;\textsuperscript{120} burden more speech or conduct than is permissible to achieve the government’s interest;\textsuperscript{121} impose impermissible content- or viewpoint-based discrimination;\textsuperscript{122} exceed the scope of the government’s authority under the constitutional provision that purportedly authorizes the law;\textsuperscript{123} or be supported by an insufficient evidentiary record.\textsuperscript{124}

Similarly, a regulation may be invalid on any of these grounds, or because it exceeds the scope of an agency’s organic statute\textsuperscript{125} or violates some other statutory restriction.\textsuperscript{126} All of these claims turn on an alleged conflict between the text of a legal provision and a superior source of law (i.e., the Constitution or a statute), defects in a provision’s legislative history or administrative record, or legislative facts that have nothing to do with the individualized circumstances of particular plaintiffs or right holders. The claims of putative class members will invariably involve common questions of law, and the class representative’s

\textsuperscript{115} Bd. of Airport Comm’rs v. Jews for Jesus, 482 U.S. 569, 574-75 (1987) (concluding that a resolution limiting free speech was substantially overbroad).

\textsuperscript{117} See Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that the Equal Protection Clause prohibits states from enacting laws with a racially discriminatory purpose).


\textsuperscript{121} McCutcheon v. FEC, 134 S. Ct. 1434, 1446 (2014) (holding that aggregate contribution limits were unconstitutional due to “a substantial mismatch between the Government’s stated objective and the means selected to achieve it”).

\textsuperscript{122} Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 243, 256 (1974) (invalidating a statute requiring a newspaper that criticizes a candidate or publishes attacks on the candidate’s record to provide him or her with equal space to respond).


\textsuperscript{124} City of Boerne v. Flores, 521 U.S. 507, 530, 536 (1997) (declaring the Religious Freedom Restoration Act unconstitutional in part because its “legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry”).

\textsuperscript{125} Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 486, 471 (2001) (holding that the EPA exceeded its powers under its organic statute by considering costs when promulgating air quality standards).

\textsuperscript{126} See, e.g., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786 (2014) (holding that an agency regulation requiring employers to offer employees health insurance that covers forms of contraception that violate those employers’ religious beliefs was invalid under the Religious Freedom Restoration Act).
claim will be typical of them.

These considerations also will generally be sufficient to ensure the adequacy of the class representative.\textsuperscript{127} A class representative need not be knowledgeable about the case or the underlying legal issues.\textsuperscript{128} Nor does the fact that members of the putative class may disagree with the underlying lawsuit or not wish to assert their rights render a representative inadequate.\textsuperscript{129} In short, Rule 23 imposes minimal restrictions on certification of classes for injunctive or declaratory relief that will almost invariably be satisfied as a matter of law in most kinds of constitutional cases and other litigation challenging the validity or proper interpretation of statutes or regulations.

Precisely because the requirements for certifying a class under Rule 23(b)(2) are so easily satisfied in such challenges, the rule cannot resolve the tension between \textit{Mendoza} and \textit{Califano}. Moreover, the requirements set forth in Rule 23(a) and (b)(2) appear almost completely inapposite to determining whether a single district judge’s constitutional interpretations should be binding on all right holders nationwide. None of those standards relate to either the structural considerations identified in \textit{Mendoza} or the efficiency and fairness concerns articulated in \textit{Califano}. In short, Rule 23(b)(2) provides little guidance in determining the appropriate breadth of a plaintiff class in a challenge to a federal legal provision or confirming the propriety of a nationwide injunction.

B. \textit{The Procedures for Nationwide Class Certification Under Rule 23(b)(2)}

The procedures for certifying a nationwide class under Rule 23(b)(2) also fail to perform any meaningful functions that justify empowering a district court to enter a nationwide injunction. First, Rule 23 does not require that members of a putative Rule 23(b)(2) class receive notice or an opportunity to opt out prior to class certification.\textsuperscript{130} Class members are entitled to receive notice only if a case

\textsuperscript{127} \textit{FED. R. CIV. P. 23(a)(4)} (requiring that “the representative parties . . . fairly and adequately protect the interests of the class”).

\textsuperscript{128} \textit{See} \textit{Sunowitz v. Hilton Hotels Corp.}, 383 U.S. 363, 366-67 (1966) (allowing a class action to proceed where the class representative “did not understand the complaint at all;” “could not explain the statements made in the complaint,” and “had a very small degree of knowledge as to what the lawsuit was about”).

\textsuperscript{129} \textit{See, e.g., Proib v. State Teachers’ Retirement Sys.}, 780 F.2d 776, 781 (9th Cir. 1986) (allowing a class action challenge to the state teachers’ retirement system to proceed “notwithstanding the fact that there may be some teachers who would prefer that it remain in operation”).

\textsuperscript{130} \textit{FED. R. CIV. P. 23(c)(2)(A)} (specifying that notice is optional for members of putative Rule 23(b)(2) classes); \textit{see also} \textit{Weber, supra} note 106, at 348 (arguing that Rule 23(b)(2) is “unfair” because the rule subjects all class members to res judicata while “dispens[ing] with mandatory notice, so that the class members who are bound by the judgment may never learn of the pendency of the case”); \textit{Maxwell A. Grant, Comment, The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions, 63 U. CHI. L. REV. 239, 256 (1996)} (arguing that mandatory class actions that preclude members from opting out violate putative class members’ First Amendment right to avoid engaging in expressive
is settled without a formal adjudication.\footnote{\textit{FED. R. CIV. P. 23(e)(1)(C)} (specifying when class members are entitled to notice).} even then, they are not permitted to opt out,\footnote{See Weber, \textit{supra} note 106, at 389, \textit{cf. FED. R. CIV. P. 23(e)(4)} (specifying that members of a Rule 23(b)(3) class, unlike members of Rule 23(b)(2) class, may opt out of the class if they disagree with the proposed settlement).} but rather may only file an objection for the court’s consideration.\footnote{\textit{FED. R. CIV. P. 23(e)(5)} ("Any class member may object to the proposal if it requires court approval under this subdivision . . . ").} Moreover, despite the fact that class members may have no opportunity to opt out of a lawsuit, they are generally bound to its results as a matter of res judicata, because they are deemed parties to the suit.\footnote{E.g., \textit{id. at 400-03} (arguing in favor of a variation of spurious class actions in which a class is not certified until after the government defendant is held liable, the government pays for the cost of notice, and individuals have the chance to decide whether to opt into the plaintiff class to receive the benefit of the ruling); Grant, \textit{supra} note 130, at 256 (arguing that requiring a person to be a member of a Rule 23(b)(2) class violates their First Amendment rights).} Many commentators, objecting to this policy, have argued that a class member should not be bound by the outcome of a lawsuit unless he or she was afforded an opportunity to decide whether or not to participate in the litigation.\footnote{\textit{FED. JUDICIAL CT., MANUAL FOR COMPLEX LITIGATION} \S 21.222, at 270 (4th ed. 2004) (outlining the standards for determining whether the identities of class members are ascertainable).} Nevertheless, from the perspective of putative class members, Rule 23(b)(2) certification is immaterial; it may occur without their knowledge and they have no ability to object.

Second, Rule 23(b)(2) does not play an important role in defining or limiting the class of people to whom a court’s ruling applies. In addition to satisfying Rule 23(a)’s requirements, a putative class generally must be defined in reasonably definite terms, based on objective criteria, to make the identities of its members ascertainable.\footnote{See, e.g., Sheldon v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief . . . "); Shook v. El Paso Cty., 380 F.3d 963, 972 (10th Cir. 2004) (suggesting the identifiability requirements of Rule 23(b)(3) do not apply to 23(b)(2) classes); see also RUBENSTEIN, supra note 114, \S 3:7 (explaining that definiteness is not required for class actions certified under Rule 23(b)(2)).} The definiteness and ascertainability requirements either do not apply in Rule 23(b)(2) cases,\footnote{See, e.g., \textit{In re Monumental Life Ins. Co.}, 365 F.3d 408, 413 (5th Cir. 2004) (noting that some courts have found that a precise class definition is unnecessary for classes certified under rule 23(b)(2)).} or apply in a far less demanding and precise manner. Class definitions in constitutional and similar public law
cases typically are vague and subjective, or otherwise difficult to apply, and may depend upon the mental state of potential members or their present or future intentions. A class may include anyone adversely affected by a particular statute or who wishes to exercise a particular right—including future right holders. It may be difficult or impossible to ascertain the identities of class members based on these definitions.

Thus, class certification in Rule 23(b)(2) cases has virtually no practical effect. The class is usually defined so broadly that it can encompass anyone who would be able to assert nonmutual collateral estoppel, if that doctrine were available. Frequently, neither the court nor the government can identify the members of the class, particularly when it involves future right holders. And the class members themselves—to the extent their identities are ascertainable—receive neither notice nor an opportunity to opt out of class certification.

As Part III explains, federal district courts generally lack power to impose their view of the law on parties outside the bounds of their respective jurisdictions. Neither the standards for certification of Rule 23(b)(2) classes nor the procedure for certification of such classes provides a satisfactory basis for allowing a district court to depart from that baseline. Moreover, by certifying nationwide classes and issuing nationwide injunctions, a district court raises serious questions under both the Rules Enabling Act and the general principles underlying class action litigation by using the procedural mechanism of Rule 23(b)(2) to change the substantive law—the body of binding circuit court precedents—that otherwise governs the claims of right holders living in other circuits. Thus, the laws, rules, and principles governing class actions further counsel against nationwide class certification and nationwide injunctions.

III. INCONSISTENCY AMONG THE COMPONENTS OF LOWER COURT RULINGS

As previous Parts have suggested, allowing federal district courts to grant nationwide injunctions creates inconsistencies concerning the scope of their powers. When a court interprets a legal provision or determines that it is unconstitutional, its ruling may involve up to three different components: a judgment, an injunction, and a written opinion. A written opinion setting forth

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139 See, e.g., Kenneth R. v. Hassan, 293 F.R.D. 254, 264-65 (D.N.H. 2013) (certifying a Rule 23(b)(2) class of “persons with serious mental illness who . . . are at serious risk of unnecessarily institutionalization” in certain facilities).

140 See, e.g., Finch v. N.Y. State Office of Children & Family Servs., 252 F.R.D. 192, 196, 203 (S.D.N.Y. 2008) (certifying a Rule 23(b)(2) class of “all persons who are working or desire to work” for a state social services agency and who “now and in the future” are listed on the state’s child abuse registry and have requested that the report be amended).

141 See, e.g., Biediger v. Quinnipiac Univ., No. 3:9-CV-621, 2010 WL. 2017773, at *8 (D. Conn. May 20, 2010) (certifying a Rule 23(b)(2) class of “all present, prospective, and future female students at Quinnipiac University who are harmed by and want to end Quinnipiac University’s sex discrimination”).

142 See Morley, supra note 42, at 2461-66 (describing the different legal effects and
a district court's reasoning and conclusions lacks legal force in other districts; a circuit court opinion likewise is not binding in other circuits. When a district court certifies a nationwide class, however, it assumes the power to issue binding judgments and injunctions concerning people outside the scope of its geographic jurisdiction. The same considerations that warrant the imposition of geographic limits on the legal effects of lower court opinions generally apply with equal force to other components of their rulings—judgments and injunctions—and bolster the case against nationwide injunctions.

A. Judgments and Res Judicata

A judgment is the only essential element of a court's ruling. A judgment is an independent document that specifies the court's disposition of the plaintiff's causes of action.\(^{143}\) It may not contain the court's reasoning or any "record of prior proceedings" in the case.\(^{144}\)

The primary effect of a judgment in cases challenging the validity or proper interpretation of a federal statute, regulation, or policy is res judicata.\(^{145}\) The question of the challenged provision's validity or meaning is dispositively resolved between the plaintiffs in the case and the defendant agencies or officials. Res judicata bars government defendants from enforcing an invalidated legal provision against the plaintiffs who challenged it.\(^{146}\) Conversely, a judgment upholding a statute's constitutionality—in other words, a judgment in favor of government defendants on a plaintiff's constitutional claim—precludes future challenges by that plaintiff.\(^{147}\) The res judicata effect of

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impacts of each of these three components); Morley, supra note 25, at 535-38 (explaining the interplay among judgments, opinions, and injunctions).

143 Fed. R. Civ. P. 58(a) ("Every judgment and amended judgment must be set out in a separate document . . . ."); see also 28 U.S.C. § 2201(a) (2012) (authorizing federal courts to grant declaratory judgments to "declare the rights and other legal relations of any interested party").

144 Fed. R. Civ. P. 54(a).

145 See RESTATEMENT (SECOND) OF JUDGMENTS § 17(3) (1980) (stating that a judgment is conclusive in any subsequent action between the same parties with respect to any issues that were actually litigated and essential to the judgment). A judgment for monetary damages (including damages for constitutional violations under 42 U.S.C. § 1983 (2012) or Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)) also empowers the plaintiff to levy against the defendant's assets to recover the specified amount of money. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 829-33 (4th ed. 2010)).

146 See, e.g., Montana v. United States, 440 U.S. 147, 152-53 (1979) ("Because we find that the constitutional question presented by this appeal was determined adversely to the United States in a prior state proceeding, we reverse on grounds of collateral estoppel without reaching the merits.").

a judgment is not subject to geographic limits. A litigant may invoke the res judicata effect of a federal court’s judgment in any court as a matter of federal common law, and of a state court’s judgment as a matter of full faith and credit.140

A judgment’s res judicata effect typically applies only to the parties involved in that case.150 The Fifth and Fourteenth Amendments’ Due Process Clauses generally protect third parties from being subject to the res judicata effects of a judgment in a case unless they received notice of it, were granted an opportunity to be heard, and were made parties to it.152 Third parties who stand in certain legal relationships with earlier litigants—such as bailor-bailee, assignor-assignee, trustee-beneficiary, or principal-agent—may be bound, however, by the result of litigation in which they were not personally involved.153 Similarly, class members may be bound by the results of a class action lawsuit unless they opted out.154

beared plaintiffs from pursuing a federal lawsuit under § 1983 against defendants they had previously sued unsuccessfully in state court on state-law grounds). But see Whole Women’s Health v. Hellerstedt, 136 S. Ct. 2292, 2305-07 (2016) (declining to hold that plaintiffs’ as-applied challenge to abortion restrictions was precluded by their previous unsuccessful facial challenge because they had developed additional facts which established the restrictions’ unconstitutionality).

140 See U.S. Const. art. IV, § 1 (requiring states to afford full faith and credit to the judicial proceedings of other states); 28 U.S.C. § 1738 (2012) (requiring all courts to afford a state court judgment the same res judicata effect as the courts of that state would afford it); Allen, 449 U.S. at 94-96 (recognizing that full faith and credit includes both issue and claim preclusion).

150 See RESTATEMENT (SECOND) OF JUDGMENTS § 34(2)-(3) (explaining that “a person who is not a party to an action” is generally not bound by res judicata).

151 Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (recognizing “notice and opportunity to be heard” as fundamental requirements of due process).

152 Id. at 40 (“[O]ne is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” (citing Pennoyer v. Neff, 95 U.S. 714 (1877))); Chase Nat’l Bank v. City of Norwalk, 291 U.S. 431, 441 (1934) (“The law does not impose . . . the burden of voluntary intervention in a suit to which [a person] is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a party may rest assured that a judgment recovered therein will not affect his legal rights.”).

153 Taylor v. Sturgell, 553 U.S. 880, 894 (2008) (“[N]onparty preclusion may be justified based on a variety of pre-existing ‘substantive legal relationship[s]’ between the person to be bound and a party to the judgment.” (quoting DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 77-78 (2001))).

154 Id. at 894 (“[T]he judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class . . . .”).
These principles generally apply with equal force to government litigants.\footnote{Montana v. United States, 440 U.S. 147, 154-55 (1979); holding that the United States was collaterally estopped from challenging a prior judgment because it exercised sufficient control over the prior litigation; see also United States v. Stauffer Chem. Co., 464 U.S. 165, 173 (1984) (holding that collateral estoppel applies “where the Government is litigating the same issue arising under virtually identical facts against the same party”). One notable distinction between private parties and government litigants with respect to res judicata is that private litigants are subject to nonmutual offensive collateral estoppel, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-33 (1979), while government litigants are not, United States v. Mendoza, 464 U.S. 154, 162 (1984). See supra Section I.B (discussing the Supreme Court’s rationale for refusing to apply nonmutual offensive collateral estoppel against the Government).} The very structure of the Constitution suggests that government officials are bound to follow judgments issued against them by courts of competent jurisdiction.\footnote{See Bazemore note 90, at 1845 (“[T]here are good historical, textual, and structural reasons to treat judicial dispositions of individual cases as legally binding.”).} If legislative and executive officials were free to determine the validity of a judicial ruling for themselves, or whether to follow it, court rulings in public law cases would be mere advisory opinions,\footnote{See Hayburn’s Case, 2 U.S. (2 Dall.) 409, 410 n.2 (1792) (“[B]y the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”).} which courts have refused to issue dating back to the Founding Era.\footnote{Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 179, 179-80 (1977) (refusing then-Secretary of State Thomas Jefferson’s request for an advisory opinion).}

In itself, however, a judgment does not bind the government with respect to people or entities other than the particular plaintiffs in that case. A judgment in favor of certain plaintiffs does not collaterally estop the government from enforcing the same legal provision against different people, or from litigating the provision’s constitutionality or proper interpretation in subsequent proceedings against third parties.\footnote{United States v. Mendoza, 464 U.S. 154, 158 (1984); see also United States v. Alaska, 521 U.S. 1, 13 (1997) (citing Mendoza, 464 U.S. at 160-63) (“[T]he doctrine of nonmutual collateral estoppel is generally unavailable in litigation against the United States . . . .”); Stauffer Chem., 464 U.S. at 173 (noting the Court’s rejection of “the application of collateral estoppel against the Government in the absence of mutuality”).} In other words, as Part I explores in greater detail, neither the federal government nor state governments are subject to nonmutual offensive collateral estoppel.\footnote{Mendoza, 464 U.S. at 162-63 (“[N]onmutual offensive collateral estoppel simply does not apply against the Government . . . .”).} Conversely, if a court rejects a particular plaintiff’s constitutional challenge to a statute, that judgment would not, in itself, preclude subsequent litigants from challenging the provision’s
validity or interpretation, either on the same grounds or different ones.161
Because judgments are binding only upon the parties to a case, class certification can have a tremendous impact on the scope of a judgment’s legal effects. In a class action suit, a favorable judgment runs in favor of each member of the plaintiff class, which collectively may include all people across the state or nation affected by the challenged legal provision.162 Conversely, if a court rejects a constitutional claim in a class action case, the ruling precludes class members from pursuing similar challenges, even in more favorable jurisdictions.163 Thus, allowing district courts to certify nationwide classes enables them to adjudicate claims and enter judgments for or against class members who live well outside their geographic jurisdictions.

B. Plaintiff- and Defendant-Oriented Injunctions and Contempt

When a court holds a legal provision unconstitutional, it also may enjoin the government defendant from enforcing it. An injunction is the strongest means available for enforcing judicially determined rights.164 Injunctions differ from judgments in several respects. First, an injunction expressly orders a party to engage in, or refrain from, particular actions, whereas a judgment only announces a court’s conclusions concerning certain litigants’ legal claims that bind those parties in future litigation. Second, injunctions are enforceable through civil165 or criminal166 contempt, while judgments require a court to take some further action, such as issuing an injunction, before they may be enforced.

Third, an injunction may not only forbid the defendant agencies or officials from violating a plaintiff’s legal or constitutional rights, but further require them to perform, or refrain from performing, certain acts as prophylactic measures to protect those underlying rights.167 Judgments, in contrast, are limited to

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163 Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) (“A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.”).
164 Morley, supra note 42, at 2457.
165 Int’l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827 (1994) (“[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience.”).
166 Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795 (1987) (“[T]he initiation of [criminal] contempt proceedings to punish disobedience to court orders is a part of the judicial function.”).
167 See Tracy A. Thomas, The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief, 52 Buff. L. Rev. 301, 314 (2004) (“The conduct addressed in a prophylactic injunction, unlike other equitable relief, directs legal conduct that is affiliated with, rather than the direct cause of or result of, the harm.”).
identifying the prevailing parties for each cause of action and declaring litigants’ rights. For these reasons, an injunction is usually regarded as a stronger or harsher remedy than a judgment alone.\textsuperscript{168}

Samuel Bray rejects the notion that injunctions are harsher or stronger remedies than declaratory judgments, arguing that “these remedies are rough substitutes and in many cases they have the same effect.”\textsuperscript{169} He does not explain, however, what it means to say that a particular remedy is milder, weaker, or stronger than another.\textsuperscript{170}

Among the most important considerations in determining the “harshness” of a remedy are the explicitness of any threat and the imminence of coercion. An injunction is an express command; the imperative force of a judgment, in contrast, is implicit in the court’s adjudication of the parties’ rights.\textsuperscript{171} More importantly, injunctions carry the possibility of immediate civil and criminal sanctions for violations that declaratory judgments lack.\textsuperscript{172} The distinction between a declaratory judgment and an injunction is akin to the difference between a police officer with her weapons holstered politely asking someone for a moment of their time, and an officer pointing pepper spray or a Taser at someone, threatening to shoot unless they freeze. In both scenarios, the possibility of coercion is unavoidably present, but it is much more explicit and imminent in the latter. Likewise, the injunction’s imperative nature and immediate enforceability render it a more effective and “harsher” remedy than a declaratory judgment alone.

Bray contends that the absence of immediate sanctions for parties that act contrary to declaratory judgments is practically irrelevant.\textsuperscript{173} He points out that parties typically will conform their conduct to judicial declarations\textsuperscript{174} to avoid


\textsuperscript{170} See id.

\textsuperscript{171} Perez, 401 U.S. at 124 (Brennan, J., concurring in part and dissenting in part) (“A broad injunction against all enforcement of a statute paralyzes the State’s enforcement machinery; the statute is rendered a nullity. A declaratory judgment, on the other hand, is merely a declaration of legal status and rights; it neither mandates nor prohibits state action.”).

\textsuperscript{172} Bray argues that the immediate availability of contempt makes injunctions more “managerial” than declaratory judgments, rather than harsher. Bray, supra note 169, at 127.

\textsuperscript{173} Bray contends that, rather than focusing on the intrinsic “doctrinal” characteristics of injunctions, we should instead focus on the declaratory judgment’s role in a “legal and social environment.” Id. at 1121.

\textsuperscript{174} Id. at 1108-09 (arguing that “there is no need for a command” because, “[a]fter [a] declaratory judgment, everyone knows what to do”).
the sanctions for violating the underlying legal right or prohibition that the declaratory judgment is enforcing. While Bray makes solid arguments, they establish only that, in cases where parties truly sought clarification of their rights to guide their future conduct, a declaratory judgment is usually sufficient to resolve the dispute. The fact that injunctions may often be unnecessary, however, does not imply that they are equivalent to, or no harsher than, declaratory judgments.

Furthermore, there are many circumstances in which litigants may not be deterred by the likely outcome of subsequent litigation in the manner Bray contemplates. Some litigants may not engage in the same rational assessment of future litigation outcomes that Bray contemplates without the possibility of immediate sanctions that injunctions afford. Political actors in particular sometimes face strong incentives to challenge courts and push back on constitutional determinations until absolutely compelled to comply. Moreover, in situations where exhaustion requirements or practical considerations preclude a person from quickly "upgrading" a declaratory judgment to a restraining order or injunction, a declaratory judgment often will be less of a deterrent to illegal conduct than an injunction. Thus, while Bray makes valid points, he does not establish that declaratory judgments and injunctions are effectively equivalent.

Like a judgment, an injunction applies primarily to the parties in the case. It binds not only the named defendants in the case and their agents, but also "other persons who are in active concert or participation" with them. Conversely, an injunction typically is enforceable only by the parties protected by it. In a class action case, depending on the breadth of the plaintiff class, an injunction may run in favor of all right holders within the judicial district, state, circuit, or even nation. Thus, a single district judge may issue an order prohibiting the

175 Id. at 1110-11 ("[I]t is not necessary to threaten the losing plaintiff with a contempt sanction: the very sanction that motivated a person to seek a declaratory judgment is a sufficient deterrent.").

176 See id. at 1111 (offering a model of litigants' incentives); cf. Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 974 (1979) ("[A] divorcing spouse will generally have no expectation that an adjudicated case will create precedent, or that any precedent created will be of personal benefit in future litigation.").


178 Morley, supra note 42, at 2481-83.

179 Cf. Bray, supra note 169, at 1110 ("[A] plaintiff who receives a declaratory judgment can go back to court and receive an injunction if needed . . . .").

180 FED. R. CIV. P. 65(d)(2).

181 Califano v. Yamasaki, 442 U.S. 682, 702-03 (1979) ("The certification of a nationwide
government from enforcing a legal provision anywhere in the country, regardless of the limits of the court's geographic jurisdiction.

Circuits have split over the proper scope of injunctive relief in cases other than class actions ("nonclass cases"). After invalidating a legal provision, some courts will issue a Plaintiff-Oriented Injunction that bars the government from enforcing that provision against only the particular plaintiffs in the case. In a class action brought on behalf of all right holders, a Plaintiff-Oriented Injunction will afford relief to everyone adversely affected by the challenged provision. Plaintiff-Oriented Injunctions in nonclass cases, in contrast, leave the government defendants free to continue enforcing the invalidated provisions against other right holders and defend the provisions' validity in subsequent litigation.

A Defendant-Oriented Injunction, in contrast, completely prohibits the defendant officials and agencies from enforcing the invalidated legal provision against anyone. Defendant-Oriented Injunctions treat nonclass cases as de facto class actions, granting relief to all right holders rather than just the class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.

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125 For a thorough discussion of the distinction between Plaintiff- and Defendant-Oriented Injunctions, see Morley, supra note 14, at 491-93.

126 Id.; see, e.g., N.Y. Progress & Prot. PAC v. Walsh, 733 F.3d 483, 489 (2d Cir. 2013) (enjoining the state from applying its contribution limits to certain types of contributions only from the plaintiff political committee); Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 393 (4th Cir. 2001) (prohibiting the FEC from applying its regulatory definition of "express advocacy" only to the plaintiff organization).

127 Future litigation over the constitutionality of a provision that a district or even circuit court holds unconstitutional is possible because, as discussed in Section III.A, a court's judgment binds only the parties to the case, and neither the federal government nor the states are subject to nonmutual offensive collateral estoppel. United States v. Mendoza, 464 U.S. 154, 162-63 (1984). Moreover, district court opinions generally lack precedential value and cannot make the law "clearly established" for qualified immunity purposes. See infra notes 223-226 and accompanying text. In cases involving "indivisible" rights, such as the right to a desegregated school system or legislative districts of equal population size, it is impossible to grant relief just to a single plaintiff without effectively granting relief to all other affected right holders. See ALI AGGREGATE LIMITATION, supra note 31, § 2.04(a)-(b) (defining indivisible remedies as those for which granting "relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants"). Thus, to comply with a Plaintiff-Oriented Injunction concerning indivisible rights, government defendants would also have to enforce the rights of third-party nonlitigants (at least as long as the plaintiff retains standing to continue enforcing the injunction.) Many constitutional and statutory rights are "indivisible," however, meaning that the government can enforce or uphold them solely with regard to particular people. Id. (defining indivisible remedies as those which may be limited "to one or more claimants individually").

128 Morley, supra note 25, at 490-91, 504-10, see, e.g., Wirtz v. Baldor Elec. Co., 337 F.2d 518, 533-34 (D.C. Cir. 1963) (issuing a Defendant-Oriented Injunction because granting relief just to the individual plaintiff would be "unconscionable").
immediate plaintiffs in the case. Such injunctions raise a variety of troubling constitutional, jurisdictional, and policy concerns, and I have argued elsewhere that courts should generally avoid issuing them. Particularly in jurisdictions that require courts to issue Plaintiff-Oriented Injunctions, certifying a nationwide class allows a court to issue an injunction enforcing the rights of class members throughout the nation, well beyond the bounds of its geographic jurisdiction.

C. Opinions, Stare Decisis, and Civil Liability

The final possible component of a judicial ruling invalidating a legal provision is the court’s opinion. The primary effect of a legal opinion is stare decisis, which includes both horizontal and vertical components. Horizontal stare decisis refers to the obligation of the same court to either apply the same ruling, or give great deference to it, in future cases. Vertical stare decisis is the obligation of lower courts to follow the ruling.

Stare decisis requires the Court to “sometimes fail[] to enforce what otherwise would be the best interpretation of particular constitutional [and statutory] provisions.” The doctrine applies with greater force to previous judicial interpretations of statutes than the Constitution, because it is easier for Congress to correct perceived errors in statutory precedents (by amending the statute) than constitutional ones. As “[s]tare decisis is not an inexorable command” in

180 Morley, supra note 25, at 500-01.
181 See id. at 521-38 (discussing the problems with Defendant-Oriented Injunctions).
182 Id. at 550-53.
183 Stare decisis also likely attaches to the actual judgment. Because courts virtually always issue written opinions amplifying and explaining judgments in cases that are likely to have important precedential effects, later courts and advocates usually rely on the opinion in an earlier case rather than the underlying judgment when invoking stare decisis. For discussions of the historical development of stare decisis, see generally Thomas Healy, Stare Decisis as a Constitutional Requirement, 104 W. Va. L. Rev. 43 (2001), and Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Va. & L. Rev. 647 (1999).
186 See Agostini v. Felton, 521 U.S. 203, 235-36 (1997) (declaring that stare decisis “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions”), Payne v. Tennessee, 501 U.S. 808, 828 (1991) (stating that, “particularly . . . in constitutional cases,” stare decisis “is not an inexorable command”), cf. Lee, supra note 189, at 652 (“The modern dichotomy that allocates deference based on the statutory or constitutional basis of the precedent finds no support in the founding era and very little support in Supreme Court decisions of the nineteenth century.”); Lee J. Strang & Bryce G. Poole, The Historical (In)Accuracy of the
either type of case, the Court will overrule a precedent when its adverse consequences outweigh the general systemic and reliance considerations underlying stare decisis. This flexibility leads many critics to contend that Justices’ personal political preferences, rather than any objective or consistent doctrine of stare decisis, are the true determinants of the continuing validity of Supreme Court precedents.

An opinion’s precise vertical and horizontal stare decisis effects depend primarily on the level of court that issues it. A Supreme Court opinion binds all federal and state courts throughout the nation as a matter of vertical stare decisis. The Court also affords its own precedents substantial weight as a matter of horizontal stare decisis.

A United States Court of Appeals opinion—whether from the court sitting on


104 Payne, 501 U.S. at 828.

105 See Montez v. Louisiana, 556 U.S. 778, 792-93 (2009) (identifying factors courts must consider when deciding whether to overturn precedents); cf. _Randy J. Kozel, Stare Decisis as Judicial Doctrine_, 67 Wash. & Lee L. Rev. 411, 414-15 (2010) (arguing that the force of stare decisis should depend exclusively on the extent to which a precedent has been relied upon). Kurt Lash argues that, because the American government rests on popular sovereignty, the Court should be more willing to overrule precedents that remove issues from the sphere of “democratic decision making” (i.e., those holding laws unconstitutional), than precedents that leave room for contemporary democratic majorities to reach their own conclusions on issues. Kurt T. Lash, _The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory_, 89 Notre Dame L. Rev. 2189, 2208-09 (2014); see also Jonathan F. Mitchell, _Stare Decisis and Constitutional Text_, 110 Mich. L. Rev. 1, 5-6 (2011) (arguing that the validity of stare decisis depends on the nature of the issue and whether the Court previously upheld or invalidated the challenged legal provision).

106 See, e.g., Kozel, _supra_ note 195, at 414 (“[T]he modern doctrine of _stare decisis_ is essentially indeterminate. The various factors that drive the doctrine are largely devoid of independent meaning or predictive force. . . . [T]his weakness exposes the Court to criticism for appearing results-oriented in its application of _stare decisis_.”).

107 One controversial issue is whether dicta gives rise to either a horizontal or vertical stare decisis effect. Some courts hold that they are bound to follow both the holdings and dicta of opinions from higher courts. E.g., United States v. Donegal, 454 F.3d 366, 375 (D.C. Cir. 2006) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” (quoting Sierra Club v. EPA, 322 F.3d 718, 724 (D.C. Cir. 2003))). Other courts believe that such dicta should be afforded “considerable weight,” but does not have the same binding effect as the Court’s outright holdings. United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975).

108 _Moore et al., supra_ note 72, § 134.02[2].

109 Citizens United v. FEC, 558 U.S. 310, 362 (2010) (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”).
banc or from a three-judge panel—binds future three-judge panels of that court as a matter of horizontal stare decisis, 203 as well as all federal district courts within that circuit as a matter of vertical stare decisis. 204 Only a circuit court sitting en banc (or the United States Supreme Court) may overrule a prior en banc or panel ruling. 205 Unlike the Supreme Court, a three-judge panel of the circuit court lacks authority to reconsider and overrule earlier decisions of the court. 205

District court rulings cannot have any vertical stare decisis effect because there are no lower courts within the federal judicial hierarchy upon which their rulings could be binding. Their rulings are not afforded precedential effect as a matter of horizontal stare decisis, including within the same district. 204

These stare decisis requirements arise from a variety of sources. The vertical stare decisis impact of Supreme Court opinions is likely constitutionally mandated. The Constitution requires that the federal judiciary be comprised of “one supreme Court” and “such inferior Courts as the Congress may from time

203 Under Seal v. Under Seal, 326 F.3d 479, 484 (4th Cir. 2003) ("As a panel of the full court, we cannot overrule prior decisions of the court, panel or en banc, and we are bound to apply principles decided by prior decisions of the court to the questions we address.").

204 Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1279-80 (10th Cir. 2010) ("[A] district court is bound by decisions made by its circuit court.").

205 See, e.g., United States v. Mitchell, 900 F. App’x 802, 803 (11th Cir. 2012) ("Under the prior panel rule, a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined by the point of abrogation by the Supreme Court or by an appeals court sitting en banc." (quoting United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008))).

206 Id.

207 Camreta v. Groene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); see also Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 428 (2011) ("Federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court."); Gasperini v. Ctr. for Humantities, Inc., 518 U.S. 415, 430 n.10 (1996) (noting that each district court judge “sits alone and renders decisions not binding on the others.”). Decades ago, some district court rulings stated that judges generally should follow precedents from their own district as a matter of comity unless they are clearly erroneous. See, e.g., E.W. Bliss Co. v. Cold Metal Process Co., 174 F. Supp. 99, 121 (N.D. Ohio 1959) (indicating that the district’s judges should adhere to that district’s precedents), aff’d in part, rev’d in part, 285 F.2d 231 (6th Cir. 1960); United States v. Alumnum Co. of Am., 2 F.R.D. 224, 234 (S.D.N.Y. 1941) (stating that, when a district court judge “has put out a considered opinion on a question of law, it is felt generally by his associates that good administration requires them to accept it unless some other judge of this court . . . thinks that the ruling . . . was clearly erroneous”). For a thorough analysis of district court opinions’ lack of precedential value, see Mead, supra note 22, at 800-04 (discussing changing attitudes toward stare decisis for district court opinions).
to time ordain and establish.’ This constitutionally prescribed judicial hierarchy strongly implies that ‘inferior’ courts are obligated to follow Supreme Court rulings, and the Supreme Court can enforce this requirement by reversing lower court rulings that deviate from, misconstrue, or ignore its precedents. Because the Constitution does not expressly discuss intermediate appellate courts, vertical stare decisis likely arises for U.S. Courts of Appeals’ rulings as a matter of statute, from Congress’s implicit decisions about the structure and relationship of those courts to federal district courts.

Horizontal stare decisis is more controversial. The Supreme Court has repeatedly referred to the stare decisis effect it affords its own opinions as a matter of “policy.” Some commentators argue that horizontal stare decisis is a matter of federal common law and may be changed or abrogated by Congress. Richard Fallon rejects this argument, contending instead that Article III’s grant of the “judicial power” allows the Supreme Court to craft rules concerning the binding force of its own precedent. As Fallon cogently notes, if stare decisis were not constitutionally authorized or mandated, it “could not displace what otherwise would be the best interpretation of the written Constitution binding on the Supreme Court as ‘the supreme Law of the Land.’” He contends that Congress may not abrogate the stare decisis effect

205 U.S. CONST., art. III, § 1; see also id. art. I, § 8, cl. 9.
206 Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (“Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by ‘one supreme Court.’” (quoting U.S. CONST. art. III, § 1)).
208 E.g., Agostini v. Felton, 521 U.S. 203, 235 (1997) (emphasizing that stare decisis reflects a “policy judgment” and is not an “inexorable command”); Helvering v. Hallock, 309 U.S. 106, 119 (1940) (“We recognize that stare decisis embodies an important social policy.”).
210 See Fallon, supra note 192, at 577-78, 591-92 (“Article III’s grant of ‘the judicial Power’ authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication.”).
211 Id. at 591 (quoting U.S. CONST. art. VI, § 2). But see Michael Stokes Paulsen, Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme
of judicial rulings because part of the judicial function is deciding which sources of authority to rely upon and the weight each should be accorded. 212

In Anatasoff v. United States, 213 a unanimous panel of the Court of Appeals for the Eighth Circuit took this argument even further, concluding that stare decisis is constitutionally mandated. 214 The court held that every judicial “declaration and interpretation” of the law that is necessary to resolve a case is “authoritative” and “must be applied in subsequent cases to similarly situated parties.” 215 The panel concluded that the Eighth Circuit’s local rule declaring unpublished opinions to be nonprecedential and discouraging citation of them was unconstitutional. 216

Other courts have rejected this attempt to constitutionalize stare decisis. The Ninth Circuit held that Article III’s grant of the “judicial Power” was just that—a grant of authority—and could not be interpreted as limiting the manner in which a court may use it. 217 The court further explained that the Eighth Circuit’s interpretation was inconsistent with the original understanding of the Constitution, because modern notions of stare decisis and precedent did not develop until the nineteenth and twentieth centuries. 218 It added that, even if the Eighth Circuit’s interpretation were correct as an originalist matter, federal courts were free to revise their operating methods, including by issuing unpublished opinions that lack precedential value. 219 The court concluded,

Court’s Current Doctrine of Stare Decisis?, 86 N.C.L. REV. 1165, 1169 (2008) (arguing that stare decisis is neither constitutionally grounded nor required).

212 Fallon, supra note 192, at 592; see also Kermit Roosevelt III, Polyphonic Stare Decisis: Listening to Non-Article III Actors, 83 NOTRE DAME L. REV. 1303, 1314 (2008) (“[A]dopting some form of stare decisis is part of the process of deciding cases, committed to judicial authority as part of the Article III judicial power to the same extent as the choice between different levels of scrutiny.”). But see Gary Lawson, The Constitutional Case Against Precedent, 17 HARV. J.L. & PUB. POL’Y 23, 28 (1994) (arguing that stare decisis is unconstitutional because the obligation of Supreme Court Justices to uphold and enforce the Constitution requires them to apply that document rather than contrary precedents).

213 223 F.3d 898 (8th Cir.), reh’g en banc granted and vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc).

214 Id. at 899-900 (holding that stare decisis “derive[s] from the nature of judicial power”); see also Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 262-63 (5th Cir. 2001) (per curiam) (Smith, J., dissenting) (concluding that the question of whether unpublished opinions must be treated as precedential is “close”). Polly J. Price, Precedent and Judicial Power After the Founding, 42 B.C. L. REV. 81, 82-84 (2000) (arguing that Anatasoff promotes “transparency of judicial decisionmaking” and ensures that like cases are treated alike).

215 Anatasoff, 223 F.3d at 899-900.

216 Id. at 899 (citing 8TH CIR. R. 28A(i)).

217 Hart v. Massanari, 266 F.3d 1155, 1161 (9th Cir. 2001) (“[T]he term ‘judicial Power’ in Article III is more likely descriptive than prescriptive.”).

218 Id. at 1168, 1174-75.

219 See id. at 1162-63 (“The overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise
persuasively, that horizontal stare decisis is not constitutionally required, “but rather a matter of judicial policy.” 222

From a purely functional perspective, stare decisis is comparable to res judicata because both doctrines allow earlier court rulings to limit a litigant’s ability to contest certain issues in subsequent cases. 221 Stare decisis can be even harsher for litigants because it can arise from cases in which they were not involved. “Precedent binds future litigants even though those future litigants were not afforded the opportunity to select the representative in the original, precedent-setting lawsuit; were not provided with notice of that original litigation; and were not afforded the opportunity to participate in that original litigation.” 222

Apart from their stare decisis effects, judicial opinions also may change the consequences of illegal or unauthorized government actions by subjecting government agents and officials to personal liability. Decisions of the Supreme Court and the pertinent circuit court of appeals can “clearly establish” governmental conduct as illegal or unconstitutional, allowing plaintiffs to overcome defendant officials’ qualified immunity 223 and recover damages under § 1983 or Bivens. 224 District court opinions, in contrast, generally cannot give rise to “clearly established” law. 225 The Supreme Court has approved of this of the judicial power.”).

222 Id. at 1175; see also Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., L.P., 277 F.3d 1361, 1368 (Fed. Cir. 2002) (reasoning that courts need not follow unpublished opinions, but remain bound by the precedents upon which such opinions are based).


226 See supra note 145 (describing the availability of monetary damages for constitutional violations under § 1983 and Bivens).

227 Morley, supra note 25, at 502 n.55. As the Court of Appeals for the Seventh Circuit forcefully declared, “[d]istrict court decisions cannot clearly establish a constitutional right. . . . [B]y themselves they cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and
approach without discussing whether a circuit may choose to allow district court rulings to do so. 226

The limited geographic scope and legal effects of lower court opinions cast doubt on the propriety of nationwide injunctions. There is a fundamental inconsistency in allowing a district court to certify a nationwide class and enter judgments and injunctions concerning the rights of people throughout the nation, while depriving the opinion and reasoning underlying those rulings—even if affirmed on appeal by a circuit court—any stare decisis effect (i.e., the force of law) in other circuits.

One obvious response is that this argument proves too much. When a district court adjudicates the rights of litigants within its geographic jurisdiction in a nonclass case, it may enter a judgment and injunction despite the fact that its opinion lacks the force of law within its own district. Joseph Mead has thoroughly explored the puzzling inconsistencies that arise from our current system’s failure to afford stare decisis effect to district court rulings, 227 and this doctrine warrants serious reconsideration. Even under current law, however, the fact that a circuit court’s opinions are not deemed binding in other jurisdictions strongly suggests that the judgments and injunctions based on those opinions—and, by extension, the judgments and injunctions of district courts within that circuit—should be similarly limited.

Lower courts should not be permitted to extend the effective reach of their legal determinations by certifying nationwide classes and issuing nationwide injunctions. The geographic scopes of each possible component of a court’s ruling—the people who may be bound to its judgments by res judicata, the parties who may be subject to its injunctions, and the people for whom its rulings constitute enforceable law as a matter of stare decisis—should be reasonably consistent.

IV. PROPOSALS FOR REFORM

This Part offers a new approach to nationwide class certification and injunctions. Based on the considerations examined in the preceding Parts, nationwide classes in constitutional, statutory, and other similar challenges under Rule 23(b)(2) should be deemed presumptively invalid. This Part identifies four situations, however, in which such classes might be appropriate. Otherwise, district courts should certify circuit-wide classes under Rule 23(b)(2) in such public law cases.


226 Camreta, 563 U.S. at 709 n.7 (“Many Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity.”).

227 See generally Mead, supra note 22 (arguing that district court rulings generally should be afforded stare decisis effect).
Courts should presumptively avoid certifying nationwide classes under Rule 23(b)(2) when plaintiffs challenge the constitutionality or proper interpretation of a federal legal provision. Such classes are inconsistent with the structure of the federal judicial system, which contemplates that lower courts will not be able to give their legal rulings the force of law for all right holders nationwide. They prevent issues from percolating through the judicial system, deprive the Supreme Court of the opportunity to assess the consequences of competing interpretations of the Constitution or law in different jurisdictions, compel the Government to appeal every adverse ruling, effectively bar intercircuit nonacquiescence, and deprive litigants in other jurisdictions of the right to have their claims adjudicated under the law of their respective circuits.

There are certain circumstances, however, in which nationwide class certification under Rule 23(b)(2) and nationwide injunctions against federal agencies or officials might be warranted. Rather than definitively staking out a position, this Article offers ideas as a springboard for further study. First, borrowing standards from other legal contexts, the district court should assess whether the plaintiffs’ arguments are based on “clearly established” law solely under Supreme Court precedents,228 or whether “fairminded jurists” would be unable to disagree about the challenged legal provision’s invalidity or proper interpretation.229 The Supreme Court generally prohibits lower courts from “conduc[ing] a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”230 Here, however, the court would not be assessing the merits to decide whether to certify a class, but rather to determine its scope. In cases where binding Supreme Court precedent patently establishes that a legal provision is unconstitutional or otherwise invalid beyond reasonable dispute, the relitigation contemplated by Mendez may be unnecessary, and certification of a nationwide class is more appropriate.

Second, a court should consider the nature of the claimed right. When a plaintiff asserts an “indivisible” right, meaning that it would be impossible to grant him or her relief without effectively extending such relief to other right holders,231 as well, then it may be appropriate for the court to certify a class—including a nationwide class, if necessary—encompassing all such right holders. Because class certification would not affect the scope of the court’s injunction,232 concerns about the court inappropriately expanding its powers 228 (c.f. supra notes 223-226 and accompanying text (discussing how decisions from the Supreme Court and circuit courts can “clearly establish” conduct as unconstitutional)).
231 See supra note 184 and accompanying text (discussing how granting a single plaintiff relief for an “indivisible” right necessarily benefits third-party nonlitigants).
232 See, e.g., Washington v. Reno, 35 F.3d 1093, 1104 (9th Cir. 1994) (“Because relief for the named plaintiffs in this case would also necessarily extend to all federal inmates, the district court did not err in granting wide-ranging injunctive relief prior to certifying a
generally should not arise. Moreover, should the government defendants prevail, they would be able to invoke collateral estoppel against any similar claims in the future.

Third, a court should consider the nature of the alleged infirmity with the underlying legal provision. If the alleged defect is that the provision is unnecessarily burdensome, then the nature of the underlying constitutional right may counsel in favor of broad, nationwide class certification. Requiring other right holders to file independent federal lawsuits to enforce their rights would burden those rights even further. The need to avoid constitutionally undue burdens upon the exercise of fundamental rights may outweigh the Government’s interest in retaining the power to relitigate issues and discretion over whether to appeal an adverse ruling.

Finally, the court should conduct an implicit preliminary severability analysis. If the challenged provision can coherently be applied to everyone but the plaintiffs, and the court determines that the entity that enacted the provision would have wanted to “save” as much of it as possible,” then the court should refuse nationwide class certification. In contrast, if “the court determines that the entity that enacted the legal provision would not have wanted to have two conflicting sets of rules simultaneously enforced on different segments of the public, or that it would be impossible as a practical matter to apply different rules to different people,” then nationwide certification is likely warranted. While nationwide classes and injunctions implicate numerous serious issues, these principles can provide a starting point for determining when such relief is most appropriate.

Thus, in the majority of constitutional and statutory challenges under Rule 23(b)(2), nationwide class certification will likely be inappropriate. This leaves the question of how broadly a district court should define a class that meets the requirements of Rules 23(a) and (b)(2) in such cases. Certifying circuit-wide classes offers the best balance between limiting the power of lower courts and practical considerations, such as judicial economy and minimizing unnecessary burdens on litigants.

A circuit-wide approach emphasizes each circuit court as a more important source of law than the individual judicial districts within it. Limiting Rule

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nationally class of plaintiffs.”), Bailey v. Peterson, 323 F.2d 201, 206-07 (5th Cir. 1963) (“We find it unnecessary to determine, however, whether this action was properly brought under Rule 23(a), for whether or not appellants may properly represent all Negroes similarly situated, the decree to which they are entitled is the same. . . . The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.”).


234 Morley, supra note 25, at 552.

235 Id.
23(b)(2) classes and injunctions to the circuit in which a district court sits gives that court’s judgment and injunction the same geographic range as the circuit court opinions upon which they most immediately rest. At the same time, the Government preserves the opportunity to relitigate legal issues in other circuits, allowing those courts to reach their own conclusions and facilitating percolation and intercircuit diversity—important considerations underlying Mendoza. The Government lacks a comparable interest in ensuring that each district court within a circuit has an opportunity to interpret and apply that circuit’s governing precedents for itself. Adopting a circuit-based approach to class certification under Rule 23(b)(2) and injunctions strikes an appropriate compromise between Mendoza and Califano.

CONCLUSION

Nationwide injunctions have become an important means through which litigants on both sides of the political spectrum seek to enforce their understanding of the Constitution. By obtaining a favorable ruling from a single trial court judge—sometimes effectively handpicked through careful choice of venue—a litigant may have a statute or regulation definitively construed or even invalidated throughout the entire nation. The Supreme Court approved of this approach, albeit cautiously, in Califano.

Nationwide injunctions nevertheless run contrary to the Supreme Court’s rejection of nonmutual collateral estoppel against the Government in Mendoza. The Mendoza Court held that the Government should not be bound to the first decision—particularly the first adverse decision—on a legal issue, and effectively forced to appeal every adverse ruling against it. Limiting the legal consequences of district court rulings in this manner is consistent with Congress’s intent in granting such courts limited geographic jurisdiction. Mendoza also sought to promote the quality of judicial decision-making by allowing the Supreme Court to consider the practical consequences of different possible interpretations of a constitutional provision or statute in various circuits before definitively adopting one for the entire nation. It also ensured that most rulings of national significance would be made by the Supreme Court, a collegial institution in which decision makers can be affirmatively confronted with potential defects or oversights in their reasoning, rather than a single, overburdened trial-level judge.

Based on the structure of the judicial system; the statutes, rules, and other policies governing class actions; and the limited stare decisis effect of lower

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236 United States v. Mendoza, 464 U.S. 154, 162 (1984) (stating that the government has an interest in knowing “whether a court will bar relitigation of [an] issue in a later case” so that it can “determin[e] whether or not to appeal an adverse decision”).


238 Mendoza, 464 U.S. at 162.

239 Id.
court rulings, district courts should certify nationwide classes and issue nationwide injunctions only in certain situations. Such injunctions are appropriate, in light of the concerns set forth in Mendoza, where: Supreme Court precedent (without intermediating circuit-level precedents) directly renders the challenged legal provision indisputably invalid or otherwise conclusively resolves the legal issue; the plaintiff seeks to enforce an indivisible right or contends that the challenged provision is unduly burdensome; or the entity that enacted the provision at issue would not have intended for it to continue being applied if certain people had to be exempted from it. Applying this framework would increase the legitimacy and public acceptance of nationwide injunctions by ensuring that courts issue them on an objective and predictable basis, and only when important interests require such an extraordinary form of relief.
De Facto Class Actions: Plaintiff-and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases

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DE FACTO CLASS ACTIONS? PLAINTIFF- AND DEFENDANT-ORIENTED INJUNCTIONS IN VOTING RIGHTS, ELECTION LAW, AND OTHER CONSTITUTIONAL CASES

MICHAEL T. MORLEY

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INTRODUCTION

Litigation challenging the validity of statutes and regulations governing the electoral process has become a staple of nearly every federal election cycle.\(^1\) Democratic Presidential candidate Hillary Clinton’s barrage of constitutional and other challenges to various state laws governing the electoral process, commencing over a year-and-a-half before the 2016 presidential election,\(^2\) is merely the latest front in the ongoing Voting Wars.\(^3\) Left-wing partisans routinely challenge measures such as voter identification laws\(^4\) and reductions in early voting periods.\(^5\) Right-wing litigants, for their part, have primarily challenged

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campaign finance restrictions\(^6\) and federal limits on state sovereignty such as the Voting Rights Act.\(^7\)

When a plaintiff successfully challenges an election law or regulation as violating the U.S. Constitution, an applicable state constitution,\(^8\) the Voting Rights Act or some other federal statute (for state legal provisions), or an agency's organic statute or law such as the Administrative Procedure Act\(^9\) (for regulations), the district court must decide numerous issues in determining the proper relief. For example, in constitutional cases, the court must decide whether the challenged provision is facially unconstitutional or unconstitutional only as applied to litigants in the plaintiff's position.\(^10\) The court also must determine whether an injunction is an appropriate remedy\(^11\) and, if so, how broadly it should be crafted. In particular, the court must determine whether the injunction should grant relief sole-


\(^{8}\) See generally Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 Vand. L. Rev. 89, 101-05 (2014) (arguing that state constitutions typically protect the right to vote to a greater extent than the federal Constitution). But see Michael T. Morley, Rethinking the Right to Vote Under State Constitutions, 67 Vand. L. Rev. 189, 191-92 (2014) [hereinafter Morley, State Constitutions] (arguing that the test that the U.S. Supreme Court has adopted for determining whether the right to vote under the U.S. Constitution has been violated is substantially similar to the standards that most state supreme courts have long applied when interpreting their respective state constitutions).


\(^{11}\) Even in constitutional cases, courts must confirm that a plaintiff has standing to seek injunctive relief, see City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983), and often at least go through the motions of applying the four-factor standard set forth in eBay, Inc. v. MercExchange LLC, 547 U.S. 388 (2006), for determining whether an injunction is an appropriate remedy. See Michael T. Morley, Enforcing Equality: Statutory Injunctions, Equitable Balancing Under eBay, and the Civil Rights Act of 1964, 2014 U. Chi. Legal F. 177, 188-90 [hereinafter Morley, Statutory Injunctions].
ly in favor of the plaintiffs in the case ("Plaintiff-Oriented Injunction"), or instead enjoin the defendant officials or agencies ("government defendants") from enforcing or implementing the challenged provision against anyone in the state or even the nation, as appropriate ("Defendant-Oriented Injunction").

A Plaintiff-Oriented Injunction precludes the government defendants from enforcing the challenged provision against the successful plaintiffs in the case, while leaving them free to enforce the provision against other members of the public. Such an order is generally sufficient to resolve the case or controversy before the court and vindicate the plaintiffs' rights, without adjudicating or enforcing the rights of third parties not before the court that the plaintiffs lack standing to assert. Because non-mutual offensive collateral estoppel generally does not lie against the government, the government defendants remain free to defend the provision's validity in subsequent cases, in which other courts may uphold the provision. The limited scope of Plaintiff-Oriented Injunctions also ensures that the effects of a trial or intermediate appellate court's ruling do not extend beyond the scope of its territorial jurisdiction, to parts of the state or nation where its opinions lack the force of law.

A Defendant-Oriented Injunction, in contrast, allows a single judge to completely enjoin enforcement of a state or federal legal provision throughout the state or nation, respectively. It prevents the unfairness that could result from enforcing certain plaintiffs' rights while allowing the challenged provision to otherwise remain in effect, violating the rights of others. A Defendant-Oriented Injunction effectively transforms an individual-plaintiff lawsuit into a de facto class action, without satisfying the requirements of Rule 23 or giving the injunction’s

12. See Califano v. Yamasaki, 442 U.S. 682, 702-03 (1979) (recognizing the power of district courts to grant nationwide injunctions). Both Plaintiff-Oriented and Defendant-Oriented Injunctions, of course, almost always are directed exclusively toward the defendants, requiring them to take, or prohibiting them from taking, certain acts. A Plaintiff-Oriented Injunction is one which restricts the defendants' behavior solely toward the particular plaintiffs in the case. A Defendant-Oriented Injunction, in contrast, enjoins the defendants from applying an invalid legal provision, or taking some other improper action, with regard to anyone.
purported beneficiaries notice of the suit or an opportunity to opt out.\textsuperscript{14}

These categories are not entirely distinct. In certain cases, it would be impossible to fully enforce a plaintiff’s rights without completely invalidating a statute or regulation as it applies to everyone. Unconstitutional or otherwise improper redistricting presents perhaps the most obvious example of this concept in the election law context. A state cannot have one set of congressional or legislative districts for individual plaintiffs in a case and a different set for everyone else.\textsuperscript{15} And “[e]ven if individual relief might satisfy [a] plaintiff’s claim, it [may] be economically impractical to create a special remedy just for the single victorious plaintiff.”\textsuperscript{16} Across the broad run of cases, however, it often will be possible to grant meaningful relief to individual plaintiffs without necessarily extending it to everyone else.\textsuperscript{17} In the parlance of the American Law Institute’s Principles of Aggregate Litigation, it is typically possible for courts in

\begin{itemize}
  \item \textsuperscript{14} This Article uses the phrases “individual-plaintiff case” and “individual-plaintiff lawsuit” to refer to any non-class case brought by one or more individual, non-organizational plaintiffs, or entities asserting associational standing to enforce the rights of their members on their behalf. \textit{See infra} notes 278–79 and accompanying text. When an organization instead contends that applying the challenged legal provision to any member of the public would harm the organization’s own institutional interests, \textit{see infra} notes 280–86 and accompanying text, the case is best conceptualized as an “organizational” lawsuit, which implicates unique issues, rather than an individual-plaintiff case. \textit{See infra} Part III.B.
  \item \textsuperscript{15} \textit{See} McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) (“[I]n reapportionment and school desegregation cases, for example, it is not possible to award effective relief to the plaintiffs without altering the rights of third parties.”); \textit{see also} Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963) (entering Defendant-Oriented Injunction, prohibiting defendants from engaging in any segregation, to enforce plaintiffs’ right to desegregated transportation facilities); Brandon L. Garrett, \textit{Aggregation and Constitutional Rights}, 88 NOTRE DAME L. REV. 593, 632 (2012) (citing school desegregation example); Ryan C. Williams, \textit{Due Process, Class Action Opt Outs, and the Right Not to Sue}, 115 COLUM. L. REV. 599, 648 (2015) (offering other examples). Lisa Marshall Manheim has identified several ways in which redistricting litigation may fail to protect the interests of non-litigants (that is, the general public), who are unavoidably affected by those rulings. Lisa Marshall Manheim, \textit{Redistricting Litigation and the Delegation of Democratic Design}, 93 B.U. L. REV. 563, 599–603 (2013).
  \item \textsuperscript{17} Williams, \textit{supra} note 15, at 650 (“[I]t will often be possible for courts to craft a narrower equitable remedy that affords complete relief to the particular plaintiff or plaintiffs appearing before it that would not affect the defendant’s obligations with respect to other similarly situated individuals.”).
\end{itemize}
election law, voting rights, and other constitutional cases to award “divisible,” plaintiff-specific relief, rather than “indivisible,” across-the-board relief. The question is whether, and when, they may (or should, or must) do so.

The choice between a Plaintiff- or Defendant-Oriented Injunction assumes particular importance in election law cases because these cases tend to be brought on behalf of individual plaintiffs, or sometimes associational plaintiffs (which implicate unique standing problems), rather than as class actions. The goal of most such plaintiffs is not simply to enforce their own rights, but rather to change the underlying rules by which the campaign or election as a whole will be conducted. Likewise, as discussed at greater length below, the issue assumes primary importance for cases at the trial and intermediate appellate levels, where the court’s written opinion concerning the validity of the challenged provision will not definitively resolve the issue across the entire state or nation as a matter of stare decisis.

Courts have adopted inconsistent approaches to determining whether to issue Plaintiff- or Defendant-Oriented Injunctions in non-class cases. Indeed, many courts either fail to recognize that they have a choice in the matter, or overlook most of the critical issues that the decision between a Plaintiff-Oriented Injunction and Defendant-Oriented Injunction implicates. Commentators have begun to recognize the importance of this is-

18. Principles of the Law of Aggregate Litigation § 2.04(a)–(b) (2010). The comments to the Principles muddy the waters, stating that a lawsuit challenging “a generally applicable policy or practice maintained by a defendant” requires “indivisible remedies.” Id. § 2.04 cmt. a. This statement is inaccurately overbroad, however. Even if a law is facially unconstitutional, it often will be possible for a trial or appellate court to enjoin its enforcement solely against individual plaintiffs in a case, rather than completely. See Williams, supra note 15, at 650.

19. See infra Part III.B.


21. See infra notes 52–56 and accompanying text.

22. See infra Part I.B.
sue, but have yet to reach a consensus, and have never examined it specifically in the unique context of election law.\textsuperscript{23}

This Article contends that the traditional rules governing litigation and the scope of judgments apply equally to constitutional cases, including election law and voting rights cases. Courts should be attentive to such principles to avoid inadvertently or inappropriately providing “overrelief” to plaintiffs in non-class cases, particularly in ways that violate courts’ jurisdictional limits or infringe the rights of third parties. While the insights offered in this Article apply to all fields of constitutional and administrative law, this Article will focus primarily on election law and voting rights because those fields are permeated by the deep interplay between individual and col-

\textsuperscript{23} Some have advocated caution in the use of Defendant-Oriented Injunctions. See Michelle R. Slack, Separation of Powers and Second Opinions: Protecting the Government’s Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government, 31 REV. LITIG. 943, 968–71 (2012) (arguing that Defendant-Oriented Injunctions interfere with interbranch dialogue and prevent an issue from percolating through the lower courts); Daniel J. Walker, Note, Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief, 90 CORNELL L. REV. 1119, 1123–24, 1145–49 (2005) (arguing that courts should decide whether to issue Plaintiff- or Defendant-Oriented Injunctions on a case-by-case basis, depending on the totality of the circumstances, including the nature of the rights at issue).

Others have urged more widespread use of Rule 23(b)(2) classes to facilitate the issuance of broad injunctions while avoiding many of the concerns raised by this Article. See Carroll, supra note 20, at 2075–76 (arguing that rules should be reformed to facilitate certification of Rule 23(b)(2) class actions, rather than encouraging courts to continue issuing Defendant-Oriented Injunctions in non-class cases); Garrett, supra note 15, at 643–48 (arguing that both substantive constitutional decision rules and procedural rules should be changed to facilitate class-action-based constitutional challenges); Daniel Tenny, Note, There is Always a Need: The “Necessity Doctrine” and Class Certification Against Government Agencies, 103 MICH. L. REV. 1018, 1019 (2005) (criticizing the “necessity doctrine,” under which courts decline to certify classes under Rule 23(b)(2) on the grounds that government officials can be trusted to implement their rulings, because class certification is necessary to ensure that favorable court rulings are applied to all similarly situated people); Timothy Wilton, The Class Action in Social Reform Litigation: In Whose Interest?, 63 B.U. L. Rev. 597, 597–600 (1983) (arguing that, because courts have broad discretion to issue Defendant-Oriented Injunctions, it is in government defendants’ interests for social reform litigation to proceed via class action rather than individual suits, to allow those defendants to invoke res judicata against subsequent claims if they prevail). Mark C. Weber advocates the use of Rule 23(b)(2) when a plaintiff seeks injunctive relief that will benefit many others, but argues that class members should not be bound by res judicata unless they were given notice and an opportunity to opt out. Weber, supra note 16, at 400–01; cf. Williams, supra note 15, at 651–53 (arguing that class members who oppose injunctive relief should be permitted to opt out of Rule 23(b)(2) classes).
lective rights that the choice between Plaintiff- and Defendant-Oriented Injunctions reflects.

Part I of this Article reviews the different approaches that courts have adopted in deciding whether to issue Plaintiff- or Defendant-Oriented Injunctions in "individual-plaintiff" or non-class cases, and the rationales underlying those approaches. This Part also examines the overarching theoretical tensions that give rise to these conflicting approaches.

Part II identifies the various concerns that Defendant-Oriented Injunctions raise. Because a plaintiff's rights generally can be fully enforced through a Plaintiff-Oriented Injunction, individual plaintiffs lack Article III standing to seek broader relief in the form of Defendant-Oriented Injunctions. A Defendant-Oriented Injunction effectively allows a plaintiff to assert, and a court to enforce, the rights of third parties over whom the court never acquired personal jurisdiction. Some of those people inevitably will be outside of the court's geographic jurisdiction, and may very well support the enjoined provision or not wish to assert or enforce their purported rights.

Defendant-Oriented Injunctions also raise fairness concerns due to asymmetric claim preclusion. If courts may award Defendant-Oriented Injunctions in non-class, individual-plaintiff cases, then when a plaintiff in such a case prevails, all rightholders throughout the state or nation stand to have their rights enforced by the judgment. If the plaintiff loses, however, other rightholders are not bound by res judicata or collateral estoppel; the court's ruling does not prevent them from bringing their own challenges to the legal provision at issue, either in the same court or different courts. Fundamental fairness counsels against a doctrine that allows third parties to have their rights vindicated by a favorable ruling, without having those rights be deemed adjudicated by an adverse ruling.

Defendant-Oriented Injunctions also are in tension with the policies of Rule 23, which dictate that classwide relief should be available only if the requirements set forth in the rule are satisfied. Finally, such injunctions allow trial and intermediate appellate courts to give their rulings the force of law outside their respective geographic jurisdictions.

Part III discusses some potential ways of avoiding both the limitations of Plaintiff-Oriented Injunctions and the challenges posed by Defendant-Oriented Injunctions. This Part considers
Rule 23(b)(2) class actions,\textsuperscript{24} lawsuits brought by associational plaintiffs, specialized courts, and stricter application of Equal Protection principles. As this Part demonstrates, none of these alternatives are fully satisfactory.

Part IV offers an alternate approach. This Part begins by proposing a two-prong test for determining whether a Plaintiff- or a Defendant-Oriented Injunction is the proper remedy in a non-class, individual-plaintiff lawsuit to enjoin a legal provision. First, the court should assess whether granting the requested relief solely to the individual plaintiffs would create unconstitutional disparities concerning fundamental rights in violation of Equal Protection principles. As discussed in Part III.D, this seldom, if ever, should be the case, but commentators or courts reasonably may take a different view of this issue. Indeed, even if a court disagrees with this Article’s recommended approach to the Equal Protection component of the analysis, it still may apply this Article’s recommended framework for determining the proper scope of relief when a legal provision is challenged.

Second, if limiting relief solely to the individual plaintiffs would be constitutional, the court should then determine whether a Plaintiff-Oriented Injunction would be proper under the challenged statute or regulation itself. The court should treat this issue as a question of severability. In a traditional severability analysis, a court will sever an invalid provision from the rest of an enactment, allowing the remainder to continue in effect, if: (i) the remaining provisions can operate coherently as a law, and (ii) the court concludes that the enacting entity would have intended for those remaining provisions to be enforced even without the invalidated portion of the law.\textsuperscript{25}

A court should apply the same approach in determining whether a challenged legal provision may be enjoined only with regard to the particular plaintiffs in a case, or instead must be invalidated in toto. If the challenged provision can co-

\textsuperscript{24} Fed. R. Civ. P. 23(b)(2) ("A class action may be maintained if Rule 23(a) is satisfied and if... the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole... ").

herently be applied just to people other than the plaintiffs, and the entity that enacted the provision would have wanted to "save" as much of it as possible (that is, have it enforced, even though certain people must be excluded from its scope), then a Plaintiff-Oriented Injunction would be the proper remedy. If, in contrast, the court determines that the entity that enacted the legal provision would not have wanted to have two conflicting sets of rules applied concurrently to different segments of the public, or that it would be impossible to do so, then a Defendant-Oriented Injunction would be required.

Part IV goes on to suggest that the trial court should conduct this analysis at the outset of any non-class, individual-plaintiff case in which the plaintiffs seek to enjoin an allegedly invalid legal provision. If the court concludes that a Defendant-Oriented Injunction would be the required remedy if the plaintiffs prevail, then it should hold that indispensable parties are missing from the case (that is, the non-party beneficiaries of a Defendant-Oriented Injunction), and require the plaintiffs to refile the suit as a Rule 23(b)(2) class action. Conversely, if neither the Constitution nor the challenged legal provision would require the court to issue a Defendant-Oriented Injunction should the plaintiffs succeed, then the court should allow the case to proceed on a non-class basis. If the plaintiffs prevail, they would be eligible to receive only a Plaintiff-Oriented Injunction. This Article's suggestions are independent of each other: a court could adopt the proposed two-prong test for determining the proper breadth of relief while declining to conduct this analysis at the outset of a case. Addressing those issues at the outset, however, allows a court to avoid the standing and asymmetric preclusion concerns discussed in Part II by requiring that suits in which Defendant-Oriented Injunctions would be necessary are brought as Rule 23(b)(2) class actions.

Part IV concludes by offering some important caveats to these recommendations. Because Rule 23(b)(2) class actions do

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26. As a matter of judicial economy, the court might have discretion to simply dismiss a case without performing this analysis if it determines that the plaintiffs' claims are squarely foreclosed by binding precedent as a matter of law. Cf. Shapiro v. McManus, 136 S. Ct. 450, 455–56 (2015).

27. Cf. Fed. R. Civ. P. 19(a)(1)(A) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . in that person's absence, the court cannot accord complete relief among existing parties . . . .").
not guarantee class members either notice or an opportunity to be heard prior to class certification, res judicata should apply less stringently than usual in any subsequent challenges to the same legal provisions. Class members should be barred from relitigating only specific issues and arguments actually raised on their behalf, rather than all issues and arguments that could have been raised in the initial suit, such as alternate constitutional challenges to the legal provision at issue.  

Moreover, to prevent courts of limited geographic jurisdiction from unilaterally dictating law to the entire nation, any certified class should be limited geographically. This Article recommends that the class be limited to rightholders within the geographical boundaries of the intermediate appellate court in which the trial court sits. For a case filed in the U.S. District Court for the Middle District of Florida, for example, the class would include all rightholders within the Eleventh Circuit. A stricter alternative would be to limit the class solely to rightholders within the trial court’s geographic jurisdiction.

Part V briefly concludes. At a minimum, this Article seeks to bring greater attention to the often-overlooked choice between Plaintiff- and Defendant-Oriented Injunctions. More ambitiously, it proposes a new framework to help courts make remedial decisions in a more consistent and predictable manner. Applying this framework also will help courts recognize and address the wide range of jurisdictional limits, constitutional and statutory restrictions, and policy considerations that their remedial decisions implicate.

I. INJUNCTIVE RELIEF IN ELECTION LAW CASES

A court may determine that a legal provision is invalid for any number of reasons. Most basically, it may conclude that the provision violates the U.S. Constitution or a state constitution, either facially or as applied. A court may deem a state law inconsistent with, or preempted by, federal law.  

28. Cf. Allen v. McCurry, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." (citing Cromwell v. Cty. of Sac, 94 U.S. 351, 352 (1876))).

29. Preemption is a special concern in the context of laws governing congressional elections. The Elections Clause specifically grants Congress power to "make or alter" state laws concerning the "Times, Places and Manner" of such elections.
may invalidate a regulation for violating an agency's organic statute or a framework law such as the Administrative Procedure Act. Whenever a court determines that a statute or regulation is invalid for any of these reasons, it must decide whether to enjoin enforcement of that provision, and how broadly any such injunction should be crafted.

To determine whether to issue a permanent injunction, a federal court applies the four-factor test set forth in eBay v. MercExchange. eBay requires the court to assess whether the plaintiff has suffered irreparable injury and lacks an adequate remedy at law, the balance of hardships favors the plaintiff, and injunctive relief is in the public interest. Federal courts have periodically declined to issue injunctions to plaintiffs facing impending or ongoing constitutional violations due to their failure to satisfy one or more of these factors. Courts have declined to grant injunctive relief in constitutional cases for a variety of other reasons as well, including lack of standing, laches, and the belief that injunctive relief was unnecessary because the court was confident government officials would enforce its ruling.

Once a court has decided that injunctive relief is an appropriate remedy, it must determine the proper scope of the injunction. One issue is whether the court should tailor its injunction to prohibit only conduct that it has ruled

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30. 547 U.S. 388, 393–94 (2006); see also Morley, Statutory Injunctions, supra note 11, at 188–90 & n.74 (explaining that the eBay test has become the generally accepted standard for injunctive relief across numerous fields of law, including constitutional law). I have argued elsewhere that injunctions afford the strongest available protection for a rightholder's entitlements. Michael T. Morley, Public Law at the Cathedral: Enjoining the Government, 35 CARDOZO L. REV. 2453, 2481–83 (2014) [hereinafter Morley, Public Law at the Cathedral].

31. eBay, 547 U.S. at 393–94.

32. Morley, Statutory Injunctions, supra note 11, at 188, 190, 205 (citing cases).


34. See, e.g., Soules v. Kauaians for Nukoli Campb Comm., 849 F.2d 1176, 1182 (9th Cir. 1988) ("[T]he district court did not err in barring appellants' equal protection claim for equitable relief on the ground of laches."); see also Thatcher Enters. v. Cache Cty. Corp., 902 F.2d 1472, 1476 (10th Cir. 1990).

unconstitutional, or instead enter a broader prophylactic injunction, to require or prohibit other conduct that may not actually be constitutionally required or proscribed.\textsuperscript{39} Courts in institutional reform cases often enter broad prophylactic injunctions to protect people’s rights more effectively.\textsuperscript{37} Despite their utility and widespread adoption in a variety of contexts,\textsuperscript{38} the Supreme Court has voiced concern about broad prophylactic injunctions on separation of powers and federalism grounds.\textsuperscript{39} Similarly, scholars have questioned the propriety of such relief,\textsuperscript{40} and Congress has pushed back against such measures in the prison reform context through the Prison Litigation Reform Act.\textsuperscript{41}

Outside of institutional reform cases, when a litigant challenges the validity of a discrete legal provision, relief typically focuses on the disputed provision itself. The main question concerning the scope of injunctive relief in such cases is whether the injunction should focus on the plaintiffs or the defendants. In other words, should the court enter a Plaintiff-Ori-


\textsuperscript{37} See, e.g., Hutto v. Finney, 437 U.S. 678, 685–88 (1978) (upholding injunction barring prison from imposing punitive solitary confinement on prisoners for longer than thirty days, even though the Court held that the practice did not necessarily violate the Eighth Amendment); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971); OWEN FESE, THE CIVIL RIGHTS INJUNCTION 13 (1978).


\textsuperscript{39} See, e.g., Horne v. Flores, 557 U.S. 433, 448 (2009) (noting that “institutional reform injunctions often raise sensitive federalism concerns” and can have “the effect of dictating state or local budget priorities”); Lewis v. Casey, 518 U.S. 343, 385 (1996) (Thomas, J., concurring) (“Article III cannot be understood to authorize the Federal Judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make.”).


ent Injunction, tailored to prevent the plaintiffs’ rights from being violated by the invalid provision, or instead enter a Defendant-Oriented Injunction, prohibiting the defendant government entity or officials from enforcing the invalid provision altogether, against anyone?

A deep and largely unrecognized circuit split exists concerning the scope of relief a court should award when a plaintiff demonstrates that a legal provision is invalid in a non-class, individual-plaintiff case.\textsuperscript{42} Section A begins by exploring the distinction between Plaintiff- and Defendant-Oriented Injunctions in greater depth. Section B discusses the various approaches that courts have adopted in determining the proper scope of injunctive relief, while Section C examines the theoretical tensions that have contributed to courts’ confusion.

A. Plaintiff- and Defendant-Oriented Injunctions

A court’s decision about whether to issue a Plaintiff- or Defendant-Oriented Injunction is, in many ways, as important as its underlying ruling on the merits of the plaintiffs’ constitutional claim. A Plaintiff-Oriented Injunction vindicates the plaintiffs’ rights, but otherwise leaves the underlying statute or regulation undisturbed. In voting rights and election law cases, the rules governing the election remain unchanged as applied to everyone else. Because such cases often are not brought as class actions,\textsuperscript{43} Plaintiff-Oriented Injunctions, by definition, apply narrowly, to only a few people. A Defendant-Oriented Injunction, in contrast, allows a single judge of ostensibly limited territorial jurisdiction to completely prohibit the defendant agency or official from enforcing the challenged provision against anyone throughout the state or nation.

Defendant-Oriented Injunctions turn non-class, individual-plaintiff cases into modern analogues to “spurious” class actions, which had been permitted by the pre-1966 version of Rule 23.\textsuperscript{44} As one commentator explains, in a spurious class action:

\[
\text{[t]he named plaintiff could sue on behalf of the class and obtain a decision in the class’s favor. Class members could then}
\]

\textsuperscript{42} See Carroll, \textit{supra} note 20, at 2032.
\textsuperscript{43} See \textit{supra} note 20.
opt in to get relief from the court. If the named plaintiff lost the case, the result did not bind the class members, who were free to file later lawsuits on the same claim, and win or lose on the merits without any application of res judicata against them. 45

One of the goals of the 1966 amendments to Rule 23 was to abolish such actions. 46

The distinction between Plaintiff- and Defendant-Oriented Injunctions is particularly important in lower courts. 47 When the Supreme Court issues a ruling, most concerns about the scope of injunctive relief become moot. Because the Court has nationwide authority, geographic limitations on its power are not a concern. Its rulings on federal constitutional and statutory law bind all state and federal courts throughout the nation directly, 48 rather than simply binding parties to a particular case through res judicata. Government officials are generally expected to follow such rulings, regardless of whether they were parties to the case or subject to an injunction. 49 Indeed, in one of the most controversial rulings of all time, 50 Roe v. Wade, the Court held that Texas’s abortion law was unconstitutional, yet declared that it was “unnecessary to decide” whether the lower

46. Id. at 400; see FED. R. CIV. P. 23, Advisory Committee’s Note (1966), available at 39 F.R.D. 73, 105–06.
47. In certain types of cases, however, even the Supreme Court’s decision as to whether to grant an injunction can have practical significance. See Morley, Public Law at the Cathedral, supra note 30, at 2481–83.
49. See, e.g., Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (“[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court.”). Some scholars reject this position, arguing that, while government officials are bound by courts’ judgments, they are not required to accept accompanying judicial opinions as definitive constructions of the Constitution or federal laws. See William Baude, The Judgment Power, 96 GEO. L.J. 1807, 1844–45 (2008); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 CARDOZO L. REV. 43, 43–44 (1993). Under this view, judicial opinions simply allow government officials to predict how courts are likely to resolve future cases. While the possibility of future litigation may induce officials to conform their conduct to judicial opinions, particularly those of the Supreme Court, there is no reason (beyond an opinion’s persuasive value) for government officials to adhere to such interpretations in matters not subject to judicial review.
court should have enjoined its enforcement. Rather, the Court "assume[d] the Texas prosecutorial authorities [would] give full credence to [its] decision."\textsuperscript{51} For these reasons, Supreme Court cases generally act as de facto class actions.\textsuperscript{52}

The scope of injunctive relief assumes much greater importance in trial and intermediate appellate courts. The breadth of an injunction is a critical consideration, particularly at the trial level, because trial court opinions generally are not precedent, even within the same district.\textsuperscript{53} Nor are such rulings binding upon a government defendant in subsequent litigation against other plaintiffs.\textsuperscript{54} They generally do not even constitute "clearly established" law for the purpose of overcoming qualified immunity.\textsuperscript{55} Government officials often feel free to "nonacquiesce" in (that is, ignore) trial court rulings, and sometimes even intermediate appellate court rulings, when dealing with anyone other than the litigants involved in those earlier cases (particularly when acting in regions outside the prior court's jurisdiction).\textsuperscript{56}

Moreover, trial and intermediate appellate courts are the final arbiters of the overwhelming majority of election law and other constitutional issues. Many such issues do not reach the

\textsuperscript{51} 410 U.S. 113, 166 (1973).
\textsuperscript{52} Cf. Arthur S. Miller, Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron, 58 U. Det. J. Urb. L. 573, 574, 577, 580 (1981) (arguing that Supreme Court cases involving individual litigants act as de facto class actions because the Court often issues general statements of law that will govern future cases).
\textsuperscript{53} Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011).
\textsuperscript{55} See, e.g., Marsh v. Butler Cty., 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("[D]istrict court decisions cannot clearly establish a constitutional right."); Richardson v. Selsky, 5 F.3d 616, 623 (2d Cir. 1993) (same). The Supreme Court has approved of this approach without addressing whether a circuit may choose to allow district court rulings to clearly establish the law and allow plaintiffs to overcome public officials' qualified immunity. Camreta, 131 S. Ct. at 2033. For these reasons, Timothy Wilton's explanation as to why class certification is largely irrelevant at the trial level no longer remains true, assuming it once was. See Wilton, supra note 25, at 604 (arguing that government officials generally "apply a legal declaration in an individual action to [any] factually similar group" in order to preserve their qualified immunity from suit, and because of the collateral estoppel effects of the earlier ruling).
Supreme Court for years; others might never get there.57 Government entities may refrain from appealing adverse rulings due to political pressures, cost constraints, adverse publicity, strategic considerations, and changes in political administrations.58 Officials who may have felt duty-bound to defend a law's constitutionality in trial-level proceedings may feel no similar compulsion to affirmatively appeal rulings invalidating laws or regulations with which they disagree. Conversely, supporters of a statute might be reluctant to risk having an adverse ruling affirmed by a higher court, thereby enhancing its precedential value and expanding its geographic reach.59 Even if lower court rulings and judgments are seen as strictly interim measures, courts are currently applying disparate approaches in determining the proper scope of injunctive relief, often without recognizing the underlying issues at play, and there is value to discerning and advocating the correct approach.

B. Current Approaches

Courts have applied conflicting approaches in deciding whether to issue Plaintiff- or Defendant-Oriented Injunctions

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57. STEPHEN M. Shapiro et al., Supreme Court Practice 237 (10th ed. 2013) (explaining that the Supreme Court grants very few of the thousands of petitions for certiorari it receives each year).

58. For example, the left-wing group ACORN had filed numerous fraudulent voter registration forms and violated other election laws in Florida over the course of multiple federal election cycles. See, e.g., Kathleen Haughney, Vote Fraud: Is It a Big Problem?, ORLANDO SENTINEL, June 6, 2012, at A1; Lucy Morgan, Group Accused of Voter Registration Violations, ST. PETERSBURG TIMES, Oct. 22, 2004, at 5B; Sandra Pedicini, ACORN Group Faces Voter-Fraud Accusations, ORLANDO SENTINEL, Oct. 10, 2008, at A3; Brittany Wallman & Alva James-Johnson, 180 Registration Forms Surface in South Florida, SUN-SENTINEL, Oct. 27, 2004, at 4B. In response, the state legislature enacted a law imposing additional restrictions and safeguards on third-party voter-registration efforts. FLA. STAT. § 97.0575 (2011). A federal district court issued a preliminary injunction against the law. League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155 (N.D. Fla. 2012). Instead of appealing the case to the Eleventh Circuit, however, the State abandoned potentially meritorious arguments in defense of the law and consented to entry of a permanent injunction against it.

when they conclude that a legal provision is invalid, whether on constitutional, statutory, or other grounds.

1. Presumptive Issuance of Defendant-Oriented Injunctions

Some jurisdictions have held that a court should presumptively enjoin government defendants from enforcing an invalid legal provision against anyone, to the extent of its invalidity. Such assertions sometimes appear without any explanation or consideration of competing factors. Perhaps most surprisingly, some courts use their ability to completely enjoin enforcement of a law through a Defendant-Oriented Injunction as a justification for refusing to certify a proposed class, on the grounds that class certification is purportedly unnecessary. Nationwide Defend-

60. See Wilton, supra note 23, at 603 ("Plaintiffs in most social reform cases will be able to obtain the identical declaratory or injunctive relief and attorneys’ fees award in both individual and class action suits."); see also Garrett, supra note 15, at 634 ("[T]he equitable discretion of the judge... does permit judges even in individual cases to extend injunctive relief to a class... ").

61. See, e.g., Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed."); Sandford v. R.L. Coleman Realty Co., 573 F.2d 175, 178 (4th Cir. 1978) ("[T]he plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action... "); A-1 Cigarette Vending, Inc. v. United States, 49 Fed. Cl. 345, 358 (2001) ("When a challenge is brought to the validity of a regulation, as opposed to a challenge to the application of an otherwise valid regulation, the district court's determination will be binding upon the entire agency across the nation."); Caspar v. Snyder, 77 F. Supp. 3d 616, 642 (E.D. Mich. 2015) ("[A] plaintiff may seek an injunction applicable to all similarly-situated individuals harmed by the same unconstitutional practice, without the necessity of seeking class action treatment.") (collecting cases); see also Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 781 (9th Cir. 1986); Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir. 1984); Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650, 665 (D.C. Cir. 1983); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971) ("Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases" to award Defendant-Oriented Injunctions to individual plaintiffs); Am. Fed'n Gov't Emps. v. Cavazos, 721 F. Supp. 1351, 1377 (D.D.C. 1989), aff'd in part and vacated in part, 925 F.2d 1215 (D.C. Cir. 1991); Walker, supra note 23, at 1122-23 & n.27 (discussing examples).

ant-Oriented Injunctions can lead to awkward conflicts in which one court refuses to adopt the conclusion of a court in another jurisdiction that a legal provision is invalid, despite the fact that the other court has enjoined the governmental defendant from enforcing that provision anywhere.63

Justice Blackmun endorsed Defendant-Oriented Injunctions in the administrative law context in his oft-quoted dissent in Lujan v. National Wildlife Federation, stating:

In some cases the “agency action” will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain “programmatic” relief that affects the rights of parties not before the court.64

Courts occasionally justify Defendant-Oriented Injunctions on the grounds that a Plaintiff-Oriented Injunction would unfairly give special rights to the plaintiffs in the case, while allowing the invalid legal provision to remain in effect for other, similarly situated parties.65 For example, in Wirtz v. Baldor Electric Co., a few electronics businesses sued to have the Secretary of Labor’s determination as to the prevailing wage in the electronics industry invalidated.66 The D.C. Circuit held that it was unnecessary to determine whether the suit should have been certified as a class action.67 It declared that, so long as one of the plaintiff businesses had standing to sue, the district court “should enjoin the effectiveness of the Secretary’s determination with respect to the entire industry.”68

alleged facial unconstitutionality of a federal or state statute or regulation.” MANUAL FOR COMPLEX LITIGATION § 1.401 (1973). The latest edition of the Manual has abandoned this position. See generally MANUAL FOR COMPLEX LITIGATION (Fouth) (2004).

63. See, e.g., Biggs v. Quicken Loans, Inc., 990 F. Supp. 2d 780, 785–86 (E.D. Mich. 2014) (“The proposition that a district court may issue injunctions that bind parties outside its geographic jurisdiction is distinct from whether this Court must, as a matter of binding order or precedent, adopt the D.C. Circuit’s conclusion that [an agency issuance] is void ab initio.”).
64. 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting).
65. Wirtz, 337 F.2d at 534.
66. Id. at 533.
67. Id.
68. Id. at 535.
The D.C. Circuit explained, "[A] court order enjoining the Secretary's determination for the sole benefit of [the] plaintiffs-appellees who have standing to sue would . . . give them an unconscionable bargaining advantage over other firms in the industry." After discussing some of the likely negative ramifications of such a limited ruling, the court concluded, "At the very least, substantial wage inequities among firms and employees in the industry might be created, based solely on the random application of a wage determination held invalid as to some but not all members of the industry."

It added that the lawsuit—despite being brought by commercial businesses to further their own interests—was "vindicat[ing] the public interest in having congressional enactments properly interpreted and applied." The court concluded, ""As it is principally the protection of the public interest with which we are here concerned, no artificial restrictions of the court's power to grant equitable relief in the furtherance of that interest can be acknowledged." In another case reaching the same conclusion, the court emphasized that a Defendant-Oriented Injunction completely precluding the government defendant from enforcing an invalid regulation would alleviate the need for duplicative litigation from other people adversely affected by it.

Courts in election law and voting rights cases often issue Defendant-Oriented Injunctions without recognizing or addressing most of their ramifications. For example, in Frank v. Walk-

69. Id. at 534.
70. Id.
71. Id. at 534–35.
72. Id. at 535 (quoting Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 942 (D.C. Cir. 1988)). It is worth noting that the quoted language from Virginia Petroleum Jobbers Ass'n was ripped wholly out of context. That case focused solely on whether a federal court may stay an administrative proceeding before the Federal Power Commission, and had nothing to do with the distinction between Plaintiff- and Defendant-Oriented Injunctions. Va. Petroleum Jobbers Ass'n, 259 F.2d at 923–24.
73. Nat'l Mining Ass'n v. U.S. Army Corps of Engrs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); see also A-1 Cigarette Vending, Inc. v. United States, 49 Fed. Cl. 345, 358 (2001) ("It would be senseless to require the relitigation of the validity of a regulation in all federal district courts . . . .").
74. See, e.g., Obama for Am. v. Husted, 697 F.3d 423, 437 (6th Cir. 2012) (issuing Defendant-Oriented Injunction requiring the Ohio Secretary of State to allow the general public to vote during portions of the early voting period open to military voters); Fair Elections Ohio v. Husted, 47 F. Supp. 3d 667, 671 (S.D. Ohio 2014)
er, a group of individual plaintiffs brought a putative class action suit challenging Act 23, Wisconsin’s voter identification law. The district court refused to certify the putative class, but held that the law was unconstitutional and entered a Defendant-Oriented Injunction barring the Governor and the state agency responsible for elections from enforcing it. The court explained, “[I]nvalidating Act 23 is the only practicable way to remove the unjustified burdens placed on the substantial number of eligible voters who lack IDs.”

The state had argued for a less restrictive alternative, suggesting that the court could permit people without photo IDs to vote if they satisfied certain alternative requirements or signed affidavits at their polling places affirming their identities. The court rejected such suggestions on the grounds that it would have to rewrite the statute to implement them. Importantly, neither the court nor the parties addressed the possibility of granting relief just to the individual plaintiffs by enjoining the photo ID law solely in regard to them.

Intriguingly, the court explained that the plaintiffs’ motion for class certification was moot precisely because “all members of the proposed classes will benefit from the permanent injunction whether or not classes are certified.” Thus, in the district court’s view, there was “no reason to formally certify a class.” The district court offered no explanation as to how it could effectively grant classwide relief in a non-class-action case. The Seventh Circuit ultimately overturned the district

(“[The Court] ENJOINS Defendants from treating [any] late-jailed electors any differently from late-hospitalized electors.”), vacated on other grounds, 770 F.3d 456 (6th Cir. 2014).
75. 17 F. Supp. 3d 837 (E.D. Wis. 2014), rev’d, 768 F.3d 744 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015).
76. 2011 Wis. Sess. Laws 10d.
77. Frank, 17 F. Supp. 3d at 880.
78. Id. at 863 (“[T]he burdens imposed by Act 23 on those who lack an ID are not justified.”).
79. Id. (“[T]he only practicable remedy is to enjoin enforcement of the photo ID requirement.”).
80. Id.
81. Id. at 880.
82. Id.
83. Id.
court’s ruling on the merits, finding the photo ID law constitutional, and vacated the injunction.\textsuperscript{84}

In \textit{Applewhite v. Commonwealth}, individual plaintiffs and advocacy groups challenged Pennsylvania’s voter identification law in the Commonwealth Court of Pennsylvania. The court concluded that the plaintiffs had “established a clear right to relief from enforcement of the photo ID provisions.”\textsuperscript{85} Despite its reference to the rights of the plaintiffs, the court “permanently enjoin[ed] enforcement of the photo ID provisions” against anyone.\textsuperscript{86} It neither justified the scope of its ruling nor addressed the possibility of tailoring relief solely to the plaintiffs. To the contrary, at one point the court stated, “To the extent Petitioners’ challenge is deemed as applied rather than fa-

\textsuperscript{84} Frank v. Walker, 768 F.3d 744 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2014). Comparable sequences of events have occurred in other challenges to voter identification laws. In \textit{Vessey v. Perry}, 71 F. Supp. 3d 627 (S.D. Tex. 2014), aff’d in part, vacated in part, and remanded sub nom. \textit{Vessey v. Abbott}, 796 F.3d 487 (5th Cir. 2015), the district court ruled in favor of individual and associational plaintiffs’ claims, id. at 632 n.3, 679, that Texas’s voter identification statute violated the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments, id. at 693, 703, as well as the Voting Rights Act, id. at 698, 703. The court entered “a permanent and final injunction against enforcement” of the voter ID law against anyone. Id. at 705. Neither the court nor the parties addressed the possibility of entering a Plaintiff-Oriented Injunction barring enforcement of the law against only the individual plaintiffs, or members of the plaintiff organizations.

On appeal, the Fifth Circuit overturned the trial court’s conclusion that the law was enacted with a discriminatory purpose, but affirmed its ruling that the law had a disparate impact. \textit{Vessey}, 796 F.3d at 519–20. The appellate court vacated the trial court’s injunction and judgment and remanded for further proceedings. \emph{Id.}; see also ACLU v. Santillanes, 508 F. Supp. 2d 598, 605–06 (D.N.M. 2007) (holding that the associational plaintiffs lacked independent organizational standing to pursue their claims and could only assert the rights of their members, but entering Defendant-Oriented Injunction barring the city from enforcing its voter identification law against anyone on Equal Protection grounds), \textit{rev’ed}, 546 F.3d 1313, 1323–25 (10th Cir. 2008) (overturning injunction because the voter identification law was constitutional); \textit{Common Cause/Ga. v. Billups}, 406 F. Supp. 2d 1326, 1329–31 (N.D. Ga. 2005) (entering preliminary Defendant-Oriented Injunction against Georgia’s voter identification law), \textit{subsequent proceeding at} 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006) (entering identical preliminary injunction against amended version of law), \textit{vacated}, 504 F. Supp. 2d 1335, 1372–74 (N.D. Ga. 2007) (denying permanent injunction because the plaintiffs failed to prove their case at trial), \textit{vacated on other grounds}, 554 F.3d 1340, 1355 (11th Cir. 2009) (affirming denial of permanent injunction).


\textsuperscript{86} \textit{Id.} at *24.
cial, the same analysis renders the photo ID provisions . . . unconstitutional as applied to all qualified electors who lack compliant photo ID. 87

In Ohio State Conference of the NAACP v. Husted, a group of individual and associational plaintiffs challenged Ohio legal provisions that eliminated same-day voter registration, as well as early voting on Sundays and in the evening. 88 The district court agreed that the changes likely violated the Equal Protection Clause and Section 2 of the Voting Rights Act. 89 The court stated it was entering a preliminary injunction “with the purpose of preventing irreparable injury, in the form of infringement to their fundamental right to vote, to the Plaintiffs.” 90 It nevertheless enjoined the Ohio Secretary of State from reducing the early voting period, or ending Sunday and evening voting, for anyone during the 2014 general election, 91 rather than only granting additional voting opportunities to the individual plaintiffs or members of the plaintiff organizations. 92

87. Id. at *65.
89. NAACP I, 43 F. Supp. 3d at 847–51.
90. Id. at 852 (emphasis added).
91. Id. at 853.
92. The Sixth Circuit affirmed the preliminary injunction. NAACP II, 768 F.3d at 529. The Supreme Court, however, immediately stayed it, allowing the enjoined Ohio laws to remain in effect. NAACP III, 135 S. Ct. at 42 (order); see Richard L. Hasen, Reining in the Purcell Principle, 43 Fla. St. U. L. Rev. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545676 [http://perma.cc/DDT8-AS56] (discussing the Supreme Court’s reluctance to allow courts to order substantial changes to the rules governing an election shortly before it occurs). Once the 2014 election passed, the Sixth Circuit vacated the preliminary injunction as moot. NAACP IV, 2014 WL 10384647, at *1.

2. Mandatory Issuance of Plaintiff-Oriented Injunctions

Several circuits, in contrast, emphasize the Supreme Court's directive in Califano v. Yamasaki that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." These jurisdictions have held that enjoining enforcement of a law, or otherwise restricting a defendant's conduct, toward parties not before the court violates Califano's proscription because such additional relief generally is unnecessary to make the plaintiffs whole. In their view, a Defendant-Oriented Injunction implicitly converts an individual suit into a de facto class action.

The Supreme Court further bolstered the propriety of Plaintiff-Oriented Injunctions in Doran v. Salem Inn., Inc., in which it held, "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs." Elsewhere, the Court has held that, in the absence of class certifica-

93. 442 U.S. 682, 702 (1979) (emphasis added); see also Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist., 730 F.2d 258, 273–74 (5th Cir. 1984) ("injunctive relief should be no further than necessary to protect federal rights of the parties.").

94. See, e.g., Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154, 169–71 (3d Cir. 2011); Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003); Lowery v. Circuit City Stores, 158 F.3d 742, 766–67 (4th Cir. 1998), vacated and remanded on other grounds, 527 U.S. 1031 (1999); Zeppeda v. INS, 753 F.2d 719, 727–28 & n.1 (9th Cir. 1983); see also Brown v. Trs. of Brown Univ., 891 F.2d 337, 361 (1st Cir. 1989); Williams, supra note 15, at 651.

95. See, e.g., Meyer, 648 F.3d at 171 ("Once decertification became effective, the District Court had no jurisdiction over any of the claims of the putative class members and therefore no ability to order that any relief be granted to any claimant other than [the individual plaintiff]."); Sharpe, 319 F.3d at 273 ("The injunction issued by the district court is overly broad in that the class wide focus is completely unnecessary to provide the named plaintiffs the relief to which they are entitled as prevailing parties."); Lowery, 158 F.3d at 766 (concluding that a Defendant-Oriented Injunction prohibiting racial discrimination "inappropriately grants what amounts to class-wide relief" for individual claims); Brown, 891 F.2d at 361 ("Ordinarily, classwide relief, such as the injunction here which prohibits sex discrimination against the class of Boston University faculty, is appropriate only where there is a properly certified class."); Zeppeda, 753 F.2d at 727–28 & n.1 ("Without a properly certified class, a court cannot grant relief on a class-wide basis.").

96. 422 U.S. 922, 931 (1975); see, e.g., McCormack v. Hiedeman, 694 F.3d 1004, 1019–20 (9th Cir. 2012) (applying Doran to issue Plaintiff-Oriented Injunction); see also United States Dep't of Def. v. Meinhold, 510 U.S. 939, 939 (1993) (order) (staying lower court injunction insofar as it prohibited the military from applying its regulations to anyone other than the individual plaintiff).
tion, an "action is not properly a class action" and should not be treated as such.97 Many courts have held that these principles require them to issue Plaintiff-Oriented Injunctions, prohibiting enforcement of an unconstitutional98 or otherwise invalid99 legal provision only against the individual plaintiffs in a suit while leaving the government defendants free to enforce that provision against anyone else.100

Although such courts recognize that a broader injunction may occasionally be necessary in non-class cases to fully secure the individual plaintiffs' rights, they emphasize that the focus of the order must be on securing the plaintiffs' rights, rather than those of third parties.101 This principle, properly under-

98. See, e.g., Meinhold v. United States Dep’t of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (narrowing district court’s injunction to prohibit the Navy from discharging the individual plaintiff for admitting he was gay, without precluding the Navy from taking such action with regard to anyone else); Vives v. City of New York, 305 F. Supp. 2d 289, 303–04 (S.D.N.Y. 2003) (“Although the Court has no doubt that the enforcement of section 240.30(1) with respect to ‘annoying’ or ‘alarming’ conduct is unconstitutional as applied to anyone . . . it is outside the scope of the Court’s power to enjoin the NYPD from enforcing the statute against non-parties.”), rev’d in part on other grounds, 405 F.3d 115 (2d Cir. 2005) (reversing district court’s ruling that defendants did not have qualified immunity against plaintiff’s claim for damages); Zelotes v. Adams, 363 B.R. 660, 667 (Bankr. D. Conn. 2007) (“An injunction applying only to Plaintiff—i.e., barring Defendant from enforcing § 526(a)(4) against him—will provide Plaintiff with complete relief. It is not necessary to make the injunction any broader.”), rev’d on other grounds, 606 F.3d 34 (2d Cir. 2010).
99. See, e.g., L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) (“An order declaring the hospice cap regulation invalid, enjoining further enforcement against [the individual plaintiff], and requiring the Secretary to re-calculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief. . . . [T]he nationwide injunction must be vacated . . . .”); Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 436 (4th Cir. 2003) (overturning injunction that completely barred the defendant agency from applying its invalid interpretation of a federal statute to all mining within a certain region, because the plaintiff organization alleged injury only in connection with one particular site within that region); Native Angels Home Care Agency, Inc. v. Sebelius, 749 F. Supp. 2d 370, 379 (E.D.N.C. 2010); Russell-Murray Hospice, Inc. v. Sebelius, 724 F. Supp. 2d 43, 60 (D.D.C. 2010).
100. Interestingly, this principle has sometimes been invoked as a response to Younger abstention arguments, to demonstrate that a plaintiff’s constitutional challenges to a state law could proceed in federal court despite pending state-level prosecutions against other people. See, e.g., Mass. Delivery Ass’n v. Coakley, 671 F.3d 33, 43–44 (1st Cir. 2012); Women’s Servs., P.C. v. Douglas, 653 F.2d 355, 358–59 (8th Cir. 1981).
stood, is a narrow exception to the preference for Plaintiff-Oriented Injunctions. A court may issue a Defendant-Oriented Injunction only if widespread relief is “inevitable to remedy the individual plaintiffs’ rights,” as in redistricting or desegregation cases.

In *Virginia Society for Human Life, Inc. v. FEC*, for example, an anti-abortion non-profit corporation challenged an FEC regulation defining the term “express advocacy.” The corporation argued that the definition was impermissibly broad, because it caused groups to become subject to the Federal Election Campaign Act’s disclosure and other administrative requirements simply for engaging in speech concerning political issues (such as abortion), rather than speech specifically aimed at impending elections. The district court agreed that the regulation violated the First Amendment and enjoined the FEC from enforcing it against the plaintiff corporation or “any other party in the United States of America.”

The Fourth Circuit agreed that the regulation was unconstitutional, but held that the “the district court abused its discretion by issuing a nationwide injunction,” because it was “broader than necessary to afford full relief to [the corporation].” The court added that “[p]reventing the FEC from enforcing [the regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff].” It also pointed out that a nationwide injunction would prevent other circuits from considering the regulation’s constitutional-

102. Zepeda v. INS, 753 F.2d 719, 728 n.1 (9th Cir. 1985).
103. See supra note 15.
104. 263 F.3d 379, 381 (4th Cir. 2001) (citing 11 C.F.R. § 100.22(b) (2000)).
105. Id. at 381–82.
106. Id. at 382.
107. Id. at 392.
108. Id. at 393.
109. Id.
ity for themselves, giving the Fourth Circuit’s ruling binding effect outside of the court’s geographic jurisdiction.\textsuperscript{110}

The same issue arose in \textit{N.Y. Progress & Protection PAC v. Walsh}.\textsuperscript{111} The plaintiff was a state-level independent-expenditure-only political committee (colloquially, a “SuperPAC”) that challenged the constitutionality of New York’s contribution limits as applied to it. The SuperPAC pointed out that the Supreme Court had held that independent expenditures are not corrupting and the government therefore may not limit a person’s ability to make such expenditures. It argued that the government likewise should be barred from limiting the amount that a person may contribute to a SuperPAC, because such entities exclusively make independent expenditures.\textsuperscript{112}

Without addressing the merits of the SuperPAC’s claims, the district court denied its motion for a preliminary injunction because it would be against the public interest.\textsuperscript{113} The court also expressed “confusion” over whether the requested injunction would apply to all SuperPACs, or only the particular plaintiff before it.\textsuperscript{114} It stated, “Because Plaintiff brings this challenge as applied to independent expenditure-only organizations and solely on [its own] behalf, this Court may lack the authority to order enjoinderment of the statute beyond the parties to this case.”\textsuperscript{115} The court then expressed concern that, if its injunction ran solely to the SuperPAC plaintiff, that entity’s voice would be “amplified] . . . over the voices of other political committees.”\textsuperscript{116}

On appeal, the Second Circuit reversed the district court’s ruling, holding that the First Amendment prohibits states from limiting contributions to SuperPACs because independent expenditures do not pose a substantial risk of corruption.\textsuperscript{117} It agreed with the district court that a preliminary injunction

\textsuperscript{110} Id.
\textsuperscript{112} Id. at *3.
\textsuperscript{113} Id. at *13–14.
\textsuperscript{114} Id. at *18–19.
\textsuperscript{115} Id. at *20.
\textsuperscript{116} Id.
\textsuperscript{117} N.Y. Prog. & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013), \textit{on remand} 17 F. Supp. 3d 319 (S.D.N.Y. 2014).
would apply only to the plaintiff SuperPAC in that case.\textsuperscript{118} It held that such a limited injunction would not cause “severe disruptions to the election process itself” or other “sufficiently particularized” injuries that “outweigh[ed] the irreparable harm that stems from restrictions on political speech.”\textsuperscript{119} On remand, the district court begrudgingly enjoined the defendants from enforcing New York’s contribution limit against the SuperPAC plaintiff and its donors.\textsuperscript{120}

3. Intermediate or Compromise Approaches

Many jurisdictions have adopted compromise approaches. Several courts have emphasized that they have discretion as to whether to issue a Plaintiff- or Defendant-Oriented Injunction.\textsuperscript{121} Others have held that, while permanent injunctions must be Defendant-Oriented, at least when administrative regulations are invalidated under the Administrative Procedure Act, preliminary injunctions may be Plaintiff-Oriented.\textsuperscript{122}

Some courts, particularly those within circuits that generally frown upon Defendant-Oriented Injunctions, effectively apply compromise approaches through their willingness (to the point of inaccuracy) to hold that a Defendant-Oriented Injunction is necessary to fully enforce a plaintiff’s rights. In \textit{Bresgal v. Brock},\textsuperscript{123} for example, a few migrant foresters and an association challenged Department of Labor regulations\textsuperscript{124} that excluded commercial forestry workers from the Migrant and Seasonal Agricultural Worker Protection Act.\textsuperscript{125} The foresters argued that they were entitled to the protections that the Act granted to “agricultural workers.”\textsuperscript{126} Both the district court and Ninth

\textsuperscript{118} Id. at 489.
\textsuperscript{119} Id.
\textsuperscript{120} N.Y. Prog. & Prot. PAC v. Walsh, 17 F. Supp. 3d 319, 323 (S.D.N.Y. 2014).
\textsuperscript{123} 843 F.2d 1163, 1165 (9th Cir. 1987).
\textsuperscript{124} 29 C.F.R. §§ 780.115, 780.200 (1982).
\textsuperscript{125} 29 U.S.C. § 1802(3) (1982).
\textsuperscript{126} Bresgal, 843 F.2d at 1165–66.
Circuit agreed with the plaintiffs' interpretation of the law and held that the regulation was invalid.\(^{127}\)

The district court entered an injunction requiring the Department of Labor to apply the Act to foresters throughout the nation.\(^{128}\) On appeal, the Government argued that the injunction should be narrowed, to require the Department of Labor to apply the Act's protections solely to the individual plaintiffs.\(^{129}\) The Ninth Circuit rejected the Government's argument. It agreed that, under its prior ruling in *Zepeda*,\(^{130}\) courts must "narrowly tailor[]" relief to the "specific harm shown" when it can be "structured on an individual basis."\(^{131}\) Without addressing the involvement of the associational plaintiff, the Ninth Circuit invoked the principle that "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled."\(^{132}\)

The court asserted that the Act could not be enforced "on anything other than a nationwide basis."\(^{133}\) It went on to conclusorily declare, without explanation, "The Act cannot be enforced only against those contractors who have dealings with named plaintiffs, or against those contractors only insofar as they have dealings with named plaintiffs."\(^{134}\) The court also summarily rejected the argument, again without explanation, that the effects of its ruling should be confined to the Ninth Circuit, to allow the Government to continue applying its interpretation to non-parties in other jurisdictions.\(^{135}\) The court did not explain why it was necessary to compel the Department of Labor to extend the Act to all foresters, as well as to all contractors who hire foresters, rather than solely the named plaintiffs and their present and

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127. *Id.* at 1168.
128. *Id.* at 1169.
129. *Id.*
130. *Zepeda* v. INS, 753 F.2d 719 (9th Cir. 1983).
132. *Id.* at 1170-71 (emphasis omitted).
133. *Id.* at 1171.
134. *Id.*
perhaps future employers. Bresgal is an example of a court adopting a sweeping, and likely inaccurate, interpretation of the "complete relief" exception to circuit precedents mandating Plaintiff-Oriented Injunctions.

C. Theoretical Tensions Underlying the Dispute

Much of the difficulty concerning the choice between Plaintiff- and Defendant-Oriented Injunctions stems from three related dichotomies. The first is between substance and procedure. It is common to say, as a matter of substantive constitutional law, that when a court determines a law is facially invalid, "the state may not enforce it under any circumstances."\textsuperscript{136} Likewise, when a statute is held unconstitutional as applied in certain cases, courts and commentators speak as if the government may not enforce it under those circumstances.\textsuperscript{137}

Procedural law, however, tells a very different story. A judgment generally does not apply beyond the immediate parties to a case.\textsuperscript{138} Moreover, individual plaintiffs in non-class cases in federal court generally lack Article III standing to seek relief for anyone other than themselves;\textsuperscript{139} an injunction awarding relief solely in their favor is sufficient to moot their claims. Completely enjoining a government defendant from enforcing an unconstitutional legal provision effectively converts an individual lawsuit into a class action without satisfying the requirements of Rule 23.\textsuperscript{140}

Allowing individual plaintiffs to obtain injunctions to enforce the rights of others outside the context of class-action litigations is no less problematic. The federal courts have been asked to enjoin a state defendant from enforcing a state law, and have found the state law to be facially invalid.\textsuperscript{141} The court in Bresgal concluded that the suit was "plainly appropriate" because it "achieves precisely the ends sought under the `complete relief' exception."\textsuperscript{142} Indeed, the court in Bresgal concluded that the suit was "plainly appropriate" because it "achieves precisely the ends sought under the `complete relief' exception."\textsuperscript{143}

\textsuperscript{136} Dorf, supra note 10, at 236; see also Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (holding that a facially unconstitutional law "is unconstitutional in all of its applications").

\textsuperscript{137} Dorf, supra note 10, at 236 ("[W]hen a court holds a statute unconstitutional as applied to particular facts, the state may enforce a statute in different circumstances.").

\textsuperscript{138} Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party . . . ."). A lawsuit may bind certain third parties, such as the litigants' privies, under certain narrow circumstances. See Taylor v. Sturgell, 553 U.S. 880, 893–95 & 894 n.8 (2008).

\textsuperscript{139} Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."); accord Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013).

\textsuperscript{140} Fed. R. Civ. P. 23(a), (b)(2).
gation also may violate the rights of those third parties not before the court. The plaintiffs are permitted to leverage the rights of third parties over whom the court has not acquired personal jurisdiction, without the consent of those third parties—indeed, often without their knowledge—and without giving them an opportunity to opt out. Government defendants may be enjoined from enforcing a law against people who support the measure, would prefer or even benefit from its enforcement, and would gladly refrain from enforcing their rights against it. When courts grant sweeping injunctive relief against unconstitutional or otherwise invalid measures in individual-plaintiff cases, they generally fail to consider or address these factors. Thus, tension exists between the apparent dictates of substantive law, which contemplates nullification of a legal provision when a court (apparently, any court) determines it is unconstitutional or otherwise invalid, and the procedural, jurisdictional, and related limits of the process through which courts make such determinations.

A second important dichotomy that exacerbates the difficulty of determining the proper scope of injunctive relief concerns the power of district courts themselves. On the one hand, a court has the power to certify statewide or even nationwide classes and issue injunctions restricting a defendant's behavior anywhere in a state or the nation. On the other hand, most trial and intermediate appellate courts tend to have limited territorial jurisdictions; their legal opinions have no precedential force outside those boundaries. The opinions of most trial courts, including federal district courts, generally lack precedential effect even within their territorial jurisdictions. Moreover, government defendants generally are not subject to nonmutual offensive collateral estoppel. In other words, when a

142. Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 134.02[1][d] (3d ed. 2011))); see also Duran-Quezada v. Clark Constr. Group, LLC, 582 F. App’x 238, 239 (4th Cir. 2014) (per curiam) ("[T]he decisions of other circuits are not binding . . . ."); Hill v. Kan. Gas Serv. Co., 323 F.3d 858, 869 (10th Cir. 2003) (same). A few states, such as Maryland, have a single, centralized intermediate appellate court that, like the state supreme court, exercises statewide jurisdiction. See MD. CODE ANN., CTS. & JUD. PROC. §§ 1-401 to 1-403 (West 2016).
143. Camreta, 131 S. Ct. at 2033 n.7.
government official or agency loses a case concerning the validity or proper interpretation of a legal provision, it may attempt to relitigate and prevail on the same points against different opponents.\textsuperscript{144} Additionally, trial court opinions generally are not even considered in determining whether a government official may be stripped of qualified immunity because the law she allegedly violated was "clearly established."\textsuperscript{145}

A trial court's opinion holding a law unconstitutional or otherwise invalid generally has the legal status of a law review article: the ruling is solely of persuasive value, both within the court's jurisdiction and elsewhere.\textsuperscript{146} Thus, the scope of a trial court's power when invalidating a legal provision depends in large part on the type of tool it chooses to use.\textsuperscript{147} Allowing a trial court to enter an injunction that sweeps beyond the parties to a given case gives the court's opinion the force of law throughout the state or nation and effectively nullifies government defendants' prerogative to avoid non-mutual offensive collateral estoppel.\textsuperscript{148} Issuing a Plaintiff-Oriented Injunction, in contrast, tailors the scope of injunctive relief more closely to the territorial scope of a trial court's other powers.

The final dichotomy giving rise to these issues lies in the competing roles of the federal judicial system.\textsuperscript{149} Most rules governing the judicial process are crafted to facilitate traditional private litigation between parties concerning their re-

\textsuperscript{145} See supra note 55.
\textsuperscript{146} Cf. Baudo, supra note 49, at 1844–45 (arguing that the executive branch is obligated to obey court judgments, but not necessarily to adhere to judicial opinions); Merrill, supra note 49, at 44 (same). \textit{But see} Cooper v Aaron, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land . . . ."). Larry Alexander & Frederick Schauer, \textit{Defending Judicial Supremacy: A Reply}, 17 CONST. COMMENT 455 (2000) (arguing that judicial opinions have the same force of law as judgments).
\textsuperscript{147} Morley, Public Law at the Cathedral, supra note 30, at 2461–65; see also Merrill, supra note 49, at 58–59.
\textsuperscript{148} Cf. Walker, supra note 23, at 1134–35. Furthermore, important constitutional issues are prevented from "percolating" through the lower courts, to give different courts the opportunity to craft competing approaches for the Supreme Court to consider. \textit{See} Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").
\textsuperscript{149} See Walker, supra note 23, at 1134.
spective rights and duties toward each other.\textsuperscript{150} Even most litigation against the government is of this nature. In a typical Social Security case, for example, a claimant may challenge the interpretation or validity of a Social Security Administration regulation in order to increase the amount of her own benefits, without regard to whether or how the regulation is enforced against others.\textsuperscript{151} Or in a criminal case, a defendant asserting a constitutional defense to a statute generally is focused primarily on avoiding conviction, rather than preventing the statute from being applied to others.\textsuperscript{152} The real parties-in-interest in such suits are generally involved as litigants.\textsuperscript{153}

In contrast, many plaintiffs in election-related lawsuits—and especially the nonprofit organizations that coordinate the litigation and represent the plaintiffs—seek not just to enforce their own rights, but to completely invalidate allegedly unconstitutional election regulations to ensure they cannot be applied to anyone. The main focus of the litigation is the overall conduct of the election as a whole. Such plaintiffs often seek broad court orders allowing others to contribute\textsuperscript{154} or spend\textsuperscript{155} more money in connection with the election; making it easier for others to vote; or increasing the potential (however minimally) for invalid, unauthorized, improperly cast, or fraudulent votes to dilute or nullify the votes of duly qualified and eligible voters.\textsuperscript{156} At a minimum, the relief they seek can contribute to, or

\textsuperscript{150} Lon L. Fuller, The Form and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) (describing traditional model of adjudication); see also Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282–88 (1976).
\textsuperscript{151} See, e.g., Shinn v Comm'r of Soc. Sec., 391 F.3d 1276 (11th Cir. 2004).
\textsuperscript{153} Fuller, supra note 150, at 369, 385–87.
\textsuperscript{154} See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1445 (2014).
\textsuperscript{156} Anderson v. United States, 417 U.S. 211, 226 (1974) (holding that a person has the constitutional right to have his or her vote be “given full value and effect, without being diluted or distorted by the casting of fraudulent” or otherwise invalid ballots); see also Reynolds v. Sims, 377 U.S. 553, 555 (1964) (holding that a person’s right to vote is “denied by a debasement or dilution of the weight of [his or her] vote just as effectively as by wholly prohibiting the free exercise of the franchise”); Baker v. Carr, 369 U.S. 186, 208 (1962) (holding that the right to vote is violated by “dilution” of people’s votes through means such as “stuffing of the ballot box”); generally Morley, State Constitutions, supra note 8, at 192–93 (discussing the “defensive” right to vote).
detract from, the perceived fairness or integrity of the system.\textsuperscript{157} Such cases thus resemble the type of public law structural reform litigation discussed by Owen Fiss\textsuperscript{158} and Abram Chayes.\textsuperscript{159} Courts that view their role to be the defense of public values and constitutional principles, rather than simply the adjudication of private disputes, will strongly prefer Defendant-Oriented Injunctions.\textsuperscript{160}

Broad Defendant-Oriented Injunctions flow naturally from substantive constitutional or administrative law: when a legal provision is invalid, many courts feel compelled to prevent it from being applied to anyone.\textsuperscript{161} They are empowered to do so by their authority to enter broad nationwide injunctions, and such relief is consistent with the Fiss-Chayes conception of courts as guarantors of public values and constitutional principles. Narrower Plaintiff-Oriented Injunctions, in contrast, flow from the procedural and jurisdictional limitations to which courts are generally subject: they may award relief only to plaintiffs with standing, their powers are constrained by Rule 23, their opinions have the force of law only within a limited geographic region, and their main focus is on resolving a particular dispute and enforcing the rights of the litigants before them. Both of these visions of the federal judiciary are compelling for different reasons and can claim strong support, making the choice between Plaintiff- and Defendant-Oriented Injunctions that much more difficult.

\textsuperscript{157} See Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); Buckley v. Valeo, 424 U.S. 1, 25–29 (1976) (recognizing that the government’s interest in preventing the “appearance of corruption” is as compelling as its interest in combating actual corruption itself); see generally Adam M. Samaha, Regulation for the Sake of Appearance, 125 HARV. L. REV. 1563, 1568 (2012) (noting that appearances can be important for their own sake because they influence the underlying reality, creating a type of self-fulfilling prophecy).

\textsuperscript{158} Owen Fiss, The Forms of Justice, 93 HARV. L. REV. 1, 18–29 (1978); see also Fiss, supra note 37, at 94.

\textsuperscript{159} Chayes, supra note 150, at 1284; see also Miller, supra note 52, at 583 (noting that, beginning in the last half of the twentieth century, the “form” of adjudication has remained the same, but the “substance” of what the Court is actually doing has dramatically changed).

\textsuperscript{160} Wilton, supra note 23, at 615.

\textsuperscript{161} See Walker, supra note 23, at 1121.
II. THE PROBLEMS WITH DEFENDANT-Oriented INJUNCTIONS

Individual plaintiffs who challenge the validity of legal provisions often seek Defendant-Oriented Injunctions completely prohibiting their enforcement, rather than Plaintiff-Oriented Injunctions that only bar the defendants from applying those provisions to the plaintiffs themselves. As discussed above, courts often are receptive to such requests.\textsuperscript{162} An invalid legal provision often applies in the same way to many people, and suffers from the same deficiency in most or all of those cases. In the words of Richard Nagareda, individual challenges to such provisions frequently involve “embedded aggregation,”\textsuperscript{163} because the court’s reasoning would apply equally to numerous people beyond just the plaintiff.

Another reason that Defendant-Oriented Injunctions appeal to many courts is that a Plaintiff-Oriented Injunction grants special legal protections only to the plaintiffs in the case. Alexandra Lahav explains that “[p]rocess equality . . . entitle[s] similarly situated individuals to similar outcomes and, as a corollary, reject[s] any process that results in unequal treatment of similarly situated litigants without explanation, because such a process appears arbitrary.”\textsuperscript{164} With a Plaintiff-Oriented Injunction, the individual plaintiffs who brought the suit are protected from the unconstitutional provision, but the government remains free to apply it to other, identically situated people.\textsuperscript{165}

\begin{footnotesize}
\footnotesize\textsuperscript{162} See supra Part I.B.1.

\footnotesize\textsuperscript{163} Richard Nagareda, Embedded Aggregation in Civil Litigation, 95 CORNELL L. REV. 1105, 1108, 1112 (2010) [hereinafter Nagareda, Embedded Aggregation]; Richard Nagareda, The Proexistence Principle and the Structure of the Class Action, 103 COLUM. L. REV. 149, 227 (2003) [hereinafter Nagareda, Proexistence Principle] (“[T]he generally applicable conduct to be enjoined or declared unlawful . . . make[s] interdependent the claims of would-be class members.”); Garrett, supra note 15, at 594, 647 (arguing that “[c]onstitutional rights and remedies are not just individual rights,” particularly with regard to voting rights); Carroll, supra note 20, at 2019 (arguing that lawsuits have “an inherently aggregate dimension” where the plaintiffs seek injunctive relief “against a policy or practice that applies to a substantial number of persons on a generalized basis”).

\footnotesize\textsuperscript{164} Alexandra Lahav, Due Process and the Future of Class Actions, 44 LOY. U. CHI. L.J. 545, 556 (2012); see also Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 256 (1987) (noting that, in cases where plaintiffs seek certain kinds of injunctive relief, “the failure to provide for class treatment could result either in contradiction or inconsistency”).

\footnotesize\textsuperscript{165} See Morley, Public Law at the Cathedral, supra note 30, at 2481–83 (explaining the importance of the distinction between actually being protected by an injunct-
Leaving some rightholders unprotected also can lead to subsequent lawsuits, needlessly wasting judicial resources to re-litigate the same issues and creating a risk of inconsistent verdicts from different courts. 166

On the other hand, issuance of a Defendant-Oriented Injunction in an individual-plaintiff lawsuit effectively turns the matter into a "de facto class action," typically without addressing the numerous constitutional, procedural, practical, and policy considerations that such relief implicates. First, the plaintiffs usually lack standing to protect the rights of third parties, and particularly the rights of the public as a whole. Second, relatedly, Defendant-Oriented Injunctions may violate the due process rights of non-parties to the litigation. By seeking a Defendant-Oriented Injunction, individual plaintiffs leverage the rights of third parties who may not even be subject to the court’s personal jurisdiction, without their consent, in order to obtain more sweeping relief. Third, Defendant-Oriented Injunctions have unfairly asymmetric preclusive effects. A successful plaintiff can bind the government defendants regarding people who are not before the court. If the defendants prevail, in contrast, that judgment generally does not preclude subsequent actions, either in the same court or other jurisdictions, by third parties.

Fourth, Defendant-Oriented Injunctions run contrary to the general rules governing judgments, and effectively provide class-wide relief despite the plaintiffs’ failure to satisfy Federal Rule of Civil Procedure 23. Thus, the policy considerations that underlie both the law of judgments and Rule 23 weigh strongly against Defendant-Oriented Injunctions in non-class cases. Finally, by issuing a Defendant-Oriented Injunction, a court applies its interpretation of the law to rightholders and claims

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outside the scope of its limited territorial jurisdiction, where its opinions lack precedential effect.

The concerns set forth in this Part may be read in two different lights. In their strongest form, they are reasons why courts should not grant Defendant-Oriented Injunctions in non-class cases. This Part instead may be read as identifying the various doctrines and rules that would have to be changed, or at least adequately addressed, in order to make Defendant-Oriented Injunctions jurisdictionally, procedurally, and doctrinally permissible in non-class cases. At a minimum, courts should recognize the distinction between Plaintiff- and Defendant-Oriented Injunctions, and avoid choosing between them on a largely ad hoc, subjective basis with little apparent attention to these issues. Part IV of this Article offers one possible approach that alleviates these concerns.

A. Standing

Perhaps the most fundamental problem with Defendant-Oriented Injunctions, particularly in federal court, is that courts likely lack subject-matter jurisdiction to grant them. Federal courts are limited to adjudicating live “cases” and “controversies.” As this “case and controversy requirement,” among other things, allows federal courts to adjudicate only disputes in which the plaintiff has standing.

To have standing, a plaintiff must show that he has suffered injury-in-fact, that the defendant caused it, and—most importantly from a remedial perspective—that the “injury will be ‘redressed by a favorable decision.’" As the redressability prong of this test implies, a plaintiff must have standing not


only to assert a cause of action, but also to pursue each form of relief she seeks.\footnote{171}

Although a plaintiff has standing to seek injunctive relief to protect her own rights,\footnote{172} Article III does not permit federal courts to grant more expansive relief “cover[ing] additional actions that produce no concrete harm to the original plaintiff.”\footnote{173} A plaintiff

cannot sidestep Article III’s requirements by combining a request for injunctive relief for which he has standing with a request for injunctive relief for which he lacks standing. And for the same reason, a plaintiff cannot ask a court to expand an existing injunction unless he has standing to seek the additional relief.\footnote{174}

Thus, federal courts lack power to adjudicate requests for injunctive relief that would not prevent likely, impending, or ongoing harm to the plaintiff herself.\footnote{175}

Defendant-Oriented Injunctions violate these constitutional standing limitations. Most constitutional rights—particularly in the election law context—are “divisible,”\footnote{176} in that a court can grant meaningful, complete relief just for the plaintiff while leaving the status quo undisturbed for everyone else. When constitutional rights are divisible, a Plaintiff-Oriented Injunction requiring the government defendant to respect the plaintiff’s rights, or to refrain from enforcing a challenged legal provision against the plaintiff, redresses the harm the plaintiff

\footnote{171. Camreta v. Greene, 131 S. Ct. 2020, 2041 (2011) (“Plaintiffs must establish standing as to each form of relief they request . . . .”); accord Summers v. Earth Island Inst., 555 U.S. 486, 493 (2009); see also Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (“To have standing, a litigant must seek relief for an injury that affects him in a ‘personal and individual way.’” (quoting Lujan, 504 U.S. at 560 n.1)).}


174. Id. at 731 (Scalia, J., concurring); see Steel Co., 523 U.S. at 107 (holding that relief that does not remedy the plaintiff’s injury “cannot bootstrap a plaintiff into federal court”); see also Sprint Commc’ns Co., L.P. v. APCC Servs., 554 U.S. 269, 303 (2008) (Roberts, C.J., dissenting) (“The Court’s emphasis on the party’s injury makes clear that the basis for rejecting standing in Steel Co. was the fact that the remedy sought would not benefit the party before the Court.”) (emphasis omitted).


176. See supra note 18 and accompanying text.
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faces. A court orders that a plaintiff’s rights be enforced, but not redressed by others would not redress any harm to that plaintiff. A plaintiff lacks standing to seek such broader relief, and it would not be a proper exercise of a court’s Article III authority to grant it. Lujan’s redressability requirement thus prevents a plaintiff from bootstrapping, based on the injury she has suffered to her own rights, to seek an injunction protecting the rights of others.

Of course, to grant complete relief to a plaintiff, a court sometimes must issue an order which winds up benefiting other people. For example, as discussed earlier, if a plaintiff demonstrates that legislative districts have been drawn unconstitutionally, there is no way for the court to order a set of constitutionally valid districts to be drawn for the plaintiff, while allowing the invalidated districts to remain in force for everyone else. Apart from such cases involving “indivisible” rights, however, individual plaintiffs lack Article III standing to seek Defendant-Oriented Injunctions in non-class cases.

A Defendant-Oriented Injunction cannot be analogized to a prophylactic injunction that attempts to prevent future violations of a plaintiff’s rights by prohibiting more conduct than is actually unconstitutional or illegal. A Defendant-Oriented Injunction enforces the rights of people other than the plaintiff, despite the absence of any additional marginal benefit concerning the plaintiff’s rights. Although courts have broad eq

177. See supra note 94 and accompanying text; see also L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) (“An order declaring the hospice cap regulation invalid, enjoining further enforcement against [the individual plaintiff], and requiring the Secretary to recalculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief ... [T]he nationwide injunction must be vacated.”); Weber, supra note 16, at 361.
178. Carroll, supra note 20, at 2031.
179. See, e.g., Capogrosso v. 30 River Ct. E. Urban Renewal Co., 482 F. App’x 677, 681 (3d Cir. 2012) (holding that a tenant’s attempt to seek relief “on behalf of the other former tenants is precisely the sort of claim that does not confer standing”).
180. See supra note 174.
181. See supra note 15.
182. Cf. supra notes 36–37 and accompanying text.
uitable discretion in crafting the scope of injunctive relief. Article III imposes outer bounds on the scope of that discretion. Relief that goes beyond redressing a plaintiff's injuries is beyond the court's authority.

Defendant-Oriented Injunctions also exceed prudential limitations on jus tertii standing. The general prudential prohibition on jus tertii standing provides that, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." As the Supreme Court declared in Broadrick v. Oklahoma, "constitutional rights are personal and may not be asserted vicariously." Because jus tertii is a prudential doctrine, the Court has crafted some exceptions, allowing individuals to sue to enforce the rights of others in certain situations, such as where the plaintiff has a special relationship with those third parties or in First Amendment overbreadth cases. Even when a plaintiff may invoke the rights of third parties, however, Article III still requires the plaintiff to demonstrate that the relief she seeks will redress an injury to herself.

183. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").
185. Warth v. Seldin, 422 U.S. 490, 499 (1975); see also Allen v. Wright, 468 U.S. 737, 751 (1984) ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights . . . .").
189. Allen, 468 U.S. at 751 (holding that, even when jus tertii standing is permissible as a prudential matter, the "core component" of standing doctrine "derived directly from the Constitution" requires the plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be
Defendant-Oriented Injunctions are inconsistent with restrictions on *jus tertii* standing. Allowing individual plaintiffs to seek Defendant-Oriented Injunctions that completely prohibit government defendants from enforcing challenged legal provisions enables them to assert the rights of third parties with whom they lack any special relationship. Such a prerogative turns every individual plaintiff into a roving private attorney general. As the Ninth Circuit held:

[O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a "self-chosen representative" and "volunteer champion," must qualify under rule 23. To be sure, failure to grant class relief may leave a government official—temporarily—in a position to continue treating nonparties in a manner that would be prohibited with respect to named plaintiffs. But that is the nature of the relief.

Article III's standing requirements therefore generally bar individual plaintiffs from seeking, and courts from granting, Defendant-Oriented Injunctions in non-class cases.

B. *Due Process and Other Righolders*

A second problem with Defendant-Oriented Injunctions is that they infringe the due process rights of the third parties whose underlying substantive rights the court is adjudicating and enforcing. When a plaintiff seeks a Defendant-Oriented Injunction, it is typically leveraging the rights of third parties who are not before the court to obtain an order that sweeps far more broadly than is necessary to enforce the plaintiff's own rights. All alleged righolders across the state or nation be-

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redressed by the requested relief"); *see* e.g., Craig v. Boren, 429 U.S. 190, 194 (1976) (confirming that the plaintiff had his own, independent Article III standing before permitting him to assert the rights of others through *jus tertii* standing).

190. *Cf.* *Boldt v. Zerger*, 414 U.S. at 610–11 ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.").


192. *Cf.* Williams, *supra* note 15, at 604 ("Compelled adjudication of claims in a mandatory class proceeding deprives individuals of this right to exclude by allowing their property (i.e., their legal claims) to be used by someone else (i.e., the class representatives and their attorneys) without their consent and for a purpose with which they may not agree.").
come, in effect, members of an implied class, despite the fact that they have not been brought before the court, been notified about the case, or consented to such representation. Many of the rightholders may disagree with the plaintiff's proffered interpretation of the constitutional or other legal provisions at issue, or even support the statutes or regulations the plaintiff is challenging. 195

Indeed, it can be argued that many challenges to election-related laws involve a clash of constitutional rights. 194 The right to vote is comprised of two complementary component rights: the "affirmative" right to cast a ballot, and the "defensive" right to have that ballot be counted and "given full value and effect, without being diluted or distorted by the casting of fraudulent" or otherwise invalid ballots. 195 Many challenges to laws regulating the electoral process seek to vindicate the affirmative right to vote at the potential expense of the defensive right to vote. Voter identification statutes, proof-of-citizenship requirements, reductions in early voting periods, limits on absentee ballots, and other such regulations can make it more difficult for some people to vote, while helping ensure that legitimate, properly cast votes are not diluted or nullified by invalid, improperly cast, or fraudulent votes. Many voters might reasonably prefer to have election regulations in place to help protect their defensive right to vote, rather than have their affirmative right to vote asserted on their behalf.

A Defendant-Oriented Injunction implicates the rights of non-plaintiff third parties in many ways. Most basically, such an order arguably violates their due process right to have a court perfect personal jurisdiction over them through service of

193. See Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) ("Federal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons not parties to the litigation," in part because "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights . . . do not wish to assert them . . . ."); Rubenstein, supra note 20, at 1650 (recognizing that rightholders may not support or wish to be part of a civil rights suit, and would "rather not have the case in court"); Maximilian A. Grant, Comment, The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions, 63 U. Chi. L. Rev. 239, 246 (1996) ("[W]here a class action seeks equitable relief in pursuit of political or ideological goals, class cohesion cannot be presumed."); Derrick A. Bell, Jr., Serving Two Masters: Integration, Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 505–11 (1976).
process before adjudicating and enforcing their constitutional or other legal entitlements.196 When a plaintiff initiates judicial proceedings, it invokes and thereby implicitly consents to the court’s personal jurisdiction.197 When a person becomes an involuntary plaintiff through the actions of some other litigant, however, she should be entitled to the same service-of-process protections as a defendant.198

Relationally, Defendant-Oriented Injunctions may violate the due process rights of third parties by allowing a court to adjudicate and enforce their rights without first giving them notice and an opportunity to be heard or opt out.199 One might respond that such third parties’ interests are “virtually represented” by the individual plaintiffs in the case, but the Supreme Court largely rejected the concept of virtual representation in Taylor v. Sturgell.200

Defendant-Oriented Injunctions also might violate the substantive due process right of third parties to control their own causes of action. A legal claim that is recognized by federal or applicable state law—a chose in action—is a form of property protected by the Due Process Clause.201 As Ryan Williams ar-

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196. See Miss. Publ’g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946); see also Fed. R. Civ. P. 4(k)(1)–(2).
197. See Adam v. Saenger, 303 U.S. 59, 67–68 (1938) (“The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.”); Merchs. Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 289 (1907) (holding that, by filing a counterclaim, a defendant effectively becomes a plaintiff and submits to the personal jurisdiction of the court).
198. See Indep. Wireless Tel. Co. v. Radio Corp. of Am., 269 U.S. 459, 473 (1926) (holding that a court may join a third party as a plaintiff without its consent only if it is outside the court’s jurisdiction for service of process and it has received prior notice of the proceedings).
199. Cf. Weber, supra note 16, at 391, 394 (making the same due process argument regarding members of a class certified under Rule 23(b)(2) who were not given an opportunity to opt out); see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (emphasizing that notice and an opportunity to be heard are central to the concept of due process). But see infra notes 204–08, 274–76 and accompanying text (explaining that such purported rights are not available in Rule 23(b)(2) class actions, and that the Court has never decided whether the Due Process Clause protects them in that context).
gues, an important component of such an entitlement is “the right to decide whether or not to sue” to enforce it. He explains, “Judicial recognition of... an autonomy-based right to seek vindication of one’s legal claims in court seems to strongly support the existence of a corollary autonomy-based right to refrain from asserting those claims as well.” A Defendant-Oriented Injunction deprives rightholders of their constitutionally protected interest in deciding for themselves whether to assert and seek enforcement of their underlying rights.

The Supreme Court held in Phillips Petroleum Co. v. Shutts that putative class members outside of a court’s territorial jurisdiction have a due process right to opt out of class actions seeking monetary damages. It left open the question of whether putative class members may claim a similar due process right to opt out of suits for injunctive relief, but later noted the “serious possibility” that a denial of such opt-out rights would violate due process. Mark C. Weber agrees that Shutts’s reasoning carries over to the context of injunctions, but some lower courts have rejected this conclusion.

Perhaps the most powerful response to these objections is that rightholders are already deprived of control over their causes of action, without notice or an opportunity to be heard, in the context of Rule 23(b)(2) lawsuits. A Defendant-Oriented Injunction is a milder tool than a Rule 23(b)(2) lawsuit because it allows third parties to reap the benefits of a favora-

203. Id. at 629; cf. Weber, supra note 16, at 390 (discussing the right to “use a system of adjudication to obtain one’s own decision”).
204. 472 U.S. 797, 812 (1985) (“[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”).
205. Id. at 811 n.3 (“We intimate no view concerning other types of class actions, such as those seeking equitable relief.”).
209. See infra Part III.A.
ple ruling without subjecting them to the res judicata effects of an unfavorable one.210 On the other hand, commentators have also challenged the constitutionality of Rule 23(b)(2) on these very grounds;211 and the Supreme Court has not yet squarely addressed the issue.212

Even if the concerns identified in this Section do not amount to due process violations, it still seems unfair and undesirable to allow an individual plaintiff to assert the claims of third parties who have not formally become part of the lawsuit, who have received no notice or chance to opt out of the proceedings, and who may affirmatively oppose the plaintiff’s lawsuit or requested relief. Defendant-Oriented Injunctions allow plaintiffs to hijack the rights of third parties, without their knowledge or consent and potentially against their will, for the purpose of obtaining broader relief than is necessary to enforce those plaintiffs’ rights. Such measures undermine the autonomy interests of rightsholders over their own supposed entitlements.

Alternatively, Rule 23(b)(2) already creates a mechanism through which an individual plaintiff can bring the claims of other, similarly situated rightsholders before the court. The availability of this alternative counsels against allowing courts to grant broad, Defendant-Oriented Injunctions in cases solely involving individual plaintiffs, where a Rule 23(b)(2) class has not been certified.213

C. Asymmetric Preclusion

A third concern about Defendant-Oriented Injunctions is that they violate the principle of “preclusive symmetry.”214 Preclu-

210. See infra Part II.C.
211. Williams, supra note 15, at 623, 629; Weber, supra note 16, at 401 (arguing that members of a Rule 23(b)(2) class should be subject to res judicata only if they were given notice and an opportunity to opt out of the proceedings); see also Grant, supra note 193, at 251-56 (arguing that the inclusion of class members in a lawsuit without giving them notice and an opportunity to opt out violates their First Amendment right to refrain from associating themselves with litigation they may oppose).
212. See supra notes 205-06 and accompanying text.
213. See infra Part II.D, Part III.A.
sive symmetry exists when a lawsuit will have the same res judicata effect on both plaintiffs and defendants. Richard Nagareda explains that a plaintiff “ought not to be positioned to wield the bargaining leverage of a class-wide trial without, at the same time, affording to the defendant the assurance of a commensurately binding victory were the defendant, rather than the plaintiff class, to prevail on the merits.”

When a court is willing to grant a Defendant-Oriented Injunction, res judicata applies asymmetrically to the plaintiffs and defendants. If an individual plaintiff prevails, the court will impose a broad Defendant-Oriented Injunction, barring the government defendant from enforcing the challenged legal provision against anyone. In other words, a victory from any individual plaintiff binds the government defendant with regard to all other rightholders, and prevents that defendant, its privies, or agents from relitigating the issue against other rightholders.

Conversely, if an individual plaintiff loses, res judicata does not preclude other rightholders from raising identical challenges to the same legal provision, perhaps with different adjudicative or legislative facts, or in different courts or before a different judge. Thus, third-party rightholders stand to benefit from a ruling in favor of the individual plaintiff, but face no consequences from an adverse ruling if the individual plaintiff loses. The Civil Rules Advisory Committee amended Rule 23 in 1966 to abolish “spurious” class actions specifically to eliminate such asymmetric preclusion. The fairness concerns underlying the principle of preclusive symmetry thus counsel against Defendant-Oriented Injunctions.

215. Nagareda, Embedded Aggregation, supra note 163, at 1113.
216. See FED. R. CIV. P. 65(d)(2).
217. Hansberry v. Lee, 311 U.S. 32, 40 (1940) (“One is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”); see also Martin v. Wilks, 490 U.S. 755, 762 (1989) (discussing “our ‘deep-rooted historic tradition that everyone should have his own day in court’” (quoting 18 CHARLES Wright ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449 (1981))).
218. See, e.g., Taylor v. Sturgell, 553 U.S. 880 (2008) (permitting the plaintiff to sue the FAA for denying a FOIA request, even though an associate of his had unsuccessfully sued the FAA in a different court for denying a previous, identically worded request).
219. See supra note 46 and accompanying text.
It might be objected that, although other rightholders may not be formally bound by res judicata or collateral estoppel, an adverse ruling in an earlier case still will limit future suits as a matter of stare decisis. Trial court rulings, however, are not precedential and have no stare decisis effect, even within the same jurisdiction. Even an intermediate appellate court ruling, in systems such as the federal judiciary that are divided regionally, is not binding outside of the court’s territorial jurisdiction. Thus, most rulings in individual-plaintiff cases will not bar subsequent litigants from raising the same claims as a matter of stare decisis.

It also might be objected that asymmetric preclusion is not problematic or unfair. Jeremy Bentham himself rejected a mutuality requirement for claim preclusion. The Supreme Court authorized non-mutual defensive collateral estoppel in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, and non-mutual offensive collateral estoppel (at least against private parties) in Parklane Hosiery Co., Inc. v. Shore. Whatever the merits of those rulings in the context of purely private disputes, the Court held in United States v. Mendoza that the government generally should not be subject to non-mutual offensive collateral estoppel. It explained that permitting non-mutual offensive collateral estoppel against the Government “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” It also would “force the Solicitor General . . . to appeal every adverse decision in order to avoid foreclosing further review.” Many subsequent cir-

220. See supra notes 142–43 & accompanying text.
222. 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827).
226. Id. at 158.
227. Id. at 161.
circuit courts later applied this ruling to state litigants, as well, although not to municipalities. Defendant-Oriented Injunctions are contrary to Mendoza. An injunction completely barring a government defendant from enforcing a challenged legal provision “freez[es] the first final decision rendered” on the issue. Moreover, it effectively compels the government defendant to appeal, rather than waiting for a more favorable fact pattern or allowing the law to percolate through various courts. Indeed, a Defendant-Oriented Injunction is an even stronger remedy than non-mutual offensive collateral estoppel, because it takes effect without another rightholder having to file a subsequent lawsuit. The same reasons that led the Mendoza Court to bar plaintiffs from asserting non-mutual offensive collateral estoppel against government defendants apply with even greater force to preclude them from seeking Defendant-Oriented Injunctions.

D. The Law of Judgments and Rule 23

Yet another concern about the issuance of Defendant-Oriented Injunctions in individual-plaintiff cases is that they undermine the policy concerns that drive the law of judgments and Rule 23. In general, judgments settle the legal rights and obligations of the parties to a case against each other, and do not extend to third parties who are not before the court. The Court applied a variation of this principle in the punitive damages context in Philip Morris USA v. Williams: “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”

228. See, e.g., Idaho Potato Comm’n v. G&T Terminal Packaging, Inc., 425 F.3d 708, 713–14 (9th Cir. 2005); Hercules Carriers, Inc. v. Florida, 768 F.2d 1558, 1577–79 (11th Cir. 1985).
229. See, e.g., Robinson v. City of Chicago, 868 F.2d 959, 968 (7th Cir. 1989).
231. Id. at 161.
Rule 23 provides an exception to this principle, allowing one party to litigate on behalf of a class of rightholders when, among other things, a court determines that the rule’s numerosity, commonality, typicality, and adequacy of representation requirements are satisfied. By issuing a Defendant-Oriented Injunction in a non-class case, a court effectively grants class-wide relief without determining whether Rule 23’s requirements are satisfied, thereby circumventing and undermining Rule 23.

As discussed in the previous Section, Defendant-Oriented Injunctions also allow rightholders to potentially reap the benefit of a favorable ruling without subjecting them to the res judicata effect of an unfavorable ruling. Rule 23 was amended in 1966 to eliminate the possibility of such asymmetric claim preclusion by eliminating “spurious” class actions. Defendant-Oriented Injunctions are therefore contrary to the policies underlying Rule 23.

E. Geographic Limitations of Lower Courts

A final difficulty with Defendant-Oriented Injunctions is that they allow a court to give legal effect to its rulings beyond the scope of its territorial jurisdiction. When a court decides a case, it may issue two different types of documents: a judgment, which only specifies the ultimate outcome, and a written opinion, which explains the legal reasoning that led to the judgment. The judgment, by definition, has what can be called

234. FED. R. CIV. P. 23(a).
235. Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) [holding that the district court erred in “treat[ing] the suit as a class action” because, “[w]ithout such certification and identification of the class, the action is not properly a class action”]; Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154, 171 (3d Cir. 2011) (“Once decertification became effective, the District Court had no jurisdiction over any of the claims of the putative class members and therefore no ability to order that any relief be granted to any claimant other than [the individual plaintiff].”); Brown v. Trs. of Brown Univ., 891 F.2d 337, 361 (1st Cir. 1989) (“Ordinarily, classwide relief, such as the injunction here which prohibits sex discrimination against the class of Boston University faculty, is appropriate only where there is a properly certified class.”); Zepeda v. INS, 753 F.2d 719, 727–28 & n.1 (9th Cir. 1985) (“We understand concerns that rule 23 may present a significant hurdle for those seeking broad, class-based relief. But we assume that that was precisely the intent of its drafters.”).
236. See supra note 46 and accompanying text.
237. See FED. R. CIV. P. 58(a).
“adjudicative effects”: it resolves the dispute between the parties and specifies their respective legal rights and obligations toward each other. A judgment is generally binding and enforceable anywhere; its effects are national, and potentially even global, in scope. A monetary judgment can typically be domesticated in any state and executed through levies and garnishment, as permitted by state law.238 Similarly, a defendant may be enjoined from violating a law anywhere in the state or nation.239 The res judicata and collateral estoppel effects of a valid judgment also generally apply in all state and federal courts throughout the nation. Thus, in a variety of ways, the adjudicative effects of a court’s ruling—in other words, the effects of the judgment itself—can reverberate far beyond the county or judicial district in which the court exercises territorial jurisdiction.

The effects of the written opinion accompanying the judgment, if any, are far more limited. An opinion has what may be called “expositive effects”: the resolution of legal issues necessary to reach the judgment.240 Stare decisis determines the extent of an opinion’s expositive effects. Federal district court opinions generally lack any stare decisis effect. Future courts, even within the same district, are not bound by such opinions, and they generally cannot make the law “clearly established” for purposes of overcoming qualified immunity.241 An intermediate appellate court ruling is binding, and can make the law “clearly established,” only within that court’s territorial jurisdiction. The ruling has no such effect, and is of purely persuasive value, outside that jurisdiction.

In most cases, a court may resolve a dispute between individual plaintiffs and government defendants without affecting or enforcing anyone else’s rights. The court may enjoin the defendant from applying a challenged legal provision to the

238. See FED. R. CIV. P. 69(a)(1).
240. See Girardeau Spann, Expository Justice, 131 U. PA. L. REV. 585, 593 (1983) (“Given the importance of the courts’ expository role in the federal legislative process and of their role as the guardians and interpreters of fundamental rights, exposition rather than dispute resolution should be viewed as the primary function of the courts.”). For a critical analysis of the conflicts that can arise between a court’s law-exposition and dispute-resolution functions, see Michael T. Morley, Avoiding Adversarial Adjudication, 41 FLA. ST. U. L. REV. 291, 326–33 (2014).
241. See supra notes 53–55 and accompanying text.
plaintiffs, for example, by allowing them to remain on the voter registration rolls, vote early, vote without showing identification, have their facially invalid ballots be counted, or be excused from some other statutory or regulatory requirement. Although fairness or other constitutional concerns may arise, it is indisputably possible to extend such entitlements to individual plaintiffs without doing so for the rest of the electorate.\footnote{242. See, e.g., Lowery v. Circuit City Stores, 158 F.3d 742, 766 (4th Cir. 1998) ("The injunction's provisions . . . relating to [the individual plaintiff], on the other hand, are broad enough to provide her with complete relief without being overly burdensome or expansive."); vacated and remanded on other grounds, 527 U.S. 1031 (1999); Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (holding that the plaintiff would receive "[e]ffective relief" with an injunction barring the Navy from enforcing the challenged policy only against him); Zepeda v. INS, 753 F.2d 719, 727-28 & n.1 (9th Cir. 1985) ("The individual plaintiffs challenge INS enforcement policies with respect to aliens of Hispanic background. . . . The injunctive relief requested can be granted to the individual plaintiffs without the relief inevitably affecting the entire class."); see also Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist., 730 F.2d 258, 274 (5th Cir. 1984) ("[W]e cannot infer why protecting [an organization's] other members was necessary to relieve [the individual plaintiff]."); Zelotes v. Adams, 363 B.R. 660, 667 (Bankr. D. Conn. 2007) ("An injunction applying only to Plaintiff—i.e., barring Defendant from enforcing [the challenged statute] against him—will provide Plaintiff with complete relief. It is not necessary to make the injunction any broader.").}

When a trial or appellate court nevertheless enters a Defendant-Oriented Injunction, it is effectively giving its legal opinion the force of law on a statewide or nationwide basis, beyond where its opinions have any expositive effect. The court is preemptively resolving potential disputes between the government defendants and other rightholders who are not before the court, including those living in other counties or judicial districts, concerning events, transactions, or conduct outside the court's territorial jurisdiction.\footnote{243. See, e.g., Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154, 169-71 (3d Cir. 2011) (overturning a Defendant-Oriented Injunction awarded to an individual plaintiff because "the District Court had no jurisdiction over any of the claims of the putative class members and therefore no ability to order that any relief be granted to any claimant other than [the individual plaintiff]"); Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003) ("The injunction issued by the district court is overly broad in that the class wide focus is completely unnecessary to provide the named plaintiffs the relief to which they are entitled as prevailing parties.").}

Such "extraterritorial" application of legal determinations happens, of course, in statewide or nationwide class actions. Even though a court's territorial jurisdiction is limited, it has the power to certify classes to include putative members out-
side that jurisdiction when Rule 23’s requirements are met.\textsuperscript{244} The Supreme Court has held, however, that it is generally “preferable” for district courts to refrain from certifying classes that extend beyond their geographic limits.\textsuperscript{245}

Limiting the breadth of lower courts’ injunctions complements \textit{Mendoza’s} prohibition on non-mutual offensive collateral estoppel against government defendants. Both doctrines seek to restrict the expository effects of a lower court’s ruling to leave other courts, particularly those in other geographic regions, free to address issues de novo and potentially arrive at contrary conclusions. Broad statewide or nationwide Defendant-Oriented Injunctions preclude such multiple adjudications from occurring. Thus, Plaintiff-Oriented Injunctions ensure that the expository effects of lower courts’ rulings remain confined to the issuing court’s territorial jurisdiction.

\textbf{III. SOME POTENTIAL SOLUTIONS}

When a court attempts to determine the proper scope of injunctive relief in a constitutional case, it faces a conflict between two imperatives. On the one hand, the court is exercising its role as an expositor of the law, applying substantive constitutional principles to conclude that a statute or regulation is invalid.\textsuperscript{246} On the other hand, it must act within the confines of the particular case or controversy before it. The court is subject to a wide range of jurisdictional and policy-based limitations, and must also consider geographic constraints on the scope of its authority to impose a particular interpretation of the law.\textsuperscript{247} This Part explores some potential mechanisms for resolving such conflicts.

Section A begins by explaining how class actions under Rule 23(b)(2)\textsuperscript{248} avoid raising many of the concerns with Defendant-Oriented Injunctions identified in Part II. This Article ultimately recommends that Rule 23(b)(2) be integrated into a comprehensive framework for addressing the proper scope of

\textsuperscript{244} See \textit{FED. R. CIV. P. 23}; \textit{Califano v. Yamasaki}, 442 U.S. 682, 702–03 (1979) (recognizing the power of district courts to grant nationwide injunctions).
\textsuperscript{245} \textit{Califano}, 442 U.S. at 702.
\textsuperscript{246} See supra notes 160–61 and accompanying text.
\textsuperscript{247} See generally supra Part II.
\textsuperscript{248} \textit{FED. R. CIV. P. 23(b)(2)}. 
relief in individual-plaintiff, non-class cases. On its own, however, the rule is insufficient to resolve remedial concerns in such cases.

Section B explores the remedies available in non-class lawsuits brought by institutional plaintiffs. When an entity relies on associational standing, it is simply standing in for its members who are adversely affected by the challenged provision. A suit based on associational standing is, in effect, a suit brought on behalf of a substantial number of individual plaintiffs (that is, all of the organization’s members who are affected by the challenged provision), but does not include all rightholders within the jurisdiction. Thus, associational standing neither avoids nor resolves the fundamental challenges raised by individual-plaintiff cases.

When an entity asserts organizational standing, in contrast, it may seek a Defendant-Oriented Injunction completely barring enforcement of a legal provision. The gravamen of such a suit is that enforcement of the challenged provision against any members of the public harms the organization itself by interfering with the organization’s mission—which is typically ideological or policy-related—and requiring the diversion of the organization’s resources. Current doctrine greatly limits the ability of entities to assert organizational standing, however. Moreover, that alternative will be unavailable in cases where no appropriate organization exists or wishes to challenge a particular provision. Additionally, the concept of organizational standing fits somewhat uncomfortably with Article III’s limitations on standing.

Section C discusses the possibility of centralizing adjudication of election-related disputes in a particular court. Such “unity of forum” proposals, which already are included in Section 5 of the Voting Rights Act and the Bipartisan Campaign Reform Act, would eliminate concerns stemming from

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249. See infra Part IV.
250. See infra notes 278–79 and accompanying text.
251. See infra notes 280–86 and accompanying text.
252. Nagareda, *Embedded Aggregation*, supra note 163, at 111
geographic limits on the scope of a lower court’s power. Such an approach is vulnerable to the objections typically raised against specialized courts, however, and provides no assistance in resolving public law disputes that fall outside the jurisdiction of any such court.

Finally, Section D examines the possibility that Equal Protection principles might require courts to issue broad Defendant-Oriented Injunctions that protect all rightholders equally as the remedy for constitutional rights violations.

A. Rule 23(b)(2) Class Actions

Class actions seeking classwide injunctive relief are one obvious means of avoiding both the deficiencies of Plaintiff-Oriented Injunctions and the concerns about Defendant-Oriented Injunctions that arise in cases brought by individual plaintiffs. One of the main objections to Plaintiff-Oriented Injunctions is that they underenforce rights by allowing government defendants to continue enforcing invalidated legal provisions against non-parties. Class actions under Rule 23(b)(2) alleviate this concern.

Rule 23(b)(2) allows a court to certify a class if Rule 23(a)’s general requirements of numerosity, commonality, typicality, and adequacy of representation are satisfied, and the defendant has acted or refused to act “on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Unlike with most other types of class actions, putative class members are not entitled to receive notice of the suit or an opportunity to opt out before the class is certified.

Rule 23(b)(2) was crafted specifically to facilitate civil rights litigation. It allows rights to be enforced on an “aggregate”

255. See supra Part II.E.
256. See generally Carroll, supra note 20 (advocating Rule 23(b)(2) class actions as a means of resolving remedial issues in suits for injunctive relief).
257. FED. R. CIV. P. 23(a).
258. Id. R. 23(b)(2).
259. Id. R. 23(c)(2)(A) (specifying that the court has discretion over whether to order pre-certification notice to putative members of proposed classes under Rule 23(b)(2)).
basis by permitting all rightholders to be included as part of the plaintiff class.\textsuperscript{261} Thus, all similarly situated people stand to benefit equally from a favorable ruling, preventing disparities in the enforcement of rights.\textsuperscript{262}

The breadth of the plaintiff class in a Rule 23(b)(2) case makes a Plaintiff-Oriented Injunction effectively equivalent to a Defendant-Oriented one. Many of the concerns about Defendant-Oriented Injunctions\textsuperscript{263} are therefore alleviated. All rightholders in the class are bound by the outcome of the suit\textsuperscript{264} whereas, in an individual suit, no one other than the plaintiff is precluded from bringing a subsequent challenge.\textsuperscript{265} Thus, class-based challenges to the validity of laws and regulations prevent individual plaintiffs from bringing a succession of lawsuits against a legal provision until they inevitably find a favorable judge who might be willing to make factual findings and legal determinations in their favor.

\textsuperscript{261} Garrett, \textit{supra} note 15, at 598; \textit{see also} Nagareda, \textit{Preexistence Principle}, \textit{supra} note 163, at 232 (advocating the use of class actions for injunctive relief where “it is not possible to ascertain the legality of the defendant’s conduct as to one affected claimant without necessarily doing so as to all others”).

\textsuperscript{262} Carroll, \textit{supra} note 20, at 2022 (“Class treatment pursuant to Rule 23(b)(2) increases the likelihood that a court will issue a final decision on the merits that reaches system-wide . . . through a process designed to protect the interests of all those affected.”); Lahav, \textit{supra} note 164, at 557 (“T]he class action furthers equality by better ensuring equal outcomes among similarly situated litigants on the same side.”); Garrett, \textit{supra} note 15, at 613 (arguing that Rule 23(b)(2) civil rights class actions “may result in greater equality of results” by alleviating the risk of “inconsistent verdicts”); Tenny, \textit{supra} note 23, at 1019, 1034–35 (advocating Rule 23(b)(2) class actions so that people affected by an invalidated legal provision need not institute independent lawsuits to prevent its enforcement); Slack, \textit{supra} note 23, at 966 (recognizing that nationwide class actions lead to uniformity).

Walker concludes that Defendant-Oriented Injunctions may be appropriate in certain cases, but does not explain why courts should issue them without first certifying Rule 23(b)(2) classes. Walker, \textit{supra} note 23, at 1149–51.

\textsuperscript{263} \textit{See supra} Part II.


\textsuperscript{265} Wilton, \textit{supra} note 23, at 598 n.7, 622–23; \textit{see also} Garrett, \textit{supra} note 15, at 613 (noting that Rule 23(b)(2) class actions against government defendants allow them to avoid piecemeal litigation).
In *Califano v. Yamasaki*, the Supreme Court held that district courts considering challenges to federal legal provisions may certify nationwide classes.\(^{266}\) It emphasized that, when a court certifies an injunction-only class under Rule 23(b)(2), the limits restricting damages class actions under Rule 23(b)(3)\(^{267}\) are inapplicable.\(^{268}\) At least one circuit has held that *Califano* authorizes certification of class actions that include not only all people subject to a legal provision, but also anyone who might be subject to it in the future.\(^{269}\) The *Califano* Court recognized that nationwide class actions prevent issues from percolating through the lower courts and may foreclose courts in different parts of the country from reaching different conclusions.\(^{270}\) It concluded that such considerations should not preclude nationwide class actions, but rather counsel district courts to be cautious in certifying them.\(^{271}\)

Despite the appeal of Rule 23(b)(2) class actions, as currently crafted they cannot completely resolve problems concerning the proper remedy in lawsuits challenging the validity of legal provisions. First, most basically, plaintiffs are not required to bring suits as class actions. Even when a plaintiff’s claim involves embedded aggregation, in the sense that many people’s rights are allegedly being violated in the same way by the same legal provision, a plaintiff may choose to bring an individual suit to enforce only his own rights without seeking class certification.\(^{272}\) Second, a court cannot certify a class under Rule

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268. Califano, 442 U.S. at 702. But see Slack, supra note 23, at 944, 968, 977–78, 987 (arguing against nationwide injunctions on the grounds that they interfere with the natural development of the law, as well as dialogue between the political branches and judiciary); Walker, supra note 23, at 1121 (arguing that nationwide injunctions against government defendants seem “legislative”).
269. Tataranowicz v. Sullivan, 959 F.2d 268, 272–73 (D.C. Cir. 1992) (affirming “the practice of defining classes to include persons who in the future fit the class criteria”).
270. Califano, 442 U.S. at 702.
271. Id.
272. *Newberg on Class Actions* contends that, “[i]n rare cases, a defendant may move for certification of a plaintiff class.” William B. Rubenstein, Newberg On
23(b)(2) unless the class satisfies all of Rule 23(a)'s requirements. In some cases, plaintiffs may have trouble meeting that standard, particularly if the court finds the nature of the plaintiffs' challenge to be fact-specific.\textsuperscript{273}

Third, as currently crafted, Rule 23(b)(2) classes are problematic because members of putative classes are not entitled to notice and an opportunity to be heard before the class is certified or the case is adjudicated on the merits. In other words, under Rule 23 as currently drafted, class members may be bound by a judgment in a case about which they were never informed, and from which they never had an opportunity to opt out.\textsuperscript{274} Fairness concerns counsel against allowing people's legal rights and claims to be involuntarily extinguished by a class action that they did not know about and from which they were unable to extricate themselves.\textsuperscript{275} Weber points out, however, that due process might not require notice and an opportunity to opt out of Rule 23(b)(2) lawsuits, because the cost and burden of such measures could be prohibitive, undermining the ability of most putative class representatives to invoke Rule 23(b)(2) at all.\textsuperscript{276} Thus, while courts’ remedial decisions are much easier in cases where a plaintiff class is certified under Rule 23(b)(2), that

\textsuperscript{273} Garrett, supra note 15, at 595.

\textsuperscript{274} FED. R. CIV. P. 23(c)(3) (“The judgment in an action maintained as a class action ... whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.”); FED. R. CIV. P. 23(o)(2)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.”) (emphasis added).

\textsuperscript{275} Williams, supra note 15, at 651–53 (“Where a lead plaintiff seeks an equitable remedy that is divisible, mandatory class actions certified under Rule 23(b)(2) ... present ... [a] risk that nonconsenting class members will be erroneously deprived of their control entitlement .... [O]pt-out rights should be recognized ....”); Weber, supra note 16, at 400–01; cf. Nagareda, Embedded Aggregation, supra note 163, at 1108.

\textsuperscript{276} Weber, supra note 16, at 394; cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 & n.3 (1985) (leaving open the question of whether due process requires that class members have the power to opt out of injunction-only class actions under Rule 23(b)(2)). Richard Nagareda argues that opt-outs should be prohibited when a plaintiff seeks classwide injunctive relief, because a defendant’s interest in being able to rely on a favorable ruling outweighs putative class members’ interest in “sit[ting] on the sidelines” of the lawsuit without being subject to adverse res judicata effects. Nagareda, Freestanding Prerequisites, supra note 163, at 232–33.
rule does not enable courts to avoid the difficulties involved in determining the proper scope of relief in non-class, individual-plaintiff cases.

B. Organizational Standing

Distinctions between Plaintiff- and Defendant-Oriented Injunctions also are minimized in cases where a civil rights or other similar group asserts its own organizational standing to seek broad injunctive relief against any enforcement or application of an allegedly invalid legal provision.277 When an organization demonstrates that enforcement of a law against any members of the public directly harms its own institutional interests, it may seek an injunction barring the government defendants from enforcing it against anyone. Thus, as with Rule 23(b)(2) class actions, a Plaintiff-Oriented Injunction effectively becomes a Defendant-Oriented Injunction, without violating many of the restrictions discussed in Part II.

Organizational standing must be distinguished from the closely related concept of associational standing. When a group asserts associational standing, it is essentially standing in for one or more of its members, asserting their rights on their behalf.278 When an association’s standing rests on this basis, a Plaintiff-Oriented Injunction running in favor of the association bars the government defendant from enforcing the challenged legal provision against any of the association’s members. Such an injunction is effectively equivalent to the Plaintiff-Oriented Injunction the court could have issued if the members themselves had been named as individual plaintiffs in the case.279 It leaves the government defendant free to continue enforcing the law against non-members. Bringing a suit based on associational standing therefore does not change the analysis in Part II.

279. See Warth, 422 U.S. at 515 (“If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.”).
concerning the choice between Plaintiff- and Defendant-Oriented Injunctions. Courts still must decide whether to enjoin enforcement of the challenged provision against only the plaintiff association’s members, or instead against all similarly situated rightholders.

With organizational standing, in contrast, a group sues to assert its own institutional interests. Haven Realty Corp. v. Coleman is the quintessential example of this theory in action.280 In Haven Realty, a group called Housing Opportunities Made Equal ("HOME") sought damages from the defendant landlord for violating the Fair Housing Act of 1968 by discriminating against blacks seeking to rent apartments.282 HOME alleged that its purpose was to “assist equal access to housing through counseling and other referral services.”283 Because of the defendant’s illegal conduct, HOME “had to devote significant resources to identify and counteract the defendant’s racially discriminatory steering practices.”284

The Supreme Court affirmed HOME’s standing, explaining:

If, as broadly alleged, petitioners’ steering practices have perceptibly impaired HOME’s ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interests.285

Thus, an organization that engages in voter education and outreach, voter registration drives, or get-out-the-vote campaigns may have organizational standing to challenge certain types of election-related provisions. Such a group can argue that some allegedly unconstitutional or otherwise invalid measures compel it to devote additional resources to achieving

283. Id. at 379.
284. Id.
285. Id. (citation omitted); see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262 (1977) (affirming organizational standing where allegedly illegal conduct frustrated an organization’s "interest in making suitable low-cost housing available in areas where such housing is scarce").
its goals. A complete prohibition on enforcement of the challenged provision—effectively, a Defendant-Oriented Injunction—is the only way of completely protecting the group's organizational interests.

The possibility of organizational standing is insufficient, however, to alleviate remedial difficulties in non-class cases. First, the concept has come under heavy scrutiny, and courts have frequently rejected attempts to assert such standing, including in election law cases. The Supreme Court itself has emphasized that a group's mere ideological opposition to a legal provision or desire to promote the public interest is insufficient to give it organizational standing.

Second, fairness concerns may arise in allowing groups to seek Defendant-Oriented Injunctions (or Plaintiff-Oriented Injunctions that are so broad that they effectively serve as Defendant-Oriented Injunctions) when individual plaintiffs—including actual rightholders—raising the same claims would be unable to obtain such relief. Third, perhaps most importantly, individual plaintiffs may challenge the validity of legal provisions without including an entity as a plaintiff. Even when a group is included as a plaintiff, it often will be able to assert only associational, rather than organizational, standing. Thus, the concept of organizational standing cannot resolve difficulties concerning the proper scope of relief in individual-plaintiff cases.

C. Unity of Forum Proposals

Richard Nagareda points out that "unity of forum" proposals are another way of addressing embedded aggregation. Congress or a state could designate a certain trial court to hear cases of a certain nature (such as constitutional claims in general, or election-related claims specifically), or require that a single appellate court hear all appeals from such cases. The Bipartisan Campaign Reform Act, for example, contains a special

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286. See, e.g., Nat’l Council of La Raza v. Cegavske, 800 F.3d 1032, 1040–41 (9th Cir. 2015); Arcia v. Sec’y of State of Fla., 772 F.3d 1335, 1341–42 (11th Cir. 2014).

287. See Kicline v. Consol. Rail Corp., 800 F.2d 356, 360 (3d Cir. 1986) (holding that Havens Realty used “careful language in its narrow holding . . . indicating that the Court did not intend that the case have broad application”); see, e.g., Fair Elections Ohio v. Husted, 770 F.3d 456, 460–61 & n.1 (6th Cir. 2014).


289. Nagareda, Embedded Aggregation, supra note 163, at 1114.
judicial review provision specifying that any constitutional challenges must be filed in the U.S. District Court for the District of Columbia and adjudicated by a three-judge panel, with direct appeal to the U.S. Supreme Court.\textsuperscript{290} Similarly, the Federal Circuit has jurisdiction over appeals in patent cases from any district court in the country.\textsuperscript{291}

If certain types of cases were consolidated before a single court, particularly at the appellate level, the significance of the distinction between Plaintiff- and Defendant-Oriented Injunctions would largely evaporate. When a specialized appellate court affirms a Plaintiff-Oriented Injunction, its opinion would be binding as a matter of stare decisis in all future cases (since it would be the only court authorized to hear cases of that nature). While an injunction provides stronger protection for rights than a mere judicial opinion,\textsuperscript{292} the government defendant would risk violating clearly established law and face a series of lawsuits it was virtually guaranteed to lose (with the prospect of liability for attorneys’ fees\textsuperscript{293}) if it persisted in ignoring the ruling.

This approach is subject to the standard objections against specialized courts. In particular, if a single court had jurisdiction over all cases or appeals dealing with constitutional issues in general, or election law disputes in particular, it increases the likelihood that partisans would be nominated or rejected for the court based primarily on their views on those particular types of cases.\textsuperscript{294} Because generalist courts, by definition, adjudicate a wide range of issues, judges are unlikely to be appointed to them based on their views on a single type of case or even range of cases. Judges on a specialist court also might tend to have more extreme views on issues within their jurisdiction than generalist judges, precisely because they specialize in that area.\textsuperscript{295} The substantive and political problems posed by

\textsuperscript{292} See Morley, Public Law at the Cathedral, supra note 30, at 2481–83.
\textsuperscript{295} Paul D. Carrington et al., Justice on Appeal 168 (1974); Daniel J. Meador, Reducing Court Costs and Delay: An Appellate Court Dilemma and a Solution
vesting responsibility for all constitutional or election law cases in a particular court seem to far outweigh whatever benefits such an arrangement might offer at the remedial stage of litigation.

D. Equal Protection Approach

One final approach would be to claim that, once a plaintiff has demonstrated that a legal provision is unconstitutional, either facially or as applied under certain circumstances, the court must issue a Defendant-Oriented Injunction to avoid creating Equal Protection problems. 296 Under this view, prohibiting a government defendant from enforcing a law against an individual plaintiff on the grounds that it violates her constitutional rights, while allowing it to continue enforcing the same provision against other people (particularly other people within the court’s geographic jurisdiction), would constitute arbitrary and discriminatory enforcement of constitutional rights. Once a constitutional violation has been established, there is no basis for discriminating among rightholders by limiting an injunction only to the individual plaintiffs in a case.

If Equal Protection principles were as robust as this approach suggests, the class action mechanism would be wholly unnecessary in constitutional cases. An individual plaintiff could litigate her own rights, and the Equal Protection Clause would require the court to issue injunctive relief in favor of all rightholders throughout the court’s geographic jurisdiction, or perhaps even in the state or nation. This approach effectively advocates that substantive constitutional law should trump procedural, jurisdictional, and other conventional restrictions on litigation, at least at the remedial stage.

District court rulings do not give rise to binding precedents, however, even within the same jurisdiction. The only real function of a district court ruling is to adjudicate the claims and de-


fenses of the litigants in the case before it. It seems odd to contend that, by granting a particular plaintiff relief, even in a constitutional case, a court thereby violates the Equal Protection rights of other right holders not before the court. As Tom Merrill asks rhetorically, "X (whether rich or poor) had to sue the government to win, and now Y (whether rich or poor) also has to sue the government to win. In what respect are they being treated differently?" 297 Thus, while the Equal Protection approach seems facially compelling, it likely fails precisely because it ignores the restrictions imposed by the posture of the case in which the court articulated or enforced the substantive right.

IV. A NEW APPROACH TO INJUNCTIVE RELIEF

This Part presents a new approach for determining the proper scope of injunctive relief in non-class, individual plaintiff cases where a court determines that a legal provision is unconstitutional, invalid, or otherwise unenforceable. Section A explains the proposed two-step standard. A court should begin by assessing whether Equal Protection principles prohibit it from issuing a Plaintiff-Oriented Injunction that protects only the rights of the individual plaintiffs in the case. Assuming that a Plaintiff-Oriented Injunction would be a constitutionally valid remedy—which it usually should be—the court should go on to apply traditional severability principles to determine whether to issue a Plaintiff- or Defendant-Oriented Injunction. In other words, the court should assess whether the legal provision's invalid applications against the individual plaintiffs may be "severed" from its application to third parties not before the court.

Section B contends that a court can alleviate most of the objections that Part II of this Article raises against Defendant-Oriented Injunctions by conducting this two-step analysis at the outset of the case. If the court determines that a Defendant-Oriented Injunction is the proper remedy, as a result of either Equal

297. Merrill, supra note 49, at 54; see also Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 MINN. L. REV. 1339, 1352–53 (1991); Zepeda v. INS, 753 F.2d 719, 728 n.1 (9th Cir. 1985) (rejecting the argument that "it would be fundamentally unfair for the government to be able to treat one group of individuals differently from another group that is similarly situated except for the fact that they have successfully challenged the government's actions").
Protection principles or its severability analysis, it should require the plaintiffs to proceed with the case, if at all, as a Rule 23(b)(2) class action. If, on the other hand, the court determines that a Plaintiff-Oriented Injunction is the proper remedy, then the case may proceed on a non-class basis. This Section concludes by offering additional recommendations to protect the rights of members of Rule 23(b)(2) classes certified under this framework.

A. Choosing Between Plaintiff- and Defendant-Oriented Injunctions

In a non-class, individual-plaintiff case, when a court determines that a legal provision is unconstitutional, invalid, or otherwise unenforceable (either facially or as applied), and justiciability and other such requirements are satisfied, the plaintiffs generally are entitled, at a minimum, to a Plaintiff-Oriented Injunction barring the government defendants from enforcing the provision against them. At that point, the trial court, at the very least, must modify the statutory or regulatory scheme by essentially carving out an exception to the challenged provision to prevent its application to the plaintiffs. The question then arises whether the court should go further by issuing a Defendant-Oriented Injunction to prohibit the government defendants from enforcing the legal provision against other people, as well. The court should resolve this issue through a two-step analysis, applying constitutional law and traditional severability principles.

First, the court must determine whether granting the requested relief solely to the individual plaintiffs would violate Equal Protection principles by authorizing disparate enforcement of fundamental rights. Such potential Equal Protection concerns likely would arise only in cases where the court held a legal provision unconstitutional, rather than invalid on statutory grounds. As discussed above, some scholars have rejected the notion that granting injunctive relief only to individual plaintiffs who have requested it would violate Equal Protection principles. Under their view, Equal Protection principles seldom, if ever, require a court to issue Defendant-Oriented Injunctions. A person who has filed a lawsuit to enforce his or her rights, by definition, cannot be deemed similarly situated.

298. See supra note 296.
299. See supra note 297.
with a person who has not done so.\textsuperscript{300} That interpretation seems to be the most accurate understanding of the Equal Protection Clause. Courts and other commentators, however, reasonably might take a different view. If the court concludes that granting only a Plaintiff-Oriented Injunction would be unconstitutional, then it necessarily must grant a Defendant-Oriented Injunction.

\textit{Second}, assuming that Equal Protection principles do not compel the court to issue a Defendant-Oriented Injunction, the court should determine whether the challenged legal provision itself requires such relief by applying traditional severability principles. Severability questions arise when a court determines that a particular provision of a statute or regulation is invalid, and it must decide whether the remainder is still enforceable. Generally, a court severs the invalid provision and continues to enforce the remaining sections unless: (i) the remaining sections cannot operate coherently as a law, or (ii) the court concludes that the entity that enacted the statute or regulation would not have intended for its remaining sections to be enforced without the invalidated portions.\textsuperscript{301} Courts should apply a variation of this approach in determining the proper scope of injunctive relief in individual-plaintiff cases.\textsuperscript{302}

First, the court should determine whether the provision could function coherently without being applied to the plaintiffs in the case. The answer, in many cases, is that the law would remain functional. For example, although some fairness issues might arise, procedural requirements for voting and campaign finance restrictions could be applied coherently even if a few people were exempted from them. For certain types of provisions, in contrast, such as legislative redistricting, it would be incoherent and impossible to grant relief solely to individual plaintiffs without likewise extending it to everyone else.

\textsuperscript{300} See W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 660 (1981) ("[T]he Fourteenth Amendment... introduced the constitutional requirement of equal protection, prohibiting the States from acting arbitrarily or treating similarly situated persons differently...."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment... is essentially a direction that all persons similarly situated should be treated alike.").

\textsuperscript{301} See supra note 25.

\textsuperscript{302} Cf. Dorf, supra note 10, at 265 (discussing severability analysis for determining whether a statute should be held facially unconstitutional, or instead unconstitutional as applied).
Second, the court should consider whether the entity that promulgated the challenged provision—that is, Congress, a state legislature, or an administrative agency—still would have enacted the provision if it knew that the individual plaintiffs would have to be exempted from it. In many cases, a legislature or agency would want a provision to be applied as broadly as possible, even if some people must be exempt from it, at least until a state supreme court or the U.S. Supreme Court finally adjudicates its constitutionality. For example, based on legislative history and other contextual clues, a court reasonably may conclude that a legislature would prefer to persist in shortening an early voting period, even if the individual plaintiffs in a case must be given extra time to vote. A legislature might likewise prefer to retain a voter identification requirement, even if certain plaintiffs must be permitted to vote without such identification. Or a legislature might wish to maintain political contribution limits, even if a lower court has deemed them invalid and held that they cannot be enforced against a particular plaintiff.

Thus, if the challenged provision can coherently be applied to everyone other than the plaintiffs, and the court determines that the entity that enacted the provision would have wanted to “save” as much of it as possible, then a Plaintiff-Oriented Injunction would be the proper remedy. If, in contrast, the court determines that the entity that enacted the legal provision would not have wanted to have two conflicting sets of rules simultaneously enforced on different segments of the public, or that it would be impossible as a practical matter to apply different rules to different people, then a Defendant-Oriented Injunction would be required.

It might be objected, of course, that if the court determines that the provision is severable and issues only a Plaintiff-Oriented Injunction, then it is allowing the government defendant to continue enforcing a purportedly invalid or even unconstitutional law against other members of the public. It would be severing an invalid application of the legal provision from other invalid applications, rather than from admittedly valid ones.

This response, though facially compelling, overlooks limits on the trial court’s power. A trial court has the authority to make legal determinations necessary to adjudicate the rights of the parties before it. But those rulings generally lack stare deci-
sis or other precedential effect. In the context of litigation against the federal government or a state, such rulings generally cannot even give rise to non-mutual offensive collateral estoppel. Thus, a trial court’s decision that a legal provision is invalid has no legal effect beyond the immediate parties to a case. Any invalidation of a legal provision as it applies to third parties cannot be a direct or inherent consequence of the court’s ruling concerning its invalidity, but rather must be based on Equal Protection or severability grounds.

B. Determining the Proper Scope of Relief at the Outset of the Case

In cases where the framework set forth above requires a court to issue a Defendant-Oriented Injunction, the concerns identified in Part II still arise. Applying that framework at the outset of the case, however, would largely alleviate most of those concerns. In non-class cases in which the plaintiffs seek an injunction against a legal provision, the court could begin by reviewing the complaint to determine whether the claims are frivolous or squarely foreclosed by binding precedent, which would alleviate the need to consider the proper scope of relief. Assuming the complaint cannot be dismissed out of hand, the court should go on to apply the framework above, at the outset of the case, to determine whether either Equal Protection or severability principles would require it to issue a Defendant-Oriented Injunction if the plaintiffs ultimately prevail.

If the court concludes that a Defendant-Oriented Injunction would be the appropriate remedy, it should require the plaintiffs to re-file the case as a Rule 23(b)(2) class action, on the grounds that indispensable parties—the third parties whose rights would be protected by the injunction—are missing. If, in contrast, the court determines that a Defendant-Oriented Injunction would not be the proper remedy, then the case may proceed on a non-class basis. If the plaintiffs prevail, they would receive a Plaintiff-Oriented Injunction. Thus, the court is able to ensure at the outset that, in cases where it must grant relief to people other than the plaintiffs, they are included as

304. Cf. FED. R. CT. P. 19(a)(1)(A) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . in that person's absence, the court cannot accord complete relief among existing parties . . . .").
parties. This step alleviates problems arising from individual plaintiffs' lack of standing to seek Defendant-Oriented Injunctions, due process limitations on litigating the rights of third parties, and policy concerns about circumventing Rule 23's limits. This approach also prevents asymmetric claim preclusion. In any case where the court would have to grant relief to people other than the individual plaintiffs, they would be included in the case as class members and bound by the court's judgment, whether favorable or not.

The class could be restricted in geographic scope to limit the impact of the trial court's legal rulings. At the extreme, the class could be limited to people living within the trial court's geographic jurisdiction. For a federal lawsuit, that would mean limiting the class to rightholders within the judicial district in which the suit was filed. This would ensure that the court does not adjudicate claims of people living outside its jurisdiction concerning alleged rights violations outside that jurisdiction.

A more reasonable compromise would be to define the class based on the geographic jurisdiction of the appellate court for the region in which the trial court is located.305 Because trial court rulings generally do not constitute binding precedent for stare decisis purposes, when a trial court adjudicates a case, it is interpreting and applying the law based primarily on decisions of the Supreme Court and the intermediate appellate court for its region.306 If a trial court certifies a class that extends beyond the geographic jurisdiction of its appellate court, it is giving the force of law to that appellate court's precedents outside of its jurisdiction, where its rulings lack stare decisis effect. Residents of other appellate regions, however, have an interest in having their rights be adjudicated by courts with personal jurisdiction over them, applying precedents that are legally binding upon them.

Conversely, all trial judges within an appellate jurisdiction must apply the same body of precedents. When a trial judge certifies a class encompassing all rightholders within the applicable appellate region, rightholders from other judicial districts within that region are not adversely affected, because their

305. Some states, of course, have intermediate appellate courts of statewide jurisdiction, in which case the scope of the class for a case filed in state court would be statewide.

306. State trial courts are also bound by their state supreme court.
claims are still being adjudicated based on the same binding precedents. Thus, a Rule 23(b)(2) class should encompass rightholders within the appellate jurisdiction in which the trial court sits. This approach ensures that each rightholder’s claim is adjudicated based on the correct body of precedent, respects limits on trial courts’ authority and the powers and prerogatives of coordinate appellate courts, and prevents the unnecessary multiplicity of suits that would result from limiting classes to the bounds of a trial court’s geographic jurisdiction.

Putative members of Rule 23(b)(2) classes generally are not entitled to notice before class certification.307 When rightholders reasonably can be identified and the cost is not prohibitive, however, the court should apply a strong presumption in favor of requiring such notice. Notice would give interested rightholders an opportunity to object prior to class certification; seek to intervene as separate parties, represented by independent counsel; or file amicus briefs to raise additional points that the parties have overlooked.

Because the ability of members of Rule 23(b)(2) classes to opt out is, at a minimum, severely constrained,308 the traditional rules of res judicata should apply much more loosely to them. Class members should be barred from relitigating only specific issues and arguments that were actually raised in the earlier case, rather than the full range of issues and arguments that could have been asserted.309 The court also should exercise care to ensure the adequacy of class counsel.310 Due to the classwide res judicata effect of an adverse ruling, if class counsel declines to appeal, the court should appoint alternate counsel to prevent the claims of class members throughout the region from being extinguished without full judicial consideration.

308. See id. Of course, if the court concludes that a Defendant-Oriented Injunction is the required remedy for the plaintiffs’ claims, whether as a matter of constitutional law or a severability analysis, and the plaintiffs prevail, then even putative class members who purported to opt out still would be covered by the injunction.
309. Cf. Allen v. McCurry, 449 U.S. 90, 94 (1980) (“Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” (citing Cromwell v. Cty. of Sac, 94 U.S. 351, 352 (1877))).
310. See FED. R. CIV. P. 23(a)(4).
Thus, by determining the need for classwide relief at the outset of a case, and tweaking some of the rules governing class actions, courts can position themselves to grant appropriate injunctive relief when plaintiffs prevail while minimizing constitutional and fairness-related problems.

V. CONCLUSION

While both courts and academics have spent a substantial amount of time discussing the distinction between facial and as-applied challenges to legal provisions, they have generally overlooked the jurisdictional, constitutional, policy-based, and other limits on a court’s ability to enjoin invalid provisions. In particular, very little attention has been paid to the question of whether courts should issue Plaintiff- or Defendant-Oriented Injunctions in non-class cases. Courts have applied a variety of inconsistent approaches, often without recognizing the numerous important considerations in play.

A trial court generally should issue a Plaintiff-Oriented Injunction against an invalid legal provision unless it determines that either Equal Protection or traditional severability principles would not permit it to enjoin application of the provision solely against the individual plaintiffs. The court should conduct this analysis at the outset of the case, so that if it determines that a Defendant-Oriented Injunction would be the proper remedy, it can require that the case be brought as a Rule 23(b)(2) class action. The geographic scope of the class should be limited to the boundaries of the appellate jurisdiction in which the trial court is located. Res judicata principles should be applied loosely to allow class members to bring subsequent challenges based on issues and arguments that were not actually litigated in the original case. Such an approach to injunctive relief would lead to results that are more predictable and consistent, better reasoned, and fairer. It appropriately balances the duty of courts to resolve only the immediate disputes before them with their responsibility to articulate and enforce public values.
Mr. ISSA. Also, at this time I would like to ask unanimous consent that a Member of the Full Committee but not a Member of the Subcommittee, Congresswoman Spartz, be allowed to attend and, time permitting, if there is a yielding from another Member, be able to ask a question.

Mr. JOHNSON of Georgia. Without objection, so ordered.

Mr. ISSA. Thank you, Mr. Chair.

Mr. Chair, as often occurs in this Committee and in this Subcommittee, we have both sharp disagreement between the various Members here on the dais and a great deal of agreement. Much of what you just said in your opening statement would be paired perfectly with my views, but there are some items that I think are critical that we ensure, as we see what is wrong with the shadow docket, that we also appreciate what is right.

Many would say that a last-minute decision by the Court not to stay the execution of a prisoner is inherently wrong. However, the alternative could easily be a simple refusal to grant cert, therefore condemning the prisoner without even one last look.

When we consider, over the years, the Court’s very important decisions that they have taken on when and how you can execute a convicted person who has been sentenced to death, in fact, it is those very novel last-minute calls, such as somebody’s diminished capacity and the like, that have come to pass. So, I think it is critical that we do make sure that we continue to have the Justices feel that they can take far more than the 70 cases they take on their formal docket.

Notwithstanding that, I share with your considerable concern that during the last Administration this fivefold, as you said, increase occurred.

I would say that one of the things that I hope we explore in detail today is the question of whether or not the problem is at the High Court or even at the Solicitor General but, rather, at the fair interpretation of what an article III judge in a district is entitled to rule. None of us here today would doubt that a Federal judge, as to the case before him and the plaintiffs before him, has authority to enjoin in every part in the United States, including its territories, within his jurisdiction.

The question really is, in many cases, does he have a right to enjoin the Administration for their conduct related to anyone not currently a plaintiff in front of the Court? This is a question that I believe the Supreme Court must answer. If they fail to answer or perhaps if the answer is incomplete, it falls to this Committee and this Subcommittee to look at a restatement or a reform of the breadth of these types of decisions.

I, for one, believe that we do have an opportunity to work together on a bipartisan basis over the next 2 years to craft good and understandable decisions. I think particularly since the Administration has recently changed and, in fact, control of the Congress has changed, we could contrast how we felt during the Trump Administration, when they repeatedly went to the High Court, versus the possibility that, in the weeks to come, one or more judges around the country might, in fact, enjoin the Administration in a very similar but reverse role and they may be running to the Court. If that is the case, if, in fact, this very large increase in the
load by the Court continues but in a reverse role, then I think there could be no choice but either the Court to Act or us to act.

Further, I believe that in the case of many of the decisions that are now popping up, such as almost every death penalty case having an 11th-hour novel review, that there needs to be a greater level of certainty as to when and how a pleading can go so that, in fact, we reduce the load to the Court.

Lastly, I believe that one of your points that is most valid is that, although it is unlikely for us to get an expeditious improvement in the transparency of the Court, that we have the ability to both ask for, study, and, if necessary, require that in the period after a decision but in the clearness of those days or weeks to follow that we have a more full and complete reporting.

I believe we have an opportunity as a Committee to look into a number of bipartisan, mutually selected examples and write the Court and ask them to give us, in those specific cases that are of public interest, a more complete answer, including the process for the voting, who voted, and particularly some of the underlying elements.

If we choose cases wisely, I believe we then begin to have the building blocks for what we would ask for and expect in post-mortem of these last-minute and often, as is often said, dead-of-night decisions.

So, Mr. Chair, I would ask unanimous consent that the rest of my opening statement be placed into the record and that we be able to get to our Witnesses.

Thank you, Mr. Chair.

[The statement of Mr. Issa follows:]
MR. ISSA FOR THE RECORD
Thank you, Mr. Chairman. And thank you to our witnesses for agreeing to offer your perspective today.

Today we are set to discuss the Supreme Court’s so called “shadow docket.”

Such a conversation would be incomplete if it did not also include an examination of the actions that precede the Supreme Court engagement.

The process typically begins with an administrative action – a law or rule - by a government body.

This is followed by a lawsuit in which a judge then issues a nationwide injunction, pausing all or part of the government action for not just the plaintiff or plaintiffs, but a decision for the whole.

The government body then has little option but to appeal to the Supreme Court.
Once a rarely used tool, in recent years nationwide injunctions have become much more common in the preceding decades.

- In the last four years they were an especially popular tool to block policies of the Trump Administration.

- According to the Department of Justice, 12 nationwide injunctions were issued during the eight years of the Bush Administration and 19 during the two terms of the Obama Administration.

- But during the Trump Administration, we saw a drastic increase: 55 nationwide injunctions issued in only his first three years in office.

- Something is very out of balance, and it’s time we were honest about it.

- As the decisions can take significant time to adjudicate more thoroughly, the injunction is an especially powerful tool over a significant interim.

- Our nation has crossed a new threshold, where nationwide injunctions are virtually routine steps in a regulation or policy’s lifecycle.
• When a single federal district court judge can enjoin federal policy for the entire nation, it makes for an extremely powerful judge. And, an extremely powerful process.

• While some may criticize the Supreme Court “shadow docket” as an unjustly powerful decision point, a Supreme Court justice must convince at least four colleagues to uphold an injunction.

• Conversely, in current habit, a single district court can effectively prevent the president of the United States from fulfilling what they believe is a constitutional duty.

• The current pattern of universal injunctive relief use has fueled policy chaos.

• While everyone on this dias might at times find ourselves agreeing with the outcome of paused rules and regulations with which we disagree, we might all agree the courts should not become the replacement for unconstitutional or improper governance.

• Nor should the courts take the place of the legislative or executive branch.

• We on this dias have the greatest obligation to look to what is right, not just what is convenient.
• It is time to more closely study this form of remedy. Justice Thomas summed this up well when he wrote that nationwide injunctions “appear inconsistent with longstanding limits on equitable relief.” He also said that if the trend continues, the Court “must address their legality.”

• I’m looking forward to hearing from all our witnesses today on this complex issue, and I look forward to addressing these challenges together knowing that the current system does not appear to be in balance.

• Thank you, Mr. Chairman. I yield back.
Mr. JOHNSON of Georgia. Thank you, Mr. Issa.
I now recognize the distinguished Ranking Member of the Full Committee, the gentleman from Ohio, Mr. Jordan, for his opening statement. I might add, without objection, the remainder of your statement will be entered into the record.
With that, Mr. Jordan.
Mr. Jordan, are you with us and are you unmuted?
Apparently, Mr. Jordan is not on the line.
So, at this point, I will proceed to the introduction of the panel of Witnesses.
Our first Witness is Professor Steven Vladeck, who holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law. He has argued before the U.S. Supreme Court, the Texas Supreme Court, and lower civilian and military courts.
In addition to teaching, Professor Vladeck is an elected member of the American Law Institute, a distinguished scholar at the Robert S. Strauss Center for International Security and Law, a senior editor of the peer-reviewed Journal of National Security Law and Policy, and a Supreme Court fellow at The Constitution Project. He is also the co-host of “The National Security Law Podcast,” a CNN Supreme Court analyst, and is the executive editor of the “Just Security” blog and a senior editor of the “Lawfare” blog.
Professor Vladeck received his B.A. from Amherst College and his J.D. from Yale Law School.
Welcome, Professor Vladeck.
Next I would like to introduce Mr. Amir Ali, who is a civil rights lawyer who litigates issues of national importance in Federal courts across the country, including the U.S. Supreme Court. He is Director of the Washington, DC, office of the MacArthur Justice Center, a premier national civil rights law firm, and Deputy Director of the organization’s Supreme Court and Appellate Program.
Mr. Ali also teaches at Harvard Law School, where he directs the law school’s Criminal Justice Appellate Clinic. Mr. Ali has successfully argued multiple cases in the U.S. Supreme Court and has represented several people under death sentences before the U.S. Supreme Court.
Mr. Ali received his B.S. in software engineering from the University of Waterloo and his J.D. from Harvard Law School.
I would like to extend a warm welcome to Mr. Ali.
Professor Michael Morley joined Florida State University College of Law in 2018, where he teaches and writes in the areas of election law, constitutional law, remedies, and the Federal courts. Before joining FSU Law, Professor Morley was a Climenko fellow and lecturer in law at Harvard Law School.
Prior to his experience in academia, he served in government as Special Assistant to the General Counsel of the Army at the Pentagon, as well as a law clerk on the U.S. Court of Appeals for the 11th Circuit. He also worked as an associate at Williams & Connolly, LLP, and the Supreme Court and Appellate Group at Winston & Strawn, LLP, both in Washington, DC.
Professor Morley earned his J.D. from Yale Law School in 2003.
Welcome, Professor Morley.
Solicitor General Loren AliKhan is the solicitor general of the District of Columbia. She oversees administrative, civil, and criminal appeals in the D.C. Court of Appeals, the U.S. Court of Appeals for the D.C. Circuit, and the U.S. Supreme Court.

Prior to this, Solicitor General AliKhan focused on Supreme Court and appellate litigation at the law firm O'Melveny & Myers. She also served as a Bristow fellow in the Office of the Solicitor General at the U.S. Department of Justice and was a Temple Bar scholar in London, England, where she worked with the Deputy President of the Supreme Court of the United Kingdom.

Solicitor General AliKhan clerked for the U.S. Court of Appeals for the Third Circuit and for the U.S. District Court for the Eastern District of Pennsylvania. She earned her bachelor's degree from Bard College at Simon's Rock and her J.D. from Georgetown University Law School.


Before proceeding with testimony, I hereby remind the Witnesses that all of your written and oral statements made to the Subcommittee in connection with this hearing are subject to 18 U.S.C. 1001.

Please note that your written statements will be entered into the record in its entirety, and I ask you to summarize your testimony in 5 minutes. To help you stay within that timeframe, there is a timing light in WebEx. When the light switches from green to yellow, you will have 1 minute to conclude your testimony, and when the light turns to red, it signals that your 5 minutes have expired.

Professor Vladeck, you may now begin.

STATEMENT OF STEPHEN I. VLADECK

Mr. VLADECK. Thank you, Mr. Chair, Ranking Member Issa, distinguished Members of the Subcommittee.

Although the shadow docket has existed for as long as there has been a Supreme Court, there is no disputing that it has grown in prominence in the last 4 years, not because the total number of these orders has increased, but because the Court is acting far more aggressively in these cases than in the past, including in staying lower court injunctions of State and Federal Government action; in lifting stays of executions that lower courts have imposed, which is quite distinct, of course, from refusing to grant a stay of execution; and in directly enjoining State officials in cases in which multiple lower courts have already refused to do so.

As I explain in my written testimony, the Trump Administration helped to precipitate some of this uptick, but the shadow docket is about much more than just the Federal Government, and, even in Federal cases, it has been about much more than nationwide injunctions. In the last 2 weeks alone, we have seen four major shadow docket rulings: Three blocked State COVID-related restrictions; one refused to vacate a lower court injunction blocking an Alabama execution. None involved the Federal Government.

Not only are the Justices using the shadow docket to change the status quo with far greater frequency but, as Chair Johnson noted, they are publicly divided on these cases far more sharply than before. During the October 2017 term, Justice Kennedy's last, only two shadow docket orders provoked four public dissents. Over the
next two terms, there were 20. During the October 2019 term alone, there were almost as many public five-to-four shadow docket rulings, 11, as there were five-four merits rulings, 12.

Why has this happened? So, I think it is a long story, and I try to tell some of it in my written statement. No single development adequately explains it, including the rise of nationwide injunctions. Rather, I think it stems from a confluence of factors, including the Supreme Court’s changing composition and the ascendancy of an idiosyncratic view about when emergency relief is appropriate. Indeed, it is no coincidence, in my view, that the brakes have truly come off since the retirement of Justice Kennedy and the death of Justice Ginsburg.

Nor can it be denied that this uptick has had enormous real-world consequences. Mr. Ali and Solicitor General AliKhan are both going to speak to some of the many ways in which these rulings have affected individual Americans and government-wide policymaking. Even for those who think the Court has nevertheless reached the right results in these cases, there are still numerous respects in which we should find this uptick troubling.

First, having more and more of the Court’s significant decisions handed down through unseen, unsigned, and unexplained orders raise serious legitimacy questions since such rulings bear none of the hallmarks of principled judicial decision making.

Second, they leave lower courts and government officials to speculate and, as we have seen increasingly, disagree as to what the law actually is going forward.

Third, they invert the ordinary flow of litigation, leaving the Court to prematurely, if not unnecessarily, resolve serious constitutional questions based upon undeveloped or, at the very least, underdeveloped factual records.

Fourth, they increasingly appear to be coming at the expense of the merits docket, where the Court decided the fewest merits cases last term since the Civil War and is on pace to decide the second fewest since the Civil War this term.

Obviously, the best solution would come from the Justices themselves, pushing more of these issues to the merits docket, providing more explanation for those major disputes that must be resolved through orders. I don’t disagree that there will always be at least some need for a shadow docket, but not all these cases really are emergencies. If we take, for example, the Court’s most recent order in the California cases, that order came late on a Friday night, 6 days after the briefing had been complete. The Court has expedited merits cases in less time in its history.

In any event, Congress is hardly powerless. Although I am wary of efforts to prevent the Court from using the shadow docket, both for normative reasons and, in the extreme, for constitutional ones, I believe that there is a productive conversation to be had about how Congress might take pressure off the shadow docket. I suggest some possibilities in my written statement.

Of course, my list is hardly exhaustive. Smarter people will have better ideas. The far more important point is that the shadow docket is something to which we should all be paying more attention. If nothing else, then, today’s hearing is a welcome step in that direction.
Thank you for the opportunity to testify, and I look forward to your questions.
[The statement of Mr. Vladeck follows:]
THE SUPREME COURT’S SHADOW DOCKET

Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary
Thursday, February 18, 2021

Testimony of Stephen I. Vladeck
Charles Alan Wright Chair in Federal Courts
University of Texas School of Law
Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee:

Thank you for the invitation to testify today. As you know, I hold the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where my research and writing focus on the intersection of constitutional law, national security law, and the federal courts. In addition to teaching about the Supreme Court, I also practice before it (I’ve argued three cases over the last four Terms), and help CNN cover it (as its Supreme Court analyst).

In light of that background, I’m especially heartened that the Subcommittee is taking a close look at the Supreme Court’s so-called “shadow docket” — which has become such an increasingly significant and visible part of the Justices’ workload. To help illuminate the conversation, my testimony today has five objectives: (1) To introduce the shadow docket and describe what it comprises; (2) to document the rise in significant shadow docket rulings since 2017; (3) to identify some of the possible explanations for this uptick; (4) to outline why, in my view, the rise of the shadow docket is not a salutary development; and (5) to sketch out some potential reforms that both the Court and Congress might consider.

I. **What is the “Shadow Docket”?**

The term “shadow docket” was coined by University of Chicago law professor Will Baude in 2015 as a catch-all for a body of the Supreme Court’s work that was, to that point, receiving virtually no academic or public attention.¹ Unlike the Court’s “merits” docket, which includes the approximately 60–70 cases each Term in which the Justices hear oral argument and resolve the dispute in a signed “opinion of the Court,” the “shadow” docket comprises the thousands of other decisions the Justices hand down each Term — almost always as “orders” from either a single Justice (in their capacity as “Circuit Justice” for a particular U.S. Court of Appeals) or the entire Court. So understood, although the term itself dates only to 2015, the shadow docket has been around for as long as the Supreme Court.

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Although it’s only of recent vintage, the “shadow” metaphor is entirely appropriate given the contrast between such orders and merits decisions. The latter receive at least two full rounds of briefing; are argued in public at a date and time fixed months in advance; and are resolved through lengthy written opinions handed down as part of a carefully orchestrated tradition beginning at 10:00 a.m. EST on pre-announced “decision days.” It is impossible to miss these 60–70 cases, which, on top of the attention they receive from the Court, also tend to be the subject of numerous professional and academic Term “preview” events (before they’re argued) and “recap” events (after they’re decided).

In contrast, rulings on the “shadow docket” typically come after no more than one round of briefing (and sometimes less); are usually accompanied by no reasoning (let alone a majority opinion); invariably provide no identification of how (or how many of) the Justices voted; and can be handed down at all times of day — or, in some exceptional cases, in the middle of the night. Owing to their unpredictable timing, their lack of transparency, and their usual inscrutability, these rulings come both literally and figuratively in the shadows.\(^2\)

These shortcomings aside, scholars and court-watchers did not pay much attention to the shadow docket historically, because nearly all of the Justices’ decisions on the shadow docket were anodyne — denying petitions for certiorari in un-controversial cases; denying applications for emergency relief in cases presenting no true emergency; granting parties additional time to file briefs; dividing up oral arguments; and so on. That’s not to say that there were never controversial rulings on the shadow docket; from the execution of the Rosenbergs\(^3\) to Justice Douglas halting Nixon’s bombing of Cambodia\(^4\) to the stay of the Florida recount in what became Bush v. Gore,\(^5\) there certainly have

\(^2\) Unlike merits decisions, shadow docket rulings can appear in any of four different places on the Supreme Court’s website — as an “opinion of the Court”; an “opinion relating to orders”; a published order of the Court; or an unpublished order by an individual Justice that is reflected only on the Court’s docket. This is a minor point, to be sure, but it’s even harder to find these orders relative to merits opinions.

\(^3\) See Rosenberg v. United States, 346 U.S. 313 (Douglas, Circuit Justice 1953).


been significant rulings on the shadow docket across the Court’s modern history.

But the shadow docket rulings that provoked public attention were sufficiently few and far between that scholarly focus tended to focus on their substance — rather than their procedure. At most, each Term tended to bring with it perhaps three or four significant shadow docket rulings, and a majority of those involved either election-related disputes or last-minute appeals before executions were carried out.

And because the Court so rarely settled divisive disputes through the shadow docket (outside of the election and death penalty contexts, anyway), the most frequent litigants before the Court did not tend to rely upon it. To take just one example, from 2001–17, across two very different two-term presidencies, the Justice Department only sought emergency relief from the Supreme Court (a common source of shadow docket orders) eight times — once every other Term. Although the Court granted four of those requests and denied four, only one of the eight orders in those cases provoked any of the Justices to publicly dissent. Compared to what we have seen over the past four years, the contrast is striking.

II. THE RISE OF THE SHADOW DOCKET SINCE 2017

There’s no perfect way to measure the rise of the shadow docket over the past four years. It’s a large dataset to begin with, and it’s often hard to separate out the significant rulings (which are always a relatively small percentage of the total number of orders the Court hands down) from the insignificant ones — at least quantitatively. That said, there is simply no dispute, even anecdotally, that the shadow


8. Veseay, 135 S. Ct. at 10 (Ginsburg, J., dissenting).
docket has become increasingly prominent over the past four years. In this part, I first identify at least six distinct respects in which the past four years have seen qualitative changes in the scope and size of the shadow docket before turning to possible explanations for the uptick.

a. DESCRIBING THE RISE OF THE SHADOW DOCKET

First, excepting ordinary grants of certiorari, there are a lot more cases in which the Justices are using the shadow docket to change the status quo — where the Court’s summary action disrupts what was previously true under rulings by lower courts. Consider, in this respect, one of the Court’s most recent high-profile shadow docket rulings — the order handed down at 10:44 p.m. EST on Friday, February 5 in “South Bay II,” in which the Court enjoined most of California’s COVID-based restrictions on indoor religious services. Neither the district court nor the Ninth Circuit had blocked California’s rules, so it was the Justices, in the first instance, who put them on hold.

In both absolute and relative terms, there have been far more of these kinds of rulings in cases seeking emergency relief — granting injunctive relief, granting stays of lower-court rulings; or, as in a surprising number of capital cases, lifting stays of lower-court rulings — than at any prior point in the Court’s history. In that respect, part of the significance of the shadow docket of late has been in how often the Justices are using it to disrupt the state of affairs as a case reaches the Court.

Second, perhaps most dramatically, the shadow docket has seen a remarkable increase in action from the Solicitor General. In contrast to the eight applications for emergency relief filed by the Justice Department between January 2001 and January 2017, the Trump administration filed 41 applications for such relief over four years — asking the Justices to intervene at a preliminary stage of litigation more than 20 times as often as either of its immediate predecessors. Emergency applications became such a central feature of the Office of


the Solicitor General during the Trump administration that it even led to a restructuring of the Office’s staff.\textsuperscript{11}

What’s more, the dramatic increase in applications paid dividends. Not counting one application that was held in abeyance and four that were withdrawn, the Justices granted 24 of the 36 applications in full and four in part. Even among the eight applications that were denied in full, only a few were denied with prejudice. Thus, not only was there a dramatic increase in the demand for shadow docket rulings from the party often referred to as the Court’s “Tenth Justice,” but the Justices—or at least a majority of them—have been willing to go along with it.

Third, both in cases in which the Solicitor General sought emergency relief and otherwise, the shadow docket has become far more publicly divisive in recent years. I already noted that only one of the eight applications filed by the Bush 43 or Obama Justice Departments provoked any public dissent. In contrast, 27 of the 36 applications from the Trump administration on which the Justices ruled provoked at least one Justice to publicly dissent.

And expanding the focus beyond applications from the federal government, there has been a sharp increase in the number of shadow docket rulings that have provoked four public dissents. During the October 2017 Term, for instance, there were exactly two such rulings. In the next two Terms, there were 20. Indeed, during the October 2019 Term, there were almost as many public 5-4 rulings on the shadow docket (11) as there were on the merits docket (12).\textsuperscript{12}

Even so far this Term (the Court’s first without Justice Ginsburg), there have already been two shadow docket rulings that were publicly 5-4.\textsuperscript{13} What’s more, virtually all of the divisions in these cases are


\textsuperscript{13} See Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 68 (2020) (per curiam); Agudath Israel v. Cuomo, No 20A90, 2020 WL 6954120 (U.S. Nov. 25, 2020) (mem.).
occurring along conventional ideological lines — with the progressives on one side, one bloc of conservatives consistently on the other, and one or two of the conservative Justices occasionally voting with the progressives. None of the “strange bedfellows” that we sometimes see on the merits docket have shown up on the shadow docket in recent years: the divisiveness of the shadow docket has been even more homogenously ideological than the divisiveness of the merits docket.

Fourth, although it has long been a criticism of the shadow docket, especially denials of certiorari, that the public usually has no idea how many Justices voted for a specific outcome (let alone which Justices), that concern has become that much more pronounced as the public tally has increasingly reflected multiple dissents. Consider, in this respect, the Court’s order last Thursday night refusing Alabama’s request to vacate a lower-court injunction in order to allow a scheduled execution to proceed. Four Justices concurred in the order — and joined an opinion explaining the basis for their concurrence. Only three Justices noted dissents. So we know that either (or both) of Justices Alito and Gorsuch joined the majority to block the execution. But we have no idea which of them, or if they both did, or why. Stealth votes aren’t new, but as the shadow docket grows in both absolute terms and divisiveness, the stealth votes are increasingly the dispositive ones — which, among other things, complicates efforts to decipher the potential impact of the Court’s ruling beyond the instant case.

Fifth, accompanying the rise of the shadow docket has been the rise of new (and unusual) forms of relief. Consider again the South Bay II decision handed down on February 5, in which the Court enjoined California from enforcing at least some of its COVID-related restrictions on indoor worship services. The following Monday, the Court issued an order in another California case in which a plaintiff had sought an injunction — treating the application for an injunction as a petition for a writ of certiorari before judgment (itself an unusual

15. Id. at *1 (Kagan, J., concurring).
16. Id. at *2 (Kavanaugh, J., dissenting).
procedural vehicle)\textsuperscript{17} and issuing a “GVR,” \textit{i.e.}, granting the petition; vacating the district court’s order; and remanding “for further consideration in light of” \textit{South Bay II} — itself an unsigned order that was not accompanied by an opinion of the Court.\textsuperscript{18} What about the Court’s summary ruling in \textit{South Bay II} was the district court supposed to consider? To similar effect, on January 15, the Court granted another petition for certiorari before judgment in a federal death penalty case — and, unlike the “GVR” order in \textit{Gish}, summarily reversed the district court on the merits,\textsuperscript{19} something else that, at least according to my research, it has never before done in that posture (cert. before judgment).

\textbf{Finally,} as the \textit{Gish} order makes clear, the dramatic increase in significant shadow docket rulings has brought with it novel questions about how lower courts are supposed to give precedential effect to rulings that the Supreme Court has \textit{itself} suggested are of little precedential value.\textsuperscript{20} For instance, a panel of the Fourth Circuit split sharply in August 2020 over what to make of how the Supreme Court had handled emergency applications in different cases brought by different parties challenging the same underlying governmental policy.\textsuperscript{21} And D.C. district judge Trevor McFadden has even drafted a

\textsuperscript{17} Unlike cases arising in state courts, the Supreme Court may grant a petition for certiorari to review a lower federal court decision as soon as that case is “in” the Court of Appeals. \textit{See} 28 U.S.C. § 1254(1). Granting a writ of certiorari “before judgment” thus allows the Court to take up a case before it has been \textit{decided} by the Court of Appeals — and has, at least traditionally, been reserved for cases presenting extremely exigent circumstances and timing. \textit{See} Viadeck, \textit{supra} note 6, at 128–30.

\textsuperscript{18} \textit{Gish v. Neusom}, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (mem.).

\textsuperscript{19} \textit{United States v. Higgs}, 141 S. Ct. 645 (2021) (mem.).

\textsuperscript{20} \textit{See, e.g., Landing v. N.Y. Tax Appeals Tribunal}, 522 U.S. 287, 307 (1998) ("Although we have noted that \textit{our} summary dismissals are ... to be taken as rulings on the merits in the sense that they rejected the specific challenges presented ... and left undisturbed the judgment appealed from," we have also explained that they do not have the same precedential value ... as does an opinion of this Court after briefing and oral argument on the merits.") (quoting \textit{Washington v. Confederated Bands & Tribes of Yakima Indian Nation}, 463 U.S. 463, 477 n.20 (1979)) (alterations in original)).

\textsuperscript{21} \textit{Compare Casa de Maryland, Inc. v. Trump}, 971 F.3d 220, 229–30 (4th Cir. 2020), \textit{with id.} at 281 n.16 (King, J., dissenting). The Fourth Circuit has agreed to rehear \textit{Casa
paper, together with one of his former clerks, attempting to taxonomize the different kinds of shadow docket rulings and what their value as precedent should — and should not — be.\textsuperscript{22}

Simply put, it is no longer possible for any reasonable observer to dispute that there has been a dramatic uptick in significant, high-profile, shadow docket rulings over the past four years; that these rulings have been unusually divisive; that they are leading to novel forms of procedural relief from the Court; and that their effects are causing significant uncertainty both in lower courts and among those government officers, lawyers, and court-watchers left to parse what, exactly, these rulings portend.

b. EXPLAINING THE RISE OF THE SHADOW DOCKET

There is no single explanation for the source of this uptick. Rather, my own view is that the surge in high-profile shadow docket rulings can best be traced to a confluence of four factors: (1) subtle procedural changes that have made it easier for the Court to act collectively even when the Justices are physically dispersed; (2) a subtle but significant shift in how a majority of the Justices apply the traditional four-part standard for emergency relief pending appeal; (3) the effects of the changing composition of the Court on both the substance and procedure of these disputes; and (4) repetition — where what used to be extraordinary has increasingly become routine.

Before briefly outlining these shifts, let me first debunk one of the most common claims about the rise of the shadow docket in recent years — that it has largely been in response to the rise of so-called “nationwide” injunctions. Practically and empirically, that’s just not true. First, that only describes cases in which the federal government is the party invoking the shadow docket — which, as the myriad election and COVID cases of the past six months drive home, is only one modest slice of the shadow docket. Without considering any of those cases, we’ve still seen a dramatic uptick.

Second, even within the DOJ slice, less than half of the Trump administration’s applications for emergency relief involved nationwide injunctions. Rather, the theory on which the Trump administration routinely (and usually successfully) litigated most of its applications was that any injunction of a government policy created the kind of irreparable harm that justified emergency relief. That’s why, after staying a “nationwide” injunction against the “public charge” rule, the Court separately (and later) voted to stay an Illinois-only injunction against the same rule; the geographic scope of the injunction just wasn’t the central consideration.

Instead, my own view is that the uptick reflects a more nuanced confluence of developments. For instance, it used to be standard practice for the Justices to resolve most contentious shadow docket disputes by themselves — “in chambers,” acting as the Circuit Justice for the Court of Appeals from which the dispute arose. Into the 1970s, Justices would often even hear oral argument in such contexts, and routinely published opinions as Circuit Justices setting forth their rationale.

But two shifts starting in the 1980s moved away from this practice. First, the Court stopped formally adjourning for its summer recess — so that the Court was technically always “in session,” even when the Justices were scattered across the globe. This made it easier for the full Court to act on especially contentious cases — and took significant authority away from the individual Circuit Justices. Second, and related, although individual Justices often heard argument in chambers in shadow docket disputes (especially on matters they perceived to be of public importance), the full Court, as a matter of practice (but no formal rule) did not. Thus, the Court slowly

26. See, e.g., Cousins v. Wigoda, 499 U.S. 1201, 1201 (Rehnquist, Circuit Justice 1972) (“Because applicants’ application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.”).
27. Shapiro et al., supra note 25, § 17.2.
normalized the practice of issuing orders, even in contentious cases, by the full Court, without meeting in person, and without any opportunity for oral argument.

As the Court’s procedures shifted subtly, its composition shifted dramatically. It’s not just that the two most recent appointments have moved the Court rightward; it’s that they also appear to have provided a fifth (and sixth) vote for a particular (and idiosyncratic) view of when the Court should issue emergency relief. As I’ve explained in detail elsewhere, there now appears to be a majority of Justices who believe that, when any government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief no matter the consequences to those who might be injured by allowing the policy to remain in effect. Not only did Justice Kennedy never expressly endorse this view (which may help to explain why the uptick has accelerated since his departure), but the underlying justification for this approach does not actually hold up to meaningful scrutiny; it just gets repeated as if its logic is beyond dispute.

The upshot is that emergency relief now appears to rise and fall entirely on the merits — with virtually no regard for whether the other factors that are usually required are in fact satisfied. Once again, South Bay II stands out. Although there were four statements from the six Justices in the majority, none of them purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction. Instead, all of the discussion, and all of the Justices’ analysis, was focused on the merits of the First Amendment dispute. That’s increasingly the norm in these contexts — which may

28. Vladeck, supra note 6, at 131–32.

29. This view appears to originate with then-Justice Rehnquist, who traced the idea to the “presumption of constitutionality” that accompanies (most) government action. See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977); see also Maryland v. King, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (endorsing Rehnquist’s formulation). But the presumption of constitutionality (1) is principally about statutes, not executive action; (2) is supposed to yield when constitutional rights are implicated; and (3) is, in any event, not a justification for declining to take into account the harm caused by allowing the policy to remain in effect pending appeal. See Vladeck, supra note 6, at 132 n.60.

30. See South Bay II, 2021 WL 4062558, at *1 (notation of Alito, J.); id. (Roberts, C.J., concurring); id. (Barrett, J., concurring); id. (statement of Gorsuch, J.).
also help to explain why it’s happening so much more often. The more that the Justices issue emergency relief on the shadow docket, especially in cases in which it might not previously have been available, the more the standard for such relief is necessarily diluted — making it easier for the next applicant to make out a case for such relief, and so on.

As the merits have become the all-but exclusive consideration in shadow docket cases, it is hardly surprising that positions likely to resonate with the Court’s conservative majority are faring better. But the shift in the Court’s composition has also had procedural consequences, not just with respect to emergency relief such as stays or injunctions, but also with respect to summary reversals of lower courts — for which there is at least a norm (if not a rule) that six votes, not five, are required (on the theory that any four Justices could grant plenary review, and so it takes six to prevent that from happening). Thus, the Court’s novel January 15 ruling in Higgs — a summary reversal on a petition for a writ of certiorari before judgment — seems possible only because there are no longer four Justices who would dissent from such a procedural move.

Simply put, if a majority of the Justices are now of the view that the merits are the predominant consideration in considering emergency applications, and if six Justices are willing to summarily dispose of the merits even in novel procedural contexts, then that not only explains why we’ve seen such a dramatic uptick on the shadow docket in the last few years, but it also suggests that this shift is here to stay even if the Biden administration is less aggressive in pursuing (or the Justices are less solicitous in providing) such relief going forward. Instead, the focus will likely shift to cases in which states are parties, or cases in which those challenging federal policies are asking the Justices to intervene to freeze a lower-court ruling in favor of the federal government — as with the Clean Power Plan late in the Obama administration.31

Finally, it’s worth noting that, whatever the cause of this uptick, it has almost nothing to do with Congress — which hasn’t touched the Court’s jurisdiction or procedures in any meaningful way since 1988. Even the change in the Court’s Term — from one that formally ended

31. See West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.).
with the summer recess to a “continuous” Term — was accomplished via an amendment of Rule 3 of the Court’s rules. Everything else has come, by all appearances, through unexplained shifts in how the Court applies its own standards for emergency relief under statutes that Congress has not disturbed.

Although one scholar has argued that the uptick in the Court’s grants of certiorari before judgment can be tied to an amendment Congress enacted in 1988, that category of cases is, frankly, the smallest and least troubling subset of the cases discussed herein. After all, at least until the January 2021 ruling in Higgs, certiorari “before judgment” was primarily a mechanism for getting a merits case to the Court faster, not for summarily altering the status quo. Even if Professor Morley is correct about the 1988 reform (a debatable proposition given the lack of any increase in grants of certiorari before judgment prior to 2017), that doesn’t explain — or justify — any of the far more significant shifts in other shadow docket rulings.

III. WHY THE RISE OF THE SHADOW DOCKET IS A PROBLEM

The uptick identified above is not simply an assessment of volume. Rather, the Supreme Court’s significant shadow docket rulings in recent years have had dramatic real-world impacts — from allowing controversial immigration policies affecting millions to go into effect to clearing the way for the first federal executions in 17 years; from blocking state-wide COVID restrictions and rulings by lower federal courts extending access to the polls in the 2020 election to staying out of cases after the election seeking to overturn the result. Reasonable minds will surely disagree about the merits of each (and all) of these

34. See Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).
36. See Merrill v. People First of Ala., 141 S. Ct. 25 (2020) (mem.).
rulings. But it seems important to me to highlight some of the many ways in which handing down significant rulings via the shadow docket is problematic even to those who think the Court is generally getting the merits of most (or even all) of these disputes “right.”

1. The absence of reasoning. Most significantly, these rulings are generally coming down without any explanation from a majority of the Justices as to their reasoning, leaving not only the parties and lower courts but other actors who might be affected by the decision (e.g., state executive officials) to speculate as to why the Court ruled the way it did. Indeed, if the Justices truly are focusing on the merits to the exclusion of all other considerations in applications for emergency relief, it might behoove them to say so — so that lower courts stop applying what may increasingly be the wrong standard. Either way, the lack of reasoning makes it impossible to scrutinize the merits of the Court’s action in far too many of these cases.

2. The anonymity of the vote. The uncertainty over which Justices voted which way, especially on contentious issues, also perpetuates uncertainty among parties and lower courts — who have been instructed by the Supreme Court to generally give weight to the “narrowest” view that commands the support of a majority of the Justices. When, as in the Dunn v. Smith ruling last Thursday, we don’t even know who the fifth (and perhaps sixth) votes were in support of a shadow docket ruling, that only further complicates efforts to figure out exactly what the Court has commanded.

3. The unpredictable timing of decisions. Another issue that has arisen with the rise of the shadow docket has been the proliferation of what Bloomberg News’s Supreme Court reporter Greg Stohr has called the “night Court” — with decisions often coming down late in the evening (or very early in the morning), especially on Friday nights. In July 2020, for example, the Court handed down a pair of major rulings clearing the way for the first federal executions in 17 years in a pair of 5-4 decisions that were handed down the first night at 2:10 a.m. EST,


and two nights later at 2:46 a.m. EST. Executions raise unique timing concerns with respect to last-minute stay applications (or applications to lift stays), but even cases with no comparable urgency have led to late-night rulings — such as the decision in South Bay II, which came at 10:44 p.m. EST on a Friday night six days after briefing had been completed. Likewise, the Court’s significant ruling blocking New York’s COVID-based restrictions on certain religious services in Roman Catholic Diocese of Brooklyn v. Cuomo was handed down at 11:56 p.m. EST on Wednesday, November 25 — the night before Thanksgiving. There’s a reason why the Court follows a longstanding protocol for when it hands down rulings in argued cases. Among other things, it increases public access to and awareness of the decisions. Indeed, the hand-down announcements are even recorded and eventually published. Here, in contrast, the rulings are handed down in a manner that makes them that much more inaccessible.

4. The lack of merits briefing, amicus participation, and/or oral argument. Deciding significant questions through the shadow docket also deprives any number of affected parties of the opportunity to participate, including through the filing of friend-of-the-Court briefs. Although the Supreme Court’s rules do not preclude the filing of such amicus briefs in conjunction with shadow docket applications, the timing makes them all-but impossible in most cases. And effectively handing down merits decisions on the shadow docket also deprives the parties of a chance to fully brief the merits (as opposed to briefing whether emergency relief is warranted) and oral argument — notwithstanding the settled view that both of those are key features of the Court’s plenary consideration.

5. The problems with predictions. The above concerns all go to the transparency of the Court’s decisions and the opportunities of interested parties to help shape them. But even on their merits, shadow docket rulings suffer from multiple flaws, including the difficulties of making predictive judgments about the merits of a dispute so early in the progress of litigation. Consider, in this respect, the Court’s shadow docket ruling issuing a partial stay of two district court injunctions against the second iteration of President Trump’s travel ban.40

Presumably (although we'll never know), that decision reflected a judgment by a majority of the Justices that they would uphold that policy if and when it reached them for plenary review. But right before the Court was set to hear argument, the Trump administration withdrew the second iteration, and replaced it with the more legally nuanced third version — mooting the appeal and leading the Court to dump the cases from its calendar without reaching those merits. (They would eventually uphold the third iteration.) As these cases show, the Justices are sometimes making predictions about what they're going to do in cases on which they never actually have a chance to rule. Indeed, the Court was supposed to hear arguments in the coming weeks on challenges to President Trump's border wall and his "remain in Mexico" asylum policy — which no lower court ever sustained. But because the Biden administration has changed those policies, the Court has removed those cases from its argument calendar, and will likely never reach the merits of those disputes notwithstanding its earlier rulings that allowed the policies to go into effect pending appeals of adverse lower-court rulings.

6. Prematurely (and unnecessarily) resolving constitutional questions. The increasing prominence of the shadow docket also means that the Justices are more frequently deciding significant questions of constitutional law at an incredibly early stage of litigation — including in contexts in which such constitutional analyses turn out to be premature and/or entirely unnecessary. Consider, in this respect, the decision in *Roman Catholic Diocese of Brooklyn*, in which a 5-4 majority enjoined New York COVID restrictions that were no longer in effect on the ground that they likely violated the First Amendment. Although the dispute certainly appeared to be moot, the majority (in a rare — but unsigned — opinion for the Court) justified such an intervention because "if" the state were to re-apply the challenged restrictions on religious worship, such a hypothetical move would "almost certainly" bar individuals in the affected area from attending services before judicial relief can be obtained."41 In other words, the Court used a shadow docket ruling to resolve major First Amendment questions about a policy that wasn't even in effect — and did so before the litigation had a

chance to make its way through the courts on the merits. The Court is fond of saying that it is “a court of final review and not first view,”

42 trumpeting the virtues of percolation, of developments of factual records, and of the benefit of having several rounds of lower-court briefing (and rulings) in the record before deciding weighty constitutional cases. Except on the shadow docket.

7. Distorting the Supreme Court’s workload. In addition to these procedural and substantive concerns, the shadow docket also appears to be increasingly competing with merits cases for the Justices’ attention. During its October 2019 Term, the Court handed down signed opinions in only 53 merits cases — the fewest since the Civil War. Some of that can be blamed on COVID, which led the Justices to postpone arguments in 10 cases from the March 2020 and April 2020 sessions to October 2020. But so far this Term, the Court is on pace to hand down signed opinions in only 56 merits cases — which would be the second-lowest total since the Civil War. As the shadow docket has grown, the merits docket has shrunk (graphic credit: Adam Feldman):

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8. Undermining the Court’s legitimacy. All of the above concerns tie together in respect to the final, and most significant objection: That the rise of the shadow docket, especially at the expense of the merits docket, has negative effects on public perception of the Court — and of the perceived legitimacy of the Justices’ work. If the Court is handing down a higher number of decisions affecting Americans in unsigned, unreasoned orders, both in absolute terms and relative to merits rulings, that necessarily exacerbates charges — fair or not — that the Justices are increasingly beholden to the politics of the moment rather than broader jurisprudential principles. As Justice Sotomayor has warned, all of these developments in the aggregate “erode[] the fair and balanced decisionmaking process that this Court must strive to protect.”

IV. Potential Avenues for Reform

Of course, just as the rise of the shadow docket has largely been the result of judge-made shifts in judge-made norms and procedures, the first place where reforms to address these concerns should be pursued is at the Supreme Court itself. Hopefully, the mere fact that the Subcommittee is holding this hearing will bring additional light to the concerns I and others have raised — and perhaps the Justices will take those into account as they approach shadow docket rulings going forward.

I should also note that I’m one of those who is generally opposed to undue congressional interference in the workings of the federal courts in general, and the Supreme Court in particular. To that end, I don’t think that the concerns that I and others have identified can or should be addressed through reforms designed to prohibit the Court from doing what it’s doing — or, for example, to mandate that the Justices publicly disclose their votes on all (or even some) orders, etc. Even if such legislation doesn’t raise constitutional concerns (and some of it might), I fear that it could open up a can of worms that could lead to intrusions on norms of judicial independence going forward.

That’s not to say, however, that Congress is entirely powerless to address the rise of the shadow docket. Rather, I think there’s a

meaningful conversation to be had about shadow-docket inspired legislative reforms, which I see as falling into two basic camps:

First, Congress can and should consider mechanisms for taking pressure off of the shadow docket. If the rise of the shadow docket is in part a reflection of the Justices being unwilling to wait for plenary merits consideration of some of these issues, Congress can, of course, address that. Among other things, such reforms might include:

- Allowing the federal government to transfer all civil suits seeking “nationwide” injunctive relief to the D.C. district court — to avoid the concern of overlapping (or diverging) “nationwide” injunctions.
- In cases in which any (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower-court rulings receive plenary appellate review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority.
- In capital cases (where Justices from across the spectrum have bemoaned the difficulty of confronting novel legal questions on the literal eve of a scheduled execution), give the Court mandatory appellate jurisdiction at least over direct appeals — and perhaps also make it easier for death-row prisoners to bring timely method-of-execution challenges before an execution date has been set.

Second, Congress might consider codifying certain features of the shadow docket that were only norms historically. These could include:

- Codifying the traditional four-factor test that the Court applies in considering applications for emergency relief.\(^44\)

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\(^{44}\) Congress has, in at least some prior cases, prescribed standards of review even for injunctions against unconstitutional governmental action. See, e.g., Miller v. French, 530 U.S. 327 (2000) (upholding provision of the Prison Litigation Reform Act that prescribes a standard of review for injunctions against unconstitutional prison conditions).
Encouraging the Justices to provide at least a brief explanation of any order with respect to a stay or injunction that alters the status quo vis-à-vis the lower courts.

Encouraging the Court to hold (and funding) oral arguments on applications where there is at least a reasonable likelihood that the Justices will alter the status quo.

V. CONCLUSION

But no matter which of these reforms the Subcommittee pursues, if any, perhaps the most important thing we can do is to help bring this increasingly important source of significant Supreme Court rulings out of the shadows. In that respect, today’s hearing strikes me as a salutary first step.

Thank you again for the invitation to testify today. I look forward to your questions.

* * *
Mr. JOHNSON of Georgia. Thank you for your testimony, Professor Vladeck.

Mr. Ali, the floor is yours for 5 minutes.

STATEMENT OF AMIR H. ALI

Mr. ALI. Thank you, Mr. Chair, Ranking Member Issa, Members of the Subcommittee. Thank you for inviting me to testify today.

The very description of what we are talking about, the "shadow docket," makes clear that it does not usually get public attention, and I applaud the Subcommittee for exploring it today.

I plan to focus my testimony on one of the most frequently recurring issues on the shadow docket, the execution of human beings by the state. This is the most solemn Act our legal system authorizes.

Mr. Vladeck explained how the shadow docket resolves issues on undeveloped facts and uncertain law. Those features are at their most disturbing when we are talking about executions. When it comes to ending someone’s life, there is no do-over.

Mr. Vladeck described the legitimacy problem of a judicial system that operates on unsigned and unexplained orders. When the matter is life or death, the need to ensure transparency and public confidence in our legal system is at its apex. Yet, presently, the Supreme Court decides weighty execution issues in the middle of the night, often upon hours or even just minutes of having the briefing.

In the most disturbing of these cases, the Supreme Court allows executions to go forward without explanation after a lower court, which has had substantially more time to consider the evidence and arguments, has concluded that the impending execution likely violates the Constitution and laws of our country.

I think it is important to pause for a second and think about that. When the Supreme Court reverses, without any explanation, a person is executed even though the only analysis we have on the public record says the execution would violate the Constitution.

Let me give a clear example of the shadow docket’s arbitrary treatment of this ultimate punishment. It involves a story about three men—a Muslim, a Buddhist, and a Christian. Each of these men sought the very same thing: To die with a religious advisor of their own faith by their side to guide them through the final moments of their life.

When Domineque Hakim Marcelle Ray, a devout Muslim, asked for an imam by his side, he was told no. No imams, but he could have a Christian chaplain in the execution chamber.

A lower court stayed Mr. Ray’s execution. It found he had a powerful claim under the Establishment Clause, which prevents the government from preferring certain religions over others. The court also found that he brought this claim as quickly as he possibly could have.

In an unsigned order, the Supreme Court reversed. It did not address the lower court’s conclusions, and Mr. Ray was executed that night without any spiritual advisor to pray with him.

One month later, Patrick Henry Murphy, a Buddhist man, asked for a Buddhist priest by his side. Like Mr. Ray, he was told no. He could only have an advisor from religions that the State had chosen.
This time, the Supreme Court reached the opposite conclusion. In an unsigned, two-sentence order, it stopped Mr. Murphy’s execution. The one Justice who provided an explanation said it would have been okay to deny a Buddhist priest as long as the prison denied Christian advisors as well.

Fast-forward to just last week: Willie B. Smith, a Christian man who requested a pastor in the execution chamber. In response, the State took the Supreme Court’s latest advice: No spiritual advisors of any kind.

Once again, the Supreme Court shifts course. In another unsigned order, without legal analysis, the Court stopped Mr. Smith’s execution unless he was provided with a Christian pastor in the chamber.

This unexplained disparity is dangerous. Consider the potentially devastating public impression of our justice system. The Muslim prisoner? He may be executed without an advisor. The Buddhist man? Well, his advisor can’t be selectively excluded like the Muslim person’s but may be taken away if done right. When the Christian man comes to court, well, his right to have a pastor present, that can’t be taken away.

My point today is not that that is how the Supreme Court viewed these cases. I don’t think it viewed the cases in such terms at the time. My point is that the use of the shadow docket means we have no idea what justified the disparate treatment of these men. When the difference is life or death, even the appearance of arbitrary decisionmaking risks the very legitimacy of our legal system.

Thank you, and I look forward to your questions.

[The statement of Mr. Ali follows:]
Statement of Amir H. Ali

Director, Washington, DC Office
Deputy Director, Supreme Court & Appellate Program
Roderick & Solange MacArthur Justice Center

Hearing Before the
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives

The Supreme Court’s Shadow Docket

February 18, 2021
Statement of Amir H. Ali
Director, Washington, DC Office
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United States House of Representatives
117th Congress, 1st Session

February 18, 2021

The Supreme Court’s Shadow Docket

Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee:

Thank you for the opportunity to appear before you to address an important topic, the U.S. Supreme Court’s “Shadow Docket.” The very name used to describe this part of the Supreme Court’s work—the “Shadow Docket”—reveals it is a topic unaccustomed to open hearing and transparency. I applaud the Subcommittee for taking the time to examine and consider this part of the Supreme Court’s work in a public forum like this.

I want to begin by making clear that the disputes and issues that are resolved on the Shadow Docket are no less important than the other cases the Supreme Court decides—those in which the Court ensures that the parties have the opportunity to be heard, including full briefing and oral argument, and issues reasoned legal analysis through an opinion, usually after months of deliberations. In fact, one of the most frequently recurring issues on the Shadow Docket concerns the most solemn act that our legal system sanctions: The execution of a human being by the State. When it comes to ending someone’s life, there is no do-over. And when the matter before the Court is one of life or death, the public’s interest in transparency and the need to ensure public confidence in our legal system are at their apex. Presently, however, the Supreme Court’s decisions regarding executions are being made in the middle of the night, without anything even approaching full process. It has become routine for the Supreme Court to set aside lower court decisions detailing serious problems with an impending execution without itself giving any legal analysis of why the questioned execution should go forward. I propose a narrow first step to reducing the pressure on the Supreme Court to conduct its decisionmaking in this dangerous way.

I. What Execution Litigation is and How it Arrives at the Supreme Court.

In order to understand the particular risks that Shadow Docket execution cases pose to public confidence in our legal system, it is critical to first understand what this litigation is about and how it reaches the Supreme Court in the first place.
When a state or the federal government decides to execute a person on its death row, it generally issues an execution warrant announcing the person’s execution date. The amount of notice given is often weeks, not months, and this often triggers a need to resolve several critical legal issues before the State’s chosen execution date. For example, the person under the execution warrant may have had ongoing litigation pending in state or federal lower courts for months, if not years. The outstanding issues may concern the person’s very eligibility for the death penalty—for instance, litigation about whether the person is intellectually disabled and therefore constitutionally protected from execution under the Supreme Court’s landmark decision in Atkins v. Virginia. The State’s issuance of an execution warrant when there are still outstanding issues creates an urgency in sorting them out.

The imminence of an execution also triggers new issues that could not have been litigated before the execution date was set. In Ford v. Wainwright, the Supreme Court held that the Constitution prohibits execution of people who are found to be insane, therefore requiring an evaluation of the defendant’s competency to be executed. Because the relevant question is competency at the time of execution, this issue cannot be litigated until the State declares when the execution will occur. Several other legal issues often cannot be raised until close to the execution date, such as certain issues concerning the State’s chosen method and protocol for execution. There are also challenges that arise from the execution chamber itself. This can include the State’s last-minute changes to the execution protocol, mishandled executions which lead to prolonged agony, or even religious freedom issues, like the State’s exclusion of the defendant’s chosen spiritual advisor from the death chamber (discussed further below).

Litigation of these issues travels up the court system like any other. The person under the execution warrant must bring his or her claims in a state or federal trial court. The trial court, which has the responsibility to review the evidence and make findings of fact, generally has the longest opportunity to consider the case. Given its fact-finding responsibility, the trial court may consider the issue for weeks or months. After the trial court reviews the evidence and legal arguments, it issues an opinion on whether the defendant has presented a serious constitutional claim and, taking into account the equities between the parties, decides whether the execution should be stayed to allow further consideration of the problems that have been identified. The matter then works its way up on appeal, first to intermediate appellate courts (which generally have more time with the case still than the U.S. Supreme Court), and ultimately to the Supreme Court itself.

II. The Shadow Docket and Executions.

When an execution is imminent, the principal issue the lower courts consider is whether more time is needed to resolve the legality of the impending execution—i.e., whether to “stay” the execution because the defendant has raised issues that are sufficiently weighty to believe that the execution, as currently planned, will violate the Constitution or laws of our country. Given the short time to hear evidence and review the legal issues, trial courts frequently are not able to provide their analysis until just days before, and sometimes even the day of, the execution. That decision, whether to stay the execution for further consideration of the problems, then hurriedly works its way up the appeal system to the U.S. Supreme Court.
As a result, the legal issues pertaining to an execution often arrive at the Supreme Court just hours before the scheduled execution. And, presently, the Supreme Court’s final word on whether the defendant will be executed, or whether his claims will receive full consideration, is often delivered in the middle of the night, while the public is asleep. As a result of the pressure the Supreme Court faces, it has at times taken extraordinary liberties with the ordinary litigation process. For instance, sometimes the Supreme Court issues its decision before the parties have even had the opportunity to file their briefs. In a recent case involving the execution of Orlando Hall, the Supreme Court acted without even waiting for one of the lower courts, the D.C. Circuit, to weigh in, precluding a whole stage in the appellate process. Far more often than not, the Supreme Court’s final word on whether the person will live or die comes without any explanation or articulation of the law or reasoning supporting its decision.

The most disturbing instances of these unexplained and unsigned orders come in cases where a lower court has reviewed the record and, sometimes after holding a hearing where the court considered the testimony of witnesses and evidence, determined that the planned execution is likely to violate the Constitution. Several times this has occurred and, within a matter of hours or even minutes from receiving the relevant briefing, the Supreme Court reverses the lower court order without explanation.

It is important to pause to consider the implications for public confidence in our legal system. The question in these cases is whether the State’s imminent plan to execute someone lives up to the guarantees of the Constitution and federal law. In the circumstance I have just described, a court—and perhaps the only court to go through the full process of hearing the evidence and then applying the law in a reasoned decision—has made findings on the record and concluded that there is a substantial likelihood the execution is unlawful. When the Supreme Court vacates the lower court’s order, it means that a person may be executed even though the only reasoned judicial decision on the books tells us there was a serious likelihood the execution violates the laws of our country. The public, and the historical record, is left with little or no indication of what made it lawful for this person to be executed.

III. Recent Examples of the Lack of Transparency and Risks to Public Confidence.

In order to appreciate the serious risk to public confidence posed by current Shadow Docket practice, I ask you to consider the following examples:

First, consider the case of Dustin Higgs, who was executed last month. Mr. Higgs was infected with COVID-19, and introduced expert testimony that the Government’s planned method of lethal injection would be tantamount to torture given the damage COVID-19 had done to his organs. A federal district court held a hearing, including testimony from expert witnesses, and made factual findings that, in light of the significant damage to Mr. Higgs’ lungs, the Government’s chosen method of execution would “subject [him] to a sensation of drowning akin to waterboarding.” The court therefore stayed the execution temporarily until Mr. Higgs recovered from COVID-19. A second district court also stayed Mr. Higgs’ execution based on a serious question as to the Government’s authority to execute Mr. Higgs. When the Government appealed the latter order, the U.S. Court of Appeals for the Fourth Circuit noted that Mr. Higgs’ execution raised “novel” legal issues. It scheduled expedited oral argument, asking for just 12 additional days to consider whether it would be lawful to execute Mr. Higgs.
Around 11:00 p.m. on the night of the execution, the Supreme Court issued an order that would be virtually unheard of in any other part of its docket. It granted the extraordinary relief of “certiorari before judgment,” which meant that it would not let the Fourth Circuit take time to hear and decide the legality of Mr. Higgs’ execution. The Supreme Court then directly set aside the district court’s order without any legal analysis or explanation as to why the district court’s analysis was incorrect.

Mr. Higgs was promptly executed, at 1:23 a.m. This was so despite the fact that the only court to hear expert evidence and make factual findings on the public record found that the execution would be “akin to waterboarding” and violate the Constitution. And this was so even though the only court to issue a reasoned opinion on the issue concluded that the Government lacked the authority to execute Mr. Higgs.

The second example I ask you to consider involves a trilogy of cases concerning access to a religious or spiritual advisor to guide people through the final moments of their life. In these cases, people subject to execution warrants have asked that the spiritual advisor provided to them in the execution chamber be a member of their own faith, not another faith prescribed by the State. In these cases, the defendants were told that either they could have a Christian spiritual advisor or that they could not have any spiritual advisor at all by their side. The disparate outcomes of these cases demonstrate the arbitrariness of present death penalty practice in terms of who dies without this basic dignity.

The first of these men, Dominique Hakim Marcella Ray, was a devout Muslim. Days before his execution, the State informed him that he would not be permitted to have an Imam in the execution chamber and could only have a state-employed Christian chaplain. Mr. Ray raised a challenge to this discriminatory practice under the Establishment Clause, asking for the right to have a spiritual advisor associated with his own religion present during his final moments. A lower court panel of three judges reviewed Mr. Ray’s arguments, and concluded that he had raised a “powerful Establishment Clause claim.” It found that Mr. Ray had acted diligently to bring his claim as quickly as he possibly could have, given the State’s late notice that it would not allow his spiritual advisor. The three judges held that a stay was necessary to consider Mr. Ray’s claims in an expedited appeal.

The Supreme Court issued an unsigned opinion vacating the lower court’s stay. The Supreme Court did not provide any reasoning, except for a single citation, suggesting that Mr. Ray’s claim could be deemed solely on the basis that it reached the Court in the context of a “last minute” application. The Supreme Court did not address the lower court’s conclusion that Mr. Ray had brought his claim at his soonest possible opportunity and did not question that allowing only Christian chaplains violated Mr. Ray’s constitutional rights. Mr. Ray was executed that night without a spiritual advisor, as would have been available to any Christian person in his shoes.

One month later, the Supreme Court considered a virtually identical claim by Patrick Henry Murphy, a Buddhist prisoner who had been informed by the State of Texas that he could die with a chaplain next to him, but not a Buddhist priest. This time, the Supreme Court reached the opposite conclusion. After lower courts denied Mr. Murphy relief, relying on the Supreme Court’s decision in Mr. Ray’s case, the Supreme Court held that a stay should be granted for Mr. Murphy. In an unsigned, two-sentence order, the Court stated that Mr. Murphy could
IV. A Solution to Avoid Catastrophic and Irreparable Errors.

When it comes to the death penalty, the importance of getting things right is at its zenith: there is no do-over. At the same time, precisely because the State is wielding its most consequential power, mishaps and lack of transparency pose greater risks to public confidence in our legal system than in any other context. A system in which a lower court’s decision to hear claims is swept away by an unreasoned and unsigned order in the middle of the night is intolerable and needs to be fixed.

An immediate step Congress can take to increase accuracy, transparency, and confidence is to do what it has done in numerous other contexts: provide reviewing courts, including the Supreme Court, with clear guidance on the standard that must be applied to overrule the decisions of a lower court that has granted a stay for further consideration of an execution issue. As set forth above, the nature of execution litigation means that lower courts have substantially more time to review the evidence and arguments presented in these cases. The Supreme Court, on the other hand, considers its responsibility to be to review those decisions in a matter of hours or minutes, before the scheduled execution. When a lower court has identified a serious issue and granted a stay, the Supreme Court is left with little guidance from Congress on how to conduct its analysis in those final moments.
In ordinary appellate litigation, review of lower court decisions is dealt with through the concept of a "standard of review"—the threshold for when factual or legal determinations can be overturned by a higher court. In other contexts where Congress has identified institutional concerns, it has given guidance to courts, including the U.S. Supreme Court, by adopting deferential standards of review. In Title 28 of the U.S. Code, Section 2254(d), for instance, Congress provided that certain state court decisions concerning prisoners cannot be overturned unless it is apparent the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts in light of the evidence presented." This standard applies to the Supreme Court itself, and the Supreme Court itself has developed precedent to govern its application.

Congress should specify a similar standard of review here, in the particular instance where a lower court has reviewed the record and determined that an execution is likely to violate the law. Given the gravity and utter permanence of executions, and particularly given the abridged nature of the Supreme Court's review in these cases, a lower court's request for additional time to consider the lawfulness of an execution should be disturbed only if it is apparent to the Supreme Court that the lower court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or rested on "an unreasonable determination of the facts in light of the evidence presented." In order to prevent the untenable circumstance in which a person is executed, but the only reasoned decision in the public tells us execution would be unlawful, Congress should also specify that the Supreme Court state its reasons for concluding that the lower court's decision satisfied this standard.

This is a narrow fix that Congress can and should adopt immediately to safeguard public confidence in one of the most disturbing aspects of the Shadow Docket.

* * *

Thank you again for the invitation to share my views on this important topic. I look forward to addressing any questions that you have.
Mr. JOHNSON of Georgia. Thank you, Mr. Ali.
Next, we will go to Mr. Morley.
Mr. Morley, 5 minutes. The floor is yours.

**STATEMENT OF MICHAEL T. MORLEY**

Mr. MORLEY. Thank you very much.
Mr. Chair, Ranking Member Issa, Members of the Subcommittee,
thank you for this opportunity to testify. It is a privilege to have
this chance to speak with you again.

Today's hearing is on the Supreme Court's shadow docket. It is
a term that sounds mysterious and foreboding. In fact, it is simply
a term that a law professor coined a few years ago, as the Chair
mentioned, for the Supreme Court's orders list. All the documents,
b Briefs, and orders on the orders list are a matter of public record
and accessible through the Supreme Court's website.

One shortcoming of the orders list is that the Court sometimes
does not reveal how particular Justices voted on a matter.

Certain aspects of the shadow docket have received increased at-
tention in recent years, particularly stays of lower court injunctions
and other rulings which prevent Federal district courts' orders from
taking immediate effect; writs of mandamus to lower courts order-
ing them to perform certain actions; and grants of certiorari before
judgment, in which the Supreme Court agrees to hear the case be-
fore the court of appeals has had the opportunity to Rule on the
matter.

I would like to offer a few reflections on these developments.

First, lower courts' greater use of so-called nationwide injunc-
tions has been at least one contributing factor to the growth of the
shadow docket. Professor Vladeck's Harvard Law Review article re-
veals that, as of January 2017, about half of the Supreme Court
stays and two-thirds of its grants of certiorari before judgment as
of that time arose from cases involving nationwide injunctions.

I would implore this Committee to abandon the term "nationwide
injunction" as it is very misleading in trying to consider this issue,
since the main concern with these orders is not their geographic
applicability. Instead, we should focus on the distinction between
plaintiff-oriented injunctions and defendant-oriented injunctions.

A plaintiff-oriented injunction is appropriately tailored to re-
dressing the harm suffered by the plaintiffs before the court in a
particular case. A defendant-oriented injunction, in contrast, is an
order that unnecessarily goes further, enforcing the rights of third-
party nonlitigants throughout the Nation and potentially even the
world who are not before the court.

When a Federal court issues a nationwide defendant-oriented in-
junction, it completely disables the defendant agency or officials
from enforcing the challenged legal provisions against anyone any-
where, including people in other jurisdictions whose claims would
otherwise be adjudicated by the law of other circuits.

Because such orders can impact agency operations throughout
the Nation, suspend programs the government believes further im-
portant interests, and affect potentially millions of right holders,
the court has a tremendous impetus to respond to such sweeping
relief with extraordinary measures like stays or certiorari before
judgment.
I have written extensively about many of the concerns defendant-oriented injunctions raise. Among them, they raise serious justiciability concerns under article III. They raise concerns under Rule 23 in effectively giving class-wide relief without a plaintiff class certified. They have unfairly asymmetric preclusion effects. They magnify the effects of forum shopping. They are in tension with the hierarchical, decentralized structure of the Federal Judiciary as well as the Supreme Court’s own ruling in *United States v. Mendoza* that the government should be permitted to relitigate public law issues rather than being bound by the first adverse district court ruling.

One way to limit the growth of the shadow docket would be restricting nationwide defendant-oriented injunctions.

Secondly, the legislative history underlying the Supreme Court’s current jurisdictional provisions confirms that Congress intended immediate Supreme Court review to be available when Federal district courts struck down important Federal laws as unconstitutional.

Throughout much of the 20th century, constitutional cases were adjudicated by three-judge Federal district court panels. Their rulings could be appealed as of right directly to the U.S. Supreme Court.

In 1988, when Congress completed the lengthy process of amending these jurisdictional provisions to shift most constitutional cases back to the ordinary appellate process, this Committee issued a report, the Judiciary Committee issued a report, emphasizing that these amendments, quote, “increased the importance of certiorari before judgment,” quote, “as a means of securing an expeditious and definitive resolution of statutory unconstitutionality by the Supreme Court.”

The Committee report concluded that “the Judiciary Committee contemplates that the Court will give appropriate weight to the elimination of direct review when deciding whether to grant certiorari before judgment where a lower court has invalidated a Federal law.” So, at least in that respect, the Court is acting consistently with congressional intent.

Thank you very much.
[The statement of Mr. Morley follows:]
INTRODUCTION AND BACKGROUND

Chairman Johnson, Ranking Member Issa, Members of the Committee, thank you for the opportunity to testify at today’s hearing. This hearing is about the U.S. Supreme Court’s “Shadow Docket.” It is a phrase that sounds mysterious, foreboding, suspicious. Professor William Baude of the University of Chicago Law School coined the term a few years ago to refer to the Court’s “orders and summary decisions.” As Professor Barry Friedman of NYU Law School points out, however, another name for the shadow docket is the Supreme Court’s “orders list”—a far less ominous topic of discussion that sounds bureaucratically dull. Far from lingering in shadows, all of the documents, briefs, and orders comprising the so-called shadow docket are readily available on the Supreme Court’s website.

Orders on the shadow docket differ from the Court’s merits decisions—which result in the Court’s customary written opinions—in several respects. Although the Court’s orders are based on petitions and briefing from the parties, they are typically issued without oral argument and the involvement of amici. Additionally, the orders are often issued without accompanying opinions explaining the Court’s rationale, though either the majority or individual Justices are free to issue such opinions setting forth their reasoning. The absence of opinions can make it hard for litigants and the public to tell the standards the Court applied in granting or denying relief. This, in turn, makes it harder for lower courts to conform their rulings to the Court’s directives.

The lack of explanation can also sometimes contribute to a perception that the Court has treated similar cases differently. Indeed, the absence of reasoned elaboration may even make it more difficult for the Justices to ensure they actually are according equal treatment to similarly situated litigants. Moreover, when the Court’s orders are unsigned, it can be unclear which—or exactly how many—Justices voted to support or oppose the

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1 Institutional affiliation is provided for identification purposes only. This testimony is presented solely in my individual capacity.


3 Barry Friedman, Letter to Supreme Court ( Essays: Chemtrails is Mad. Why You Should Care), 69 Vand. L. Rev. 995, 1011 (2016).


5 Baude, supra note 2, at 6.


7 Baude, supra note 2, at 15 (citing Wheaton College v. Burwell, 134 S. Ct. 2806 (2014)).
relief. Again, however, Justices are free to publicly note their concurrence or dissent. Finally, unlike merits opinions, which are announced in open court, “[t]he orders list issues without ceremony” a half hour before the start of the Court’s regular session. Based on these aspects of the shadow docket, scholars such as Professor Baude have expressed concern that the Court may “deviate from its otherwise high standards of transparency and legal craft” in such matters.

It is important to recognize that the orders list and the procedures governing it reflect how the Supreme Court conducts most of its business. The most commonly issued order is the denial of certiorari, which the court issues when declining to review a case on the merits. Each year, the Supreme Court summarily denies between seven and eight thousand petitions for certiorari. Virtually all of these rulings are terse, unsigned orders unaccompanied by any explanation. The Court generally affords the full panoply of procedural restrictions and transparency to its opinions that establish binding law as a matter of stare decisis for the entire nation, and greater procedural flexibility to petitions for largely discretionary relief, such as certiorari denials and stays, where it is not seeking to establish binding law, but rather focusing primarily on the adjudication or resolution of a particular case. The disparity between the Court’s procedures appears to correlate to whether the Court is performing a primarily law-declaration function or dispute-resolution function. Because the Court’s role is not primarily error correction, it appears to exhibit greater procedural flexibility in the limited number of cases when it grants extraordinary relief to perform that function.

Critiques of the Shadow Docket

Professor Baude has raised two main critiques against the shadow docket. First, he points out that, apart from summary reversals, “many of the orders lack the transparency that we have come to expect in [the Court’s] merits cases.” There can be potentially valid reasons for the lack of written opinions, however. Given the emergency nature of many of these petitions, time constraints can make it difficult or impossible to prepare contemporaneous opinions. “[I]n many of those cases, there is a need for swift rulings and virtually no time to prepare even a short explanatory opinion (though the Court could release one later).” Moreover,

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9 Id. at 4, 18.
10 Id. at 6.
11 Id. at 56.
15 Baude, supra note 2, at 1.
16 Id. at 20-22.
it may often be much easier for Justices to agree on an ultimate outcome than to craft an opinion with detailed reasoning on which they can all agree. And when Justices “agree on the outcome, but on different grounds . . . deciding the case by summary order allows them to strike an incompletely theorized agreement—they achieve the right outcome, but without saying why.” The Court may be especially reluctant to issue a hurried opinion that, regardless of any disclaimers the Court may append, is likely to be treated as precedent—or at least a powerful signal—by lower courts and citers by litigants. Moreover, because many of these orders “respond to unusual or unexpected developments,” it may be hard to “have a fully prescribed set of procedures” for addressing them. At a minimum, however, these do not appear to be a need for either vote tallies, or the identities of the Justices who voted to grant or deny a petition, to be witheld from the public. Publicly disclosing Justices’ votes can help incentivize consistency, bolster “individual accountability,” and enhance the perceived legitimacy of the Court’s actions.

Second, Professor Balle contends that the criteria the Court uses to decide whether to summarily reverse a case are unclear. Summary reversals have been the subject of academic critique for decades. Unlike many other types of orders on the shadow docket, however, the modern Court typically “provides reasoned explanations” for its summary reversals. And the “sheer practice of summarily reversing a handful of cases every year creates a tradition that makes the practice not unexpected.” Balle suggests that the Court appears to have largely cededed around the view that “summary reversals are warranted in areas of law where there is an unusual epidemic of lower-court judges willfully refusing to apply the Supreme Court’s interpretations of the law.” To the extent that is accurate, it is highly unlikely the Court would expressly articulate such a standard in either its Rules or opinions. Expressly recognizing the possibility that lower courts may attempt to undermine, circumvent, or ignore Supreme Court opinions—particularly recent ones—with which they disagree would contribute to a heavily politicized, legal realist view of the federal judiciary that the Court has a strong institutional interest in opposing and refuting.

18 See Zubik v. Burwell, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurrence) (noting that “some lower courts have ignored [the Court’s] instructions” that certain opinions accompanying orders should not be construed as “signs of where this Court stands”); cf. Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 Geo. L.J. 921, 943 (2016) (explaining that some have viewed the shadow docket as a way for the Court to send “signals” to lower courts that “have precedential force but are subordinate to conventional precedent”).
19 Balle, supra note 1, at 21.
20 See id. at 23-24.
21 Id. at 2, 25, 30.
22 See, e.g., Ernest J. Brown, Foreword: Process of Law, 72 Harv. L. Rev. 77 (1957); see also Albert M. Sachs, Foreword, 68 Harv. L. Rev. 90, 103 (1954).
23 Balle, supra note 1, at 25; see also id. at 28.
24 Id. at 28.
25 Balle, supra note 1, at 36; see also id. at 42-43.
More recently, Professor Steve Vladeck of the University of Texas School of Law has voiced a third concern in recent years, the Solicitor General has become more willing to request, and the Court has concomitantly become more willing in granting, certain forms of extraordinary relief to the government through the shadow docket. As of January 2017, "the Solicitor General has sought stays from the Supreme Court on at least twenty-one different occasions; has asked for certiorari before judgment nine times; and has expressly requested mandamus relief directly against a district court in at least three different cases." Professor Vladeck argues that the Court's tolerance of such requests and willingness to grant them has given the federal government an unfair litigation advantage. He is particularly concerned the Court may be showing favoritism "for a specific political party when it's in control of the federal government." 

Based on these statistics, the two main types of extraordinary "shadow docket" relief that the Court has afforded the government in recent years are stays of lower courts' orders and certiorari before judgment. It is difficult to make categorical claims about these orders, since they arise from such a diverse array of different cases. And particular orders may certainly raise valid causes for concern. In assessing the propriety of the Court's actions more broadly, however, it is helpful to bear in mind two overarching considerations.

A. Stays Pending Appeal, Certiorari Before Judgment, and Nationwide Injunctions

A substantial fraction—though by no means all—of the Court's stays of lower court orders arose in the context of so-called "nationwide injunctions." As Professor Vladeck explains:

By volume, the most common ground the Trump Administration has invoked for needing emergency or extraordinary relief has been a response to nationwide injunctions issued by district courts against executive branch policies. Of the twenty-one stay applications, twelve sought to allow a policy that had been subjected to a nationwide injunction to remain in place, and six of the nine petitions for certiorari before judgment involved the unique harm caused by nationwide relief as the reason the Court should bypass the courts of appeals.

As an initial matter, the unfortunately ubiquitous phrase "nationwide injunction" is misleading. Many types of injunctions can have a "nationwide" effect. The real contrast is between a "plaintiff-oriented injunction," which is appropriately tailored to enforcing the rights of the plaintiffs before the court, and a "defendant-oriented injunction," which unnecessarily goes beyond that scope to enforce the rights of third-

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28 Id. at 134; see also id. at 124-25.
29 Id. at 126-27; see also id. at 139-60.
30 Id. at 126-27.
31 Professor Vladeck emphasizes, "[A] nonfrivolous percentage of the government's applications for emergency or extraordinary relief have had nothing to do with nationwide injunctions .... Thus, even if nationwide injunctions are behind much of this development, they cannot be behind all of it." Vladeck, supra note 27, at 153.
32 Vladeck, supra note 27, at 134.
party non-litigants, including rightholders outside the scope of the court’s geographic jurisdiction whose claims would otherwise be subject to the law of other circuits.24 A nationwide defendant-oriented injunction completely bars a governmental defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even world). Such orders may impact the rights of millions of people, significantly interfere with the operations of federal agencies on a national scale, and prevent implementation of programs or restrictions that the government believes to further important interests. They can turn what would otherwise be ordinary constitutional litigation—including litigation where fundamental rights are at stake—into an even more pressing matter in which the stakes have been exponentially increased, demanding more immediate attention from higher courts. The willingness of lower courts to issue nationwide defendant-oriented injunctions is one important contributing factor to the growth of the shadow docket.

Federal courts likely lack Article III jurisdiction to grant nationwide defendant-oriented injunctions.25 Such orders are likewise inconsistent with the traditional equitable principles that federal courts are bound to apply when granting equitable relief.26 Two Justices have recently issued opinions endorsing these notions.27 Nationwide defendant-oriented injunctions also raise serious questions under Rule 23(b)(2), which already provides a mechanism to allow plaintiffs to easily bring other rightholders before the court to have their claims adjudicated.28 These orders also give rise to unfairly asymmetric preclusive effects. If the Government prevails in a challenge to the validity of a legal provision, the court’s ruling has no res judicata effect for any rightholders other than the plaintiff in that case.29 And district court rulings generally lack any stare decisis effect; they do not even bind other judges within the same district.30 Yet if a single rightholder anywhere in the country prevails,

24 Morley, supra note 13, at 489-90; Morley, supra note 33, at 9-10.
25 See Salazar v. Buono, 559 U.S. 700, 734 (2010) (Scalia, J., concurring) (stating that Article III forbids federal courts from issuing orders that “cover additional actions that produce no concrete harm to the original plaintiff”); Califano v. Yamaha, 442 U.S. 682, 702 (1979) (“[p]racticable relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”); Donovan v. Salem Indus., Inc., 429 U.S. 622, 631 (1977) (“[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular plaintiff(s) . . . .”); see also Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018) (“Standing is not dispensed as grog: A plaintiff’s remedy must be tailored to address the particular injury.”); Baxa v. Palomar, 425 U.S. 308, 310 n.1 (1976) (holding that, if a district court did not certify a class, “the action is not properly a class action” and cannot be treated as such); see, e.g., U.S. Dep’t of Def. v. Meinkoth, 508 U.S. 90, 99 (1993) (mem.) (staying a lower court injunction insofar as it prohibited the military from applying the challenged regulation to anyone other than the individual plaintiff); Potomac v. Lukens Steel Co., 310 U.S. 113, 123 (1940) (declining that the D.C. Circuit’s nationwide defendant-oriented injunction against the Secretary of Labor “goes beyond any controversy that might have existed between the complaining companies and the Government officials”); Morley, supra note 13, at 523-27; Morley, supra note 33, at 28-29.
a nationwide defendant-oriented injunction would allow the court to enjoin that provision against everyone, everywhere (potentially even including the unsuccessful litigants in prior cases). In other words, the Government could successfully defend a challenged provision four times but, if it then loses the fifth time, the provision could be enjoined throughout the nation.

Additionally, defendant-oriented injunctions are inconsistent with the hierarchical, decentralized structure of the federal judiciary. By enacting the Evarts Act of 1891, Congress deliberately crafted a federal judiciary in which the lower courts exercised limited geographic jurisdictions. Each circuit is free to develop its own body of law; the rulings of courts in one district or circuit lack binding stare decisis effect in other circuits. Nationwide defendant-oriented injunctions, in contrast, allow a district or circuit court to impose its view of the law on third-party non-litigants throughout the nation, including rightsholders whose claims would otherwise be adjudicated based on the law of other circuits. Such sweeping authority is in tension with the limited geographic jurisdiction of lower courts.

Nationwide defendant-oriented injunctions are similarly inconsistent with the Supreme Court’s ruling in United States v. Mendoza.

In Mendoza, the Court held that the Government is not subject to offense non-mutual collateral estoppel. In other words, if a litigant prevails on an issue against the Government, the Government remains free to re-litigate the same issue against other litigants. The Government is not bound as a matter of res judicata or collateral estoppel by adverse judicial rulings. The Court offered many explanations for this doctrine. The Government is much more likely than other entities to be involved in repeat litigation concerning the same issues. Moreover, allowing the first adverse district court ruling to bind the government on a national basis “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” It would be difficult for legal issues to percolate through the lower courts and circuit splits to arise; the Court would be precluded from comparing the practical consequences of different possible legal conclusions in different jurisdictions.

In addition, if the government could be collaterally estopped from re-litigating adverse rulings, it would be forced to “appeal every adverse decision to avoid foreclosing further review.” The Solicitor General’s ability to effectively exercise discretion over the Government’s litigation docket before the Supreme Court

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60 See Camreta v. Greene, 563 U.S. 692 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (quoting 18 J. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 1340.02[1][d]).

61 Mendoza, supra note 13, at 531-34; Morley, supra note 33, at 29.

62 Bray, supra note 56, at 460.

63 Morley, supra note 13, at 555-59; Morley, supra note 33, at 29-30; Morley, supra note 38, at 659-53.

64 Ch. 517, § 2, 26 Stat. 820.


66 464 U.S. 154 (1984); see Morley, supra note 38, at 627-33.

67 Mendoza, 464 U.S. at 158.

68 Id. at 160.

69 Id.

70 Id. at 161.
would be greatly curtailed. And a refusal to appeal a particular adverse ruling would make it much easier for one presidential administration to bind successor administrations to a particular view of the law or Constitution without the Supreme Court having addressed the issue. Much of the reasoning that led the Mondry Court to promote resignation of public law issues by exempting the Government from the traditional rules of res judicata equally suggest that district courts should not be able to hinder or prevent resignation of such issues through nationwide defendant-oriented injunctions.

Finally, from a pragmatic perspective, allowing courts to issue such injunctions greatly enhances the incentives for, and consequences of, forum shopping. Plaintiffs can seek out the most ideologically advantageous judge in the nation, and that person can enforce their view of constitutional law on all right holders throughout the nation, at least as an initial matter. This means that controversial constitutional and other challenges will tend to be adjudicated by ideological outliers toward the extremes of the political spectrum, depending on the nature of the case, rather than a more representative cross section of the federal judiciary. Lower court adjudications will disproportionately reflect such ideologically skewed judicial views, rather than those of the median judge. And, based on the lack of the draw in the composition of the appellate panel, such rulings are often affirmed.

In short, nationwide defendant-oriented injunctions raise a wide range of serious concerns. If they are curtailed—whether through a clear Supreme Court precedent directed directly on point, a federal statute, or an amendment to the Federal Rules of Civil Procedure—at least one of the contributing factors to the recent growth of the shadow docket will be removed.

B. Certiorari Before Judgment and Congressional Intent

Certiorari before judgment is one of the main forms of extraordinary relief that the Court has increasingly granted to the Government in recent years through the shadow docket. Such an order allows the Court to review a district court's final judgment before the Court of Appeals has ruled on the case. Although the Court grants this relief very rarely, Congress' intent in adopting the Court's current jurisdictional provisions was that the Court would exercise this authority to hear important constitutional cases directly from the district courts, bypassing the intermediate appellate court.

Throughout much of the Twentieth Century, any litigant could appeal directly as of right to the Supreme Court when a federal district court struck down a federal law. In 1988, however, Congress adopted the Supreme Court Case Selection Improvement Act ("Improvement Act") to reduce the Court's caseload. 58

51 Id. at 161-62.
52 Bray, supra note 36, at 460.
53 Morley, supra note 33, at 32.
54 Vladeck, supra note 27, at 134.
55 28 U.S.C. § 1254(1) (allowing the Supreme Court to review "cases in the court of appeals . . . [by] writ of certiorari . . . before or after rendition of judgment or decree").
This act eliminated the Supreme Court's mandatory appellate jurisdiction over such constitutional cases, and instead required them to be appealed through ordinary appellate channels—that is, to the Courts of Appeals—like most other cases. To assuage concerns about eliminating mandatory, immediate Supreme Court review, however, the House Judiciary Committee report accompanying the Act explained that the measure "should not create an obstacle to the expeditious review of cases of great importance," since certiorari before judgment remained available.50

The Committee recognized that "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable for reasons of separation of powers, avoiding unwarranted interference with the government's administration of the laws and protection of the public interest."51 The Improvement Act increased[ed] the importance of certiorari before judgment "as a means of securing an expeditious and definitive resolution of questions of statutory unconstitutionality by the Supreme Court."52 The report concluded that the Committee "contemplates that the Court will give appropriate weight to the elimination of direct review" when deciding whether to grant certiorari before final judgment in cases where a lower court has invalidated a federal law.53

The Department of Justice, in advocating the Improvement Act, likewise emphasized that it "need not [prevent] expeditious" Supreme Court review "in cases of exceptional importance."54 The Department explained that, when "expedited consideration by the Supreme Court is required," the Court could grant certiorari before judgment, as it had recently done in two cases.55 It observed that such relief is appropriate because, "[i]ndeed, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review."56 Other witnesses similarly pointed to the availability of certiorari before judgment as a substitute for direct appeal as of right.57 Thus, the use of certiorari before judgment "when district courts hold federal legal provisions unconstitutional is not an unexpected abuse of power, but rather fully consistent with Congress' intent when it enacted the Court's mandatory appellate jurisdiction in constitutional cases."58

51 Id at 11 n.14.
52 Id
53 Id
54 Id
55 Id
56 Id
57 Id
59 See, e.g., Hearing on the Supreme Court Jurisdiction Act of 1978 Before the Subcommit. on Improvements in Judicial Machinery of the Senate Comm. of the Judiciary, 96th Cong., 1st Sess. 31 n.7 (June 20, 1979) (statement of Prof. Arthur D. Hellman).
60 Mosley, supra note 56.
Mr. JOHNSON of Georgia. Thank you, Professor Morley. Next, we will go to Solicitor General AliKhan for 5 minutes. Ms. AliKhan?

STATEMENT OF THE HONORABLE LOREN L. ALIKHAN

Ms. ALIKHAN. Chair Johnson, Ranking Member Issa, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today.

As the solicitor general for the District of Columbia, I have experienced firsthand the increasing frequency with which the Supreme Court disposes of contentious or novel legal issues on the shadow docket. These orders, which address issues of paramount public importance, including immigration, the election, the death penalty, and more, have enormous consequences well beyond the litigants involved.

For example, despite being styled as interim decisions, several shadow docket orders effectively decided the rules, procedures, and deadlines that would apply for votes cast in the 2020 election. In one unsigned, two-paragraph decision issued less than a month before election day, the Supreme Court reinstated South Carolina’s requirement that mail-in ballots be signed in the presence of another individual, despite the need for social distancing in light of COVID. In another, the Court reinstated Alabama’s ban on curbside voting. Because of the timing, these rulings were effectively the last word on the matter.

With the increase in important and controversial orders on the shadow docket, we are seeing two patterns that deviate from the Court’s merits cases.

First, high-profile shadow docket decisions split along the Court’s perceived partisan lines at a much higher rate than merits cases.

Second, shadow docket decisions often lack majority reasoning, full opinions, and a record of the Justices’ individual votes. Indeed, many of the shadow docket orders contain no more than one paragraph explaining the disposition, meaning that the public knows very little about what the Court was thinking and why.

As a general matter, the public overwhelmingly respects the Court’s pronouncements as authoritative, a triumph largely attributable to the Court’s strict adherence to a procedural framework that ensures transparency and consistency across cases. The defining feature of the shadow docket is that it lacks these procedures, and this carries several risks.

First, the shadow docket presents challenging conditions under which to make major decisions. Lawyers produce their best work when they have opportunities to perform research, consider facts and arguments, and consult colleagues. Supreme Court advocates and even Supreme Court Justices are no exception. The accelerated pace of the shadow docket means that the Court confronts novel, controversial issues with diminished deliberative tools and far fewer viewpoints.

When ruling on an emergency request, the Court may lack a developed record, confront claims unconstrained by the narrowing process of certiorari, or face arguments that lack full consideration through the recent opinions of multiple appellate courts.
There is also no opportunity for oral arguments, which deprives the Justices of the opportunity to clarify the scope of claims, the practical consequences of a particular result, and the specifics of the record.

Of particular importance to institutional litigants like the District of Columbia, there are also diminished opportunities for the Court to hear the views of amici curiae, which can situate a dispute in its wider legal and sociopolitical context.

The shadow docket also limits the ability of the Members of the Court to formerly deliberate. Last April, for example, the Court ruled five to four to stay an execution—to vacate a stay of execution. In a sharply worded dissent, Justice Breyer revealed that he had asked his colleagues to wait until the next morning so that they could discuss the case at their conference. Instead, the Court vacated the stay overnight, and the execution occurred before the Justices could meet to discuss.

Second, shadow docket orders provide little information on how or why the Court reached a result. In particular, we do not always know how the Justices voted. Indeed, just last week, a mystery Justice joined Justices Breyer, Sotomayor, Kagan, and Barrett to halt an execution.

Even when the vote tally is clear, shadow docket orders often contain little explanation of why issues of principle dictate the results.

The inscrutability of the shadow docket orders creates significant practical hurdles. While the precedential weight of these orders is disputed, when the Supreme Court speaks, legal institutions and stakeholders listen. Lower courts work hard to faithfully apply the Supreme Court’s instructions, but, with limited guidance, they can struggle to divine workable rules from the Court’s minimal reasoning. This lack of clarity from the Supreme Court is problematic for States and regulated parties that strive to accurately implement the Court’s directives.

The Court’s consideration of pandemic restrictions is one example. Recently, the Court issued a fractured shadow docket decision striking down California’s prohibition on indoor worship but allowing certain capacity restrictions. The order provides no consensus on what animated the Court’s conclusion and, as Justice Kagan noted in dissent, provided no guidance to other jurisdictions confronting the same issue.

I want to close by emphasizing a high-level but I think important point. Issues with the shadow docket are related to the Court’s appellate jurisdiction, meaning its supervisory function over the lower courts. As article III confirms, Congress has the authority to superintend the Supreme Court’s exercise of appellate jurisdiction and regulate lower courts. Congress has done so before, both altering cases the Supreme Court reviews, such as capital cases, and the standards lower courts must apply when issuing certain relief, like in the Prison Litigation Reform Act. Accordingly, there is a path for legislation if Congress deems it appropriate.

Thank you for the opportunity, and I look forward to your questions.

[The statement of Ms. AliKhan follows:]
GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

HEARING BEFORE THE UNITED STATES HOUSE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

February 18, 2021

Testimony of Loren L. AliKhan
Solicitor General of the District of Columbia

INTRODUCTION

Chairman Johnson, Ranking Member Issa, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to present the views of the Office of the Attorney General for the District of Columbia on the Supreme Court’s “shadow docket.”

As the Solicitor General of the District of Columbia, I defend the District’s laws against administrative and constitutional challenges and represent the District’s interests in affirmative litigation. In these dual roles, the Office of the Attorney General for the District of Columbia finds itself practicing before the Supreme Court and advising District clients on pressing legal issues informed by the Court’s rulings. The Office has experienced first-hand the increasing frequency with which the Supreme Court disposes of contentious or novel legal issues not through the traditional certiorari and merits process, but through its so-called “shadow docket.” In my testimony today, I’d like to discuss how the shadow docket has grown, why that growth should concern us, and what this Subcommittee might do in response.

I. Understanding the “Shadow Docket”

The Supreme Court’s merits docket is well known. It is largely comprised of the 70-or-so cases each year in which the Justices grant review, receive full briefing from the parties and amici curiae, hear oral argument, and issue signed opinions explaining the disposition of the case. The Court also has an “orders” docket, where it rules on procedural matters and requests for emergency relief before a case is placed on the merits calendar. Most of the rulings on the orders docket involve litigation management, like setting timelines, granting or denying requests to hear cases on the merits, or dismissing frivolous requests for emergency relief. See, e.g., Order List, 592 U.S. ____ (Jan. 11, 2021). It is thus not surprising that these orders are characterized by short (often one

1 I am extremely grateful to Assistant Attorneys General Andrew J. Delaplane and Harrison M. Stark for their assistance in preparing today’s written testimony.

sentence) dispositions and involve limited party participation, minimal briefing, and no oral argument.

The orders docket has long been a part of the Court’s established practice. Indeed, the first action ever taken by the Court was in the form of an order, in which the Court’s first Clerk recorded the absence of a required quorum and the Court adjourned, forced to wait another day for an additional Justice to arrive. Jack Metzler, The Quorum Rule, 23 The Green Bag 2d 103, 104 (2020). Between 1802 and 1839, Congress required a single Justice to come back to Washington for a “rump” session each August to dispose of, among other things, pending procedural issues for which the full Court’s consideration was unnecessary. Ross E. Davies, The Other Supreme Court, 31 J. Sup. Ct. Hist. 221, 224 (2006). And over time, Congress has enshrined the Court’s power to fashion “emergency” relief through multiple statutes, generating additional matters that are disposed of on the orders docket. See All Writs Act, 28 U.S.C. § 1651(a) (authorizing the Court to issue “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”); 28 U.S.C. § 2101(f) (“In any case in which the final judgment or decree of any court is subject to review by the Supreme Court . . . the execution and enforcement of such judgment or decree may be stayed for a reasonable time . . . by a justice of the Supreme Court.”).

While the orders docket is largely comprised of procedural or pedestrian matters, there are occasions where the Court decides a significant issue—allowing an execution, staying a lower court order, summarily reversing a case—without the benefit of full briefing and argument and without issuing a signed majority opinion. Historically, these decisions, while practically significant, were mostly legally unremarkable; although the Court occasionally decided controversial or novel questions via its orders docket because of their time-sensitivity, addressing significant issues through order was the exception, not the rule.

That has changed. Recently, the Court has addressed numerous high-profile issues—issues we might normally consider worthy of the Court’s merits docket—via summary orders. The increasing frequency with which the Court has ruled on important, high-profile, or controversial questions on the orders docket has led to greater public scrutiny, and Professor William O. Baude coined the term “shadow docket” to refer to this “range of orders and summary decisions that defy [the Court’s] procedural regularity.” William Baude, Foreword: The Supreme Court’s Shadow Docket, 9 N.Y.U. J. L. & Liberty 1, 1 (2015). The Court’s recent shadow docket practice implicates important questions about consistency and transparency, and it is the focus of my testimony today.

II. The Increasing Importance of the Shadow Docket

The reason we are here today is that the Supreme Court is increasingly issuing summary stays or injunctions in high-profile cases addressing issues of paramount public importance: immigration, the validity of entire state electoral systems, separation of powers, the death penalty, and more. Although these orders are usually not the final disposition of the case, the stay or injunction—in effect, a “pause” often designed to preserve the status quo—may deprive a lower court ruling of legal effect. These orders have enormous practical consequences not just for the litigants involved, but also for localities, states, and even the entire nation in highly sensitive areas of the law. And, in some cases, the shadow docket decision may even be the final decision in the case.
The enormous impact of the Court’s shadow docket rulings can be seen in the following areas:

A. The 2020 Election

Several of the Supreme Court’s election orders, despite being styled as interim decisions, effectively decided the rules and procedures that would apply for votes cast in the November 2020 election.

In Middleton v. Andino, for example, a district judge issued, in light of the coronavirus pandemic, an order preventing South Carolina from enforcing its requirement that mail-in ballots be verified by a signature in the presence of another individual. No. 3:20-cv-01730, 2020 WL 5591590, at *38 (D.S.C. Sept. 18, 2020). In an unsigned, two-paragraph decision issued on October 5, less than one month before the November election, the Supreme Court stayed the district court’s order “pending disposition of the appeal” in the Fourth Circuit and any petition for certiorari. Andino v. Middleton, 141 S. Ct. 9, 9-10 (2020) (mem.). The Court limited its stay so that “ballots cast before th[e] stay issue[d] and received within two days of th[e] order” could “not be rejected for failing to comply with the witness requirement.” Id. at 10. Justices Thomas, Alito, and Gorsuch indicated, without further explanation, that they would have granted the state’s application for a stay in full. Id. at 10. As merely a procedural “order,” that ruling came without advance warning and without a formal, published opinion. But for the voters of South Carolina, the Supreme Court’s decision effectively ended the dispute, because all mail-in ballots received after October 7 needed to comply with the state’s original witness requirement. See, e.g., Press Release, South Carolina Election Commission, Witness Signature Required for Mail-in Ballots (Oct. 6, 2020).3

That order typified the Court’s practice in the run-up to the election. In another case involving voter accessibility, a district judge issued an order on September 30 lifting Alabama’s ban on curbside voting, finding that the ban violated the plaintiffs’ fundamental right to vote. See People First of Ala. v. Merrill, No. 20-cv-619, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020). After the Eleventh Circuit declined to stay this order, Merrill v. People First of Ala., No. 20-13695-B, 2020 WL 6074333 (11th Cir. Oct. 13, 2020), Alabama sought a stay from the Supreme Court to reinstate its ban on curbside voting. Again, in a one-paragraph, unsigned order issued on October 21, the Court stayed the district court’s order pending appeal in the Eleventh Circuit. Merrill v. People First of Ala., 141 S. Ct. 25 (2020) (mem.). Justice Sotomayor, joined by Justices Breyer and Kagan, dissented, explaining that Alabama’s Secretary of State did not “meaningfully dispute that the plaintiffs have disabilities, that COVID-19 is disproportionately likely to be fatal to these plaintiffs, and that traditional in-person voting will meaningfully increase their risk of exposure.” Id. at 27 (Sotomayor, J., dissenting from grant of stay). For those counties that wished to implement curbside voting on Election Day, the Court’s order ended the matter. See Madeleine

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3 Available at https://bit.ly/3pjWSP0.

Similarly, the Court’s shadow docket decisions affected when voters could cast their votes in the 2020 election. In a pair of one-sentence orders, an equally divided Court declined to stay an extended deadline for mail-in ballots set by the Pennsylvania Supreme Court. See *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (mem.); *Scarratti v. Boockvar*, 141 S. Ct. 644 (2020) (mem.); see also *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020) (permitting mail-in votes that were mailed on or before Election Day to be counted as long as they were received by November 6). And less than one week before Election Day, the Court rejected a request to issue an injunction against the North Carolina Board of Elections, which had also extended its receipt deadline for mail-in ballots. *Moore v. Circosta*, 141 S. Ct. 46 (2020) (mem.). Justice Thomas indicated that he would have granted the application for an injunction, and Justice Gorsuch, joined by Justice Alito, issued a written dissent. *Id.*

**B. The COVID-19 Pandemic**

The Supreme Court has also issued several shadow docket rulings that, while styled as interim decisions, had an immediate impact on states’ abilities to enforce pandemic restrictions affecting religious gatherings. Two of the Court’s shadow docket orders—with the dissent of Justices Thomas, Alito, Gorsuch, and Kavanaugh—rejected challenges from churches to governmental restrictions on the size of religious gatherings during the pandemic. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.) (denying request to enjoin Nevada regulation limiting attendance at places of worship to 50 people), *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.) (denying request to enjoin California’s restriction on attendance at places of worship to 25 percent of building capacity or a maximum of 100 attendees).

But more recent shadow docket decisions have sharply curtailed states’ pandemic regulations. See, e.g., *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam) (enjoining New York’s 10- and 25-person occupancy limits for churches pending appeal). Two weeks ago, in response to a challenge concerning California’s new restrictions, the Court issued two unsigned, one-paragraph orders enjoining the state from enforcing its prohibition on indoor worship services in “Tier 1” counties, which have the highest COVID-19 transmission rates, while allowing other restrictions to stand. *S. Bay Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021) (mem.); *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021) (mem.). These decisions fractured the Court, spawning multiple opinions and statements about the Justices’ respective positions, with none garnering a majority.

The Court’s shadow docket is also having an immediate impact on the applicable safeguards for prison health and safety during the pandemic. See, e.g., *Barney v. Ahlman*, 140 S. Ct. 2620 (2020) (mem.) (staying a district court’s injunction requiring a Southern California jail to take more

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extensive and effective measures to protect inmates from exposure to COVID-19), *Williams v. Wilson*, No. 19A1047, 2020 WL 2988458 (U.S. June 4, 2020) (mem.) (temporarily blocking lower court orders requiring a federal prison to evaluate inmates for transfer because of their risk of exposure to COVID-19); *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (mem.) (declining to vacate a Fifth Circuit stay that paused a court order requiring Texas to take steps to protect elderly inmates from the virus).

C. Challenges to Executive Action

The Supreme Court's shadow docket orders are not limited to time-sensitive issues like the election or COVID-19. The shadow docket has also determined the fate of several high-profile—and highly controversial—executive actions.

For example, before the Supreme Court reached the merits of former-President Trump's “travel ban”—the three separate executive orders that categorically limited entry into the country for non-citizens from specifically identified foreign countries—the Court permitted aspects of the ban to go into effect through shadow docket orders. During the travel ban litigation, the Trump Administration sought six emergency stays of lower court orders from the Supreme Court. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 135 (2019). Several initial court rulings against the original travel ban prompted the government to adopt a modified policy. *Id.* Thereafter, district courts in Maryland and Hawaii enjoined the second iteration of the travel ban on a nationwide basis, see *Int'l Refugee Assistance Proj. v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), and the Fourth and Ninth Circuits affirmed in substantial part, see *Trump v. Int'l Refugee Assistance Proj.*, 857 F.3d 554 (4th Cir. 2017) (en banc); *Hawai'i v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017). The federal government sought a stay of those injunctions, arguing that the orders “prevent[ed] the Executive from effectuating his national-security judgment... caus[ing] irreparable harm to the government and the public interest.” Application for Stay at 4, *Trump v. Int'l Refugee Assistance Proj.*, No. 16A1190, 137 S. Ct. 2080 (2017) (per curiam). In June 2017, in an unsigned opinion, the Court granted a partial stay of the Maryland and Hawaii injunctions, reinstating much of the ban. *Trump v. Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080, 2088-89 (2017) (per curiam).

The third iteration of the travel ban followed a similar course. After district courts in Maryland and Hawaii entered preliminary injunctions against the revised policy, the Court again granted the federal government's applications for stays—but this time in their entirety. *Trump v. Hawai'i*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Int'l Refugee Assistance Proj.*, 138 S. Ct. 542 (2017) (mem.).

A shadow docket order also effectively ended the period for responding to the 2020 census. After a district court entered an injunction requiring, in light of the pandemic, that the counting period for the 2020 census be extended through October 31, 2020, *Nat'l Urban League v. Ross*, No. 20-CV-5799, 2020 WL 5875939, at *1 (N.D. Cal. Oct. 1, 2020), and the Ninth Circuit declined to stay that portion of the order, 977 F.3d 770, 773 (9th Cir. 2020), the federal government sought a
stay from the Supreme Court. The government argued that extending the timeline for conducting field operations would impede its ability to comply with a statutory deadline at the end of the year. Application for Stay at 21, No. 20A62, *Ross v. Nat’l Urban League*, 141 S. Ct. 18 (2020) (mem.). In a one-paragraph, unsigned order, the Court stayed the injunction extending the deadline. *Ross v. Nat’l Urban League*, 141 S. Ct. 18 (2020) (mem.). Justice Sotomayor dissented, explaining that the potential harms of “rushing this year’s census count,” such as the disproportionate allocation of federal resources, could have a “lasting impact for at least the next 10 years.” *Id.* at 21 (Sotomayor, J., dissenting from grant of stay). But the Court’s order effectively ended the Census Bureau’s field operations. See Adam Liptak & Michael Wines, *Supreme Court Rules That Census Count Can Be Cut Short*, N.Y. Times (Oct. 13, 2020) (“As a practical matter, however, it almost certainly ensures an early end because the census—one of the largest government activities, involving hundreds of thousands of workers—cannot be easily restarted and little time remains before its current deadline at the end of this month.”); Press Release, U.S. Census Bureau, *Census Bureau Statement on 2020 Census Data Collection Ending* (Oct. 13, 2020) (“Self-response and field data collection operations for the 2020 Census will conclude on October 15, 2020.”).

In addition, the Court’s shadow docket orders permitted the Trump Administration to continue construction of a physical border wall between the United States and Mexico, despite lower court rulings that would have permanently halted the process. After Congress appropriated only a fraction of the requested funds to construct a border wall, President Trump sought to have the Secretary of the Department of Defense (“DoD”) re-allocate funds earmarked for the military. Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. Times (July 26, 2019). A district judge in California granted preliminary and then permanent injunctive relief preventing the federal government from “taking any action to construct a border barrier . . . using funds reprogrammed by” DoD. *Sierra Club v. Trump*, No. 19-CV-892, 2019 WL 2715422, at *17 (N.D. Cal. June 28, 2019). After the Ninth Circuit declined to stay the injunction, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), the federal government sought a stay from the Supreme Court. In an unsigned, one-paragraph order, the Court granted a stay. Justices Ginsburg, Sotomayor, and Kagan indicated that they would have denied the application for a stay, and Justice Breyer dissented in part. *Id.* Over the next year, the federal government completed several of the projects that had been permanently enjoined as unlawful by the district court. See Application to Lift Stay at 18-19, *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020) (mem.) (describing construction over the course of a year). And after the Ninth Circuit issued a decision affirming the permanent injunction, the Supreme Court issued another unsigned, one-sentence order—this time rejecting an application to lift its earlier stay. *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020) (mem.). Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented again, noting that the stay could have the effect of a final judgment. *Id.* (Breyer, J., dissenting).

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5 *Available at* https://nyti.ms/3ag511u.
6 *Available at* https://bit.ly/2N2loEV.
7 *Available at* https://nyti.ms/3ajtCnA.
D. Death Penalty Litigation

The Supreme Court’s shadow docket decisions are also often the final word on whether death row inmates will be executed. It is common for the Court to receive last-minute applications to stay a pending execution. See, e.g., Bauder, supra, at 10; Stephen M. Shapiro, et al., Supreme Court Practice 351 n.108 (10th ed. 2013) (describing this process); Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating a preliminary injunction against four executions); Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.) (vacating a preliminary injunction prohibiting executions). In 2014, the practice made national headlines after Joseph R. Wood, III’s execution-by-injection lasted nearly two hours. Fernando Sanchez & John Schwartz, A Prolonged Execution in Arizona Leads to a Temporary Halt, N.Y. Times (July 25, 2014). Mr. Wood’s prolonged execution, during which several witnesses alleged that he “gasped, seemingly for air, more than 600 times,” came after the Supreme Court decided through short shadow docket orders that the execution could proceed. Id.; see, e.g., Wood v. Arizona, 573 U.S. 977 (2014) (mem.).

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As these examples make clear, the Supreme Court’s shadow docket is increasingly where important and controversial issues are being decided. There are also certain patterns emerging from the shadow docket that set it apart from the Court’s merits docket.

First, many of the high-profile shadow docket decisions split 5-4 or 6-3 along the Court’s perceived partisan lines. As Professor Steve Vladeck notes, in the first twenty-two cases where the Court granted emergency relief to the Trump administration, at least two Justices publicly noted dissents seventeen times. Steve Vladeck, Symposium: The Solicitor General, the Shadow Docket and the Kennedy Effect, SCOTUSBlog (Oct. 22, 2020). Nine of the Court’s orders in those cases, or 41%, were publicly 5-4 decisions. Id. That is in contrast to the merits docket, where 21% of cases on average are resolved in 5-4 opinions (and not all of these are 5-4 ideological divides). See Adam Feldman, Final Stat Pack for October Term 2019 – 5-4 Cases, SCOTUSBlog (July 10, 2020).

And, as noted above, this division on the Court extends beyond cases where the federal government is the party requesting emergency relief. Divisions along the Court’s perceived partisan lines are present in shadow docket orders about, among other issues, election administration, see supra pp. 3-4; religious gatherings, see supra p. 4; and the death penalty, see, e.g., Barr, 140 S. Ct. at 2590.

Second, shadow docket decisions often lack majority reasoning, full opinions, and a record of the Justices’ individual votes. Justice Ginsburg notably remarked that “when a stay is denied, it doesn’t mean we are in fact unanimous.” Mark Sherman, Justices silent over execution drug secrecy, Associated Press (Aug. 4, 2014); see Elena Kagan, Remarks Commemorating

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8 Available at https://nyti.ms/378npZI.
9 Available at https://bit.ly/3plEoxE.
Celebration 55: The Women's Leadership Summit, 32 Harv. J. L. & Gender 233, 236 (2009) (discussing un-noted dissents from 1876 order denying Belva Lockwood admission to the Supreme Court bar). As the above-discussed cases demonstrate, many of the shadow docket orders contain no more than one paragraph or even one sentence explaining the disposition. When the lack of information about the Justices’ votes is “combined with the minimal explanations for these rulings, the result is a Court in which we know very little about what the individual Justices think about their own procedures.” Bauda, supra, at 19.

III. The Problems of Resolving Cases Via the Shadow Docket

Justice Jackson famously wrote of the Supreme Court that “[w]e are not final because we are infallible, but we are infallible only because we are final.” Brown v. Allen, 344 U.S. 443, 540 (1953) (concurring in result). Conscientious of its role as the “final” word on issues of paramount public importance, the Court has developed robust procedural and deliberative frameworks to ensure the legitimacy—and the perceived legitimacy—of its decision-making. Even on sharply divisive issues like integration, school prayer, abortion, and immigration, the public overwhelmingly respects the Court’s pronouncements as authoritative—a triumph largely attributable to the Court’s strict adherence to an institutional framework that ensures transparency and consistency across cases and court compositions.

The defining feature of the shadow docket is that it represents a deviation from the Supreme Court’s usual fastidious procedures. That deviation may be indispensable for routine matters of docket management. But as the shadow docket takes on increasing importance for resolving pressing issues of American public life, that procedural deviation carries real risks.

A. Deviations at the Input Stage: Diminished Opportunities for Participation and Deliberation

Limited Development in the Lower Courts. The Supreme Court routinely stresses that it is “a court of review, not of first view.” Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). Adhering to that appellate function ensures that controversies come to the Court fully developed on both the law and the facts. The Court ordinarily refuses to “abandon [its] usual procedures in a rush to judgment without a lower court opinion,” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009), because it relies on fully developed briefing and “thorough lower court opinions to guide [its] analysis of the merits,” Zivotofsky v. Clinton, 556 U.S. 189, 201 (2012). Waiting for full disposition below also “guarantees that a factual record will be available to [the Court], thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances,” Illinois v. Gates, 462 U.S. 213, 224 (1983), which is why the Court hesitates to address “far-reaching and important questions” if they “are not presented by the record with sufficient clarity to require or justify their decision,” Mishkin v. New York, 383 U.S. 502, 512-13 (1966). Indeed, the Court has emphasized that it is necessary to “meticulously observe [these] customary procedural rules” in order to “promote respect for the procedures by which [its] decisions are rendered, as well as confidence in the stability of prior decisions.” Gates, 462 U.S. at 224.
Disputes in an emergency posture allow for none of these safeguards that sharpen the focus of the Court’s review. When ruling through the shadow docket, the Court may lack a developed record, confront claims unconstrained by the narrowing process of certiorari, or face arguments that lack full consideration through the reasoned opinions of multiple courts of appeal. Recent cases illustrate some of the risks when these constraints evaporate.

First, the Court might opine on sensitive questions unnecessarily. When it comes to the merits docket, the Supreme Court is typically careful not to wade into contentious hot-button disputes unless it has to. For much the same reasons as its “usual practice is to avoid the unnecessary resolution of constitutional questions,” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009), the Court “adhere[s] scrupulously to the customary limitations on [its] discretion” when “difficult issues of great public importance are involved,” *Gates* 462 U.S. at 224, see generally Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961). In both the early travel ban and census litigation, the Court considered multiple requests by the federal government for emergency or extraordinary relief and granted some of them. But those rulings ended up being entirely unnecessary because subsequent events changed the course of litigation and rendered earlier orders moot.

Second, as Professor Vladeck has observed, the posture of these applications usually requires “subjective predictions about how the litigation is likely to unfold,” Vladeck, *The Solicitor General and the Shadow Docket*, supra, at 127—predictions that may turn out to be a poor substitute for sustained engagement with the legal issues. To take but one example, last year, when the Justice Department asked the Court to vacate a district court injunction in a challenge to the federal death penalty protocol, three members of the Court wrote to express their view that “[t]he Government has shown that it is very likely to prevail when this question is ultimately decided,” and that “the question ... is straightforward.” *Barr v. Reno*, 140 S. Ct. 353, 353 (2019) (mem. ) (Alito, J., concurring). The case turned out to be anything but, sharply splintering the D.C. Circuit, with “[e]ach member of the panel tak[ing] a different view of what the [Federal Death Penalty Act] require[d]” and all three judges writing separately. In re Fed. Bureau of Prisons’ Execution Protocol Cases, 955 F.3d 106, 108 (D.C. Cir. 2020). Although the D.C. Circuit’s opinion failed to produce a controlling interpretation of the statute, the Supreme Court ultimately denied certiorari after reevaluating the case. *See Bourgeois v. Barr*, 141 S. Ct. 180 (2020) (mem.).

Of course, nothing binds a court to its initial assessment, and the law differentiates between preliminary and final relief precisely because the merits of a case may look different after threshold considerations. But—particularly in a world where the Supreme Court has discretion over its own caseload and can manage how and when cases come before it—these early predictive pronouncements represent a sharp break from the Court’s usually nuanced and restrained consideration of merits cases.

**Limited Opportunities for Advocacy and Consideration.** Lawyers produce their best work when they have adequate opportunities to perform research, consider facts and arguments, and consult colleagues. Supreme Court advocates—and even Supreme Court Justices—are no exception. Especially when compared to the meticulous procedures imposed for merits cases, the accelerated process for the shadow docket sacrifices key opportunities for participation and deliberation. Most visibly, there is no opportunity for oral argument—an often-critical opportunity for the Justices to

Of particular concern to frequent institutional litigants like the District of Columbia, there are also diminished opportunities for the views of amici curiae. Issues worthy of the Supreme Court’s attention typically affect large swaths of the population. Because the lawyers representing the parties may be focused on narrower legal questions, the Court finds amicus briefs “that bring[ ] to the attention of the Court relevant matter” not addressed by the parties to be “of considerable help.” Sup. Ct. R. 37.1. The Court frequently invites the Justice Department to opine on difficult legal questions through amicus briefs, and state governments and other stakeholders often file amicus briefs to explain the broader context of a case. This Term alone, the District of Columbia has authored or joined multistate amicus briefs weighing in on the availability of nominal damages, the Federal Trade Commission’s restitution power, and rules incentivizing women and minority-owned media broadcast companies. The availability of high-quality amicus briefs is another safeguard for the Court, as these briefs situate a particular dispute in the wider legal, social, and political context.

Although states and other stakeholders may do their best to file amicus briefs in emergency litigation (indeed, the District participated in many of the election-related disputes this past fall), the accelerated timelines and unpredictable scheduling of these cases make coordinating amicus efforts extremely challenging. And—possibly reflecting a more traditional conception of the shadow docket’s role—the Court’s official guidance notes that “[t]he filing of amicus briefs in connection with emergency applications is strongly discouraged.” Sup. Ct., Ofl. of the Clerk, Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States (Oct. 2019).

All of this means that when the Court confronts novel, controversial issues through the shadow docket, it does so with diminished deliberative tools and far fewer viewpoints than a traditional merits case. To be sure, the litigation choices of the parties play a significant role in all cases at the Court—litigants seek out the most experienced counsel for that very reason. But in a narrower framing shorn of outside perspective, the strategic framing choices of lawyers on behalf of a particular client necessarily exert greater influence. Indeed, commentators have speculated that shadow docket cases raising identical issues have produced opposite results entirely because of the lawyers’ framing. See William Baude, Death and the Shadow Docket, Volokh Conspiracy (Apr. 12, 2019) (citing discussion “that different lawyering or different amicus participation made the difference”).

Limited Opportunities for Deliberation (and Compromise). The final difference is the simplest, but potentially one of the most profound. While the Justices traditionally discuss cases at private conferences with longstanding traditions governing everything from the order in which the Justices speak to which Justice holds the door, the unpredictability of emergency litigation can deprive the Justices of this deliberative opportunity. Last April, for example, the Court ruled 5-4 to vacate a stay of execution, and in a sharply worded dissent joined by three colleagues, Justice Breyer

revealed that he had “requested that the Court take no action until tomorrow, when the matter could be discussed at Conference,” but the “Court nevertheless grant[ed] the State’s application to vacate the stay”—a ruling handed down “in the middle of the night without giving all Members of the Court the opportunity for discussion.” Dunn v. Price, 139 S. Ct. 1312, 1314-15 (2019) (mem.) (Breyer, J., dissenting). Regardless of what one thinks about the merits of executions, that process “is no way to run a railroad.” Baude, Death and the Shadow Docket, supra.

B. Deviations at the Output Stage: Less Accountability, Less Guidance, Less Confidence

Even if the Supreme Court’s consideration of cases on the shadow docket were as procedurally rigorous as its consideration of merits cases, there are still reasons to be concerned about the shift toward resolving major disputes on the shadow docket. Because shadow docket orders do not always disclose voting tallies and range from a single sentence to just a handful of pages, the public is often left with little more than a bottom-line. This lack of explanation for major rulings exacts significant costs from regulated parties, lower courts, and the public at large.

Limited Accountability. As explained, the Justices do not always make their votes public in shadow docket cases. Although Justices may register their dissent, the lack of a registered dissent “doesn’t mean [the Justices] are in fact unanimous.” Sherman, supra. Even in sharply divided cases, we may not know who on the Court joined the majority; indeed, just last week, a “mystery” Justice joined Justices Barrett, Breyer, Kagan, and Sotomayor to halt an execution. See Mark Joseph Stern, Amy Coney Barrett Joins Liberals and a Mystery Justice to Block Execution, Slate (Feb. 12, 2021).13

Although the Court’s deliberative processes should generally be confidential, anonymous voting in a divisive case is troubling. As Justice Scalia explained, signing one’s name to a decision provides a key measure of accountability: even if a Justice does not “personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of public embarrassment, meander back and forth—today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite.” Antonin Scalia, The Dissenting Opinion, 1994 J. Sup. Ct. Hist. 33, 42 (1994); see Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 139-40 (1990) (“Disclosure of votes and opinion writers . . . serves to hold the individual judge accountable” and “puts the judge’s conscience and reputation on the line.”). No one contends that every Justice must disclose every objection to a scheduling order, but a “mystery Justice” casting the tie-breaking vote in a 5-4 case affects the public’s perception of the Court’s consistency and fairness.

Limited Reasoning. Even when the vote tally is clear, shadow docket orders often contain little explanation. In the aforementioned challenge to President Trump’s construction of the border wall, for example, the Ninth Circuit issued a 38-page opinion explaining why a stay of the district court’s injunction was unwarranted, which included a significant analysis of why the plaintiffs had

13 Available at https://bit.ly/2Zpc5UI.
a cause of action to seek relief. *Sierra Club*, 929 F.3d at 677, 699. By a vote of five Justices, the Supreme Court stayed the injunction in a one-paragraph order, simply writing that “[a]mong the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action.” *Sierra Club*, 140 S. Ct. at 1.

High-profile decisions handed down without explanation come at a significant public cost. See, e.g., John Rawls, *Political Liberalism* 218 (expanded ed. 2005) (“As reasonable and rational, and knowing that [citizens] affirm a diversity of reasonable religious and philosophical doctrines, they should be ready to explain the basis of their actions to one another.”); see generally Amy Gutmann & Dennis F. Thompson, *Democracy and Disagreement* (1998). Transparent decision-making, grounded in consistent and publicly available reasoning, promotes confidence that the exercise of power is non-arbitrary and principled. See generally Tom R. Tyler, *Why People Obey the Law* (2d ed. 2006). Conversely, bottom-line effects, issued without explanation, do little to explain why issues of principle dictate what may be harsh results for many. See, e.g., Shoba Sivaprasad Wadhia, *Symposium: From the travel ban to the border wall, restrictive immigration policies thrive on the shadow docket*, SCOTUSBlog (Oct. 27, 2020).  

*Limited Guidance.* Summary orders also create significant practical hurdles for regulated parties and lower courts. To begin, these decisions may have unclear legal effects. District Judge Trevor McFadden has argued that different types of shadow docket decisions may have different levels of precedential value for lower courts. See Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBlog (Oct. 28, 2020) (arguing that denials of stay applications and “[n]o-chambers” opinions are not binding on lower courts, but stay decisions that express a majority view on the merits are entitled to deference). But there is “scant case law or academic literature on this issue, nor is there a consensus among those who have considered it.” Id.

Regardless of the doctrinal status of these orders, when the Supreme Court speaks, legal institutions and stakeholders listen. Although many of the summary orders on the shadow docket do not formally announce new “rules” to bind future cases, “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006). Lower courts work hard to faithfully apply the Supreme Court’s instructions but, with limited guidance, they can struggle to divine workable standards or rules from the Court’s minimal reasoning. For example, after the Court granted a stay in *Herbert v. Kitchen*, 571 U.S. 1116 (2014) (mem.), a case involving challenges to government restrictions on same-sex marriage, the Ninth Circuit granted a similar stay, with one judge noting in a concurrence that although the Supreme Court’s terse two-sentence order [in *Herbert*] did not offer a statement of reasons [and] is not in the strictest sense precedential, it provides a

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clear message—the Court (without noted dissent) decided that district court injunctions against the application of laws forbidding same-sex unions should be stayed at the request of state authorities pending court of appeals review.

Latta v. Otter, No. 14-35420, 2014 WL 12618172, at *2 (9th Cir. May 20, 2014) (Hurwitz, J., concurring). Other circuits have attempted to divine meaning from shadow docket orders, with mixed success. Compare Democratic Nat’l Comm. v. Bostelmann, 977 F.3d 639, 642 (7th Cir. 2020) (staying a district court injunction extending voting deadlines because “[t]he [Supreme] Court has consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government” (citing summary stay orders)), with id. at 645 (Rover, J., dissenting) (“[T]he Supreme Court’s pattern of staying similar sorts of injunctions in recent months is long on signaling but short on concrete principles that lower courts can apply to the specific facts before them. Until the Supreme Court gives us more guidance than Parcells v. Gonzalez, 549 U.S. 1 (2006),] and an occasional sentence or two in its stay rulings have provided, all that lower courts can do—and, I submit, must do—is carefully evaluate emergent circumstances that threaten to interfere with the right to vote.”).

This lack of clarity from the Supreme Court is especially problematic for jurisdictions, like the District of Columbia, that strive to accurately implement the Court’s directives related to the COVID-19 pandemic. The Court has issued many shadow docket rulings on gathering-size restrictions and other state measures designed to protect public health, see Stephen Wermiel, Symposium: Coronavirus litigation lurks in the shadows, SCOTUSBlog (Oct. 26, 2020) (surveying COVID-19-related litigation), but the scope of these rulings is often unclear. As mentioned, the Court this month issued a fractured shadow docket order striking down California’s prohibition on indoor worship but allowing capacity restrictions. S. Bay United Pentecostal Church, 2021 WL 406258, at *1. Troublingly, the order provides no consensus on what animated the Court’s conclusion, making it difficult for other jurisdictions to enact policies in the face of COVID-19. See id. at *6 (Kagan, J., dissenting in part) (“[W]ho knows what today’s decision will mean for other restrictions challenged in other cases? . . . When are such capacity limits permissible, and when are they not? And is an indoor ban never allowed, or just not in this case? Most important—do the answers to these questions or similar ones turn on record evidence about epidemiology, or on naked judicial instinct? The Court’s decision leaves state policymakers a drift, in California and elsewhere.”).

IV. Addressing The Shadow Docket

Most of the contentious issues on the shadow docket come to the Supreme Court as emergency applications, stay requests, or petitions for certiorari before judgment. Issues with the shadow docket are thus problems related to the Court’s *appellate jurisdiction*—its supervisory function over the lower federal courts. This means that Congress has the ability to address them. While I will leave it to others to explore the precise mechanisms and policy fixes that might mitigate issues with the shadow docket, I want to emphasize the high-level point that the Constitution plainly empowers Congress to act in this space.

16 Available at https://bit.ly/37bIC4U.
The text of Article III confirms that Congress may control the Court’s exercise of appellate jurisdiction. “In all [non-original] cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const. Art. III, § 2, Cl. 2 (emphasis added). That power is not theoretical, as Congress already exercises substantial control over the Court’s appellate jurisdiction by statute. See, e.g., 28 U.S.C. § 1254 (specifying how “[c]ases in the courts of appeals may be reviewed by the Supreme Court”); id. § 1257(a) (prescribing the mechanism by which “[f]inal judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court”). Congress has—successfully and within constitutional bounds—adjusted this jurisdiction by statute at numerous points in American history. See, e.g., Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (granting the Supreme Court appellate jurisdiction over capital cases); Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790 (granting the Supreme Court appellate jurisdiction over cases in which a state court had upheld claims under the Constitution or federal statutes). And, as the Supreme Court itself recently confirmed, Congress’s power over how cases move through the federal system is broad: “[s]o long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (quoting Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50, 63-64 (1944)).

Congress also wields substantial power over how the federal courts address emergency applications or stays. Congress may “alter[] the relevant underlying law,” for example, by “restrict[ing] courts’ authority to issue and enforce prospective relief” or “requiring that such relief be supported by findings and precisely tailored.” Miller v. French, 530 U.S. 327, 347 (2000) (upholding a challenged portion of the Prison Litigation Reform Act). And Congress can explore its authority over the Federal Rules of Civil and Appellate Procedure, which already prescribe some constraints for injunctive stays pending appeal, see Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a), and require that “[e]very order granting an injunction and every restraining order . . . state the reasons why it issued,” Fed. R. Civ. P. 65(d)(1)(A). Should the Subcommittee conclude that additional procedural safeguards are necessary, the federal rules offer another avenue for reform.

CONCLUSION

Thank you for the opportunity to share the views of the Office of the Attorney General for the District of Columbia with you today.
Mr. JOHNSON of Georgia. Thank you, Solicitor General AliKhan. I will now proceed under the 5-minute Rule with questions, and I will begin by recognizing myself.

Professor Vladeck, you mention in your testimony that there is a traditional four-factor test that the Court has historically applied in deciding to grant emergency relief. How has the Court’s application of this test shifted in recent years? What impact has that had on the types of emergency relief the Court has decided to grant?

Mr. VLADECK. It is a great question, Mr. Chair. The traditional four factors, just real quickly, are: First, the likelihood that the Supreme Court would grant certiorari when the case came before it on a proper appeal; second, that the Court would actually side with the applying party on the merits, the likelihood of success on the merits; third, that the appealing party would suffer irreparable harm without emergency relief pending their appeal; and, fourth, that the balance of the equities weighs in favor of such relief, that there wouldn’t be an even greater harm worked on other parties, even nonparties, by providing the relief being sought.

Mr. Chair, the Supreme Court hasn’t acknowledged any shift in those four factors, but I do think we have seen the second factor become overly dominant, where the Justices are almost exclusively focused on the merits.

A very good example of this—Solicitor General AliKhan referred to the California COVID decision from 2 weeks ago, what I think is colloquially known as “South Bay II.” In that decision, there are multiple opinions, concurring and dissenting, in the injunction the Court issues, none of which speak about the factors, none of which actually talk about whether there was, in fact, a likelihood of granting cert, whether there was irreparable harm to the applicants from California’s restrictions if they were allowed to remain in place, or the balancing of the equities, the potential downsides of enjoining California’s indoor worship restrictions for the duration of the appeal.

Mr. Chair, I think it is the disappearance of that consideration, the disappearance of the balance of the equities, that has really turned these cases into just merits decisions coming at an incredibly premature stage, where none of the other conventional equitable concerns—about the impact on other parties, about irreparable harm—are really playing the role that they have historically.

That is the shift I think we have seen. The best evidence of it is in individual opinions by individual Justices, most prominently the Chief Justice’s in-chambers opinion in a case called Maryland v. King in 2012.

Mr. JOHNSON of Georgia. Thank you.

Solicitor General AliKhan, in your written testimony, you mention that the shadow docket and the Court’s lack of clarity have been problematic for jurisdictions like the District of Columbia that are striving to implement the Court’s COVID–19 directives. Can you elaborate on the unclear guidance that has come from the Court and how that has impacted the District of Columbia and other jurisdictions?
Ms. AliKHAN. Absolutely.

Jurisdictions like the District of Columbia want to make sure that they are adhering to the Court's pronouncements, but there is some real controversial as to whether these shadow docket rulings have precedential effect and, if so, which ones do.

At the same time, when the Supreme Court has invalidated a similar provision, even if it is in a situation that is not precedential, you pay attention.

So, if you don't have the reasoning behind the decision—for example, in the South Bay II case, we don't have a sense of why the ban itself for areas that had the highest COVID transmission rates was not allowed but why certain capacity restrictions would be allowed. So, if we were to approach these restrictions on worship in light of COVID in areas that were particularly ravaged, we would have a very hard time understanding, you know, could we ban it in certain circumstances? What could appropriate capacity restrictions be?

Because we don't have any consensus on those issues from the Court, it really leaves us at a guessing game of what was animating their decision and how it would apply to us.

Mr. JOHNSON of Georgia. Thank you.

Mr. Ali, in your testimony, you write that a person may be executed even though the only reasoned judicial decision on the books tells us that there was a serious likelihood the execution violates the laws of our country. In a matter of life and death, that is a particularly astounding consequence.

You have proposed a narrow fix that would import a standard of review for such cases. Can you elaborate on this proposed standard? Explain how things may have turned out differently for some of the cases you have described had there been such a standard.

If you can do so within about 30 seconds, I would appreciate it.

Mr. ALI. Yes, and hopefully I can revisit it again.

I think that there is an easy solution here that is something that Congress does routinely, which is provide standards for courts to apply.

The example I give in my written testimony is in the statute AEDPA governing decisions made by State courts. It is in title 28 of the U.S. Code, 2254(d), and it attaches great deference to those decisions.

In this instance, where we have courts finding errors, finding problems with the legality of an impending execution, similar deferential standards of review ought to be in place here. I think this should be seen as taking pressure off the Court, helping the Court avoid the public confidence issues that I spoke about earlier.

Mr. JOHNSON of Georgia. Thank you.

With that, I will now call upon the Ranking Member, Mr. Issa, for 5 minutes of questions.

Mr. ISSA. Thank you, Mr. Chair.

I didn't plan on asking this question, but I think it needs to be asked. So, I am a Californian. I will start with Professor Morley.

In the case of a decision in California by Governor Newsom that, as an executive, shutting down churches outright while leaving, for example, pot dispensaries and a host of other retail facilities open, including restaurants for much of that time, do you feel that the
solicitor general’s theory that there is no guidance when they ruled
that essentially you could limit the capacity based on a similarity
of restaurants and so on, but you couldn’t outright ban First
amendment rights to religion.

Mr. MORLEY. So, there are two ways of thinking about how judi-
cial opinions make law.

The first is the top-down approach, where the Supreme Court ar-
ticulates rules and principles and guidelines and, just based on a
particular case, tries to anticipate future potential cases, and craft
a Rule that is responsive to that so that future parties facing com-
parable situations know exactly what to do.

A different approach is more of a common-law approach, where
the Court just looks at a particular situation before it, says, “Yes,
this is good,” “No, this is bad,” doesn’t try to articulate broad,
sweeping principles.

One reason for that would be judicial modesty, judicial uncer-
tainty, that if there is a situation where the Court thinks it might
be a fast-fact-changing situation, where, in the case of COVID, for
example, developments with either the new medications or the
spread of vaccines, either positive or negative developments, might
materially change the facts on the ground, the Court doesn’t want
to be laying out, like, hard and fast principles for then future
courts to stick to.

Rather, by taking situations on a case-by-case basis and just hav-
ing particular situations that it upholds, particular situations that
it enjoins, litigants can then look at that in a more common-law
fashion and States like California can look at those rulings in a
more common-law fashion and try and conform their conduct.

So, it is really a matter of the Court potentially trying to mini-
mize judicial error by having as narrow of a ruling as possible. The
narrowest ruling on a particular set of facts, of course, is simply
just affirming or reversing.

Mr. ISSA. Sure. Yeah. Well, and it seemed to be pretty clear to
me that the Governor was simply wrong.

In your testimony, I think you made a very strong point—I would
like to have you elaborate on it—at least as to what are called na-
tionwide injunctions.

If, in fact, this body, the House of Representatives, were to either
restate or clarify or the High Court were to clarify that a judge’s
jurisdiction is only as to the plaintiffs in front of them, recognizing
that a class would be different than an individual, would this miti-
gate a great many or at least some of those cases that went to the
High Court because they effectively shut down the entire United
States as to the Administration?

Mr. MORLEY. Yes, Mr. Ranking Member. One portion of the
shadow docket—and, again, it is certainly not the whole thing, but
one of the contributing factors of the shadow docket is the increas-
ing use of what are so-called nationwide injunctions or, as I think
the focus, focusing more on the right issue, defending-oriented in-
junctions.

So, if district courts were to limit their relief just to the par-
ticular plaintiffs before them, if they didn’t purport to enjoin Fed-
eral statutes, regulations, executive orders for litigants throughout
the entire Nation, or third-party nonlitigants, I should say,
throughout the entire Nation, there would be far less of a need for the Supreme Court to immediately hear a case. There would be far less of a need for the Supreme Court to step in with these extraordinary emergency types of relief that we see through the shadow docket.

Mr. ISSA. Lastly—am I out of time, Mr. Chair? I still have time. Lastly, historically, this body, the Congress, created the Fed Circuit in no small matter because the U.S. Supreme Court was swamped, as where the circuit court of appeals were swamped with reversals of patent cases and found themselves without the unique expertise.

Do you believe that the Congress and this Subcommittee particularly should begin looking at specialized appellate systems for many of these problems? I will just quickly say death penalty cases and nationwide injunctions as just two of them.

Mr. MORLEY. That would certainly be one potential response. If you have a single court, such as the U.S. Court of Appeals for the Federal Circuit, that has nationwide jurisdiction over issues, the scope of injunctions would become far less salient, because its rulings would have national effect as a matter of stare decisis.

There are certainly drawbacks to having such nationwide specialized courts as well that I would be happy to—I see my time has elapsed—but I would be happy to discuss later.

Mr. JOHNSON of Georgia. His time has elapsed, but proceed, Mr. Issa.

Mr. ISSA. Thank you. I will be very brief.

Mr. ISSA. Thank you. I will be very brief.

Mr. JOHNSON of Georgia. You are about 1 minute over, 1 minute and 10 seconds.

Mr. ISSA. Thank you, Mr. Chair.

Briefly, would you all agree that, if all the cases handled by the shadow docket were to be taken up by the High Court, the High Court would not be able to handle that many cases, and, therefore, we do have to either maintain the shadow docket or find some way for a deliberative body to consider more of these cases?

Mr. MORLEY. Congressman Issa, I will just say really quickly, I don’t think that is true if you consider the relevant set—not every order the Supreme Court issues but the categories we are talking about.

The Supreme Court heard 53 arguments last year. As recently as 15 years ago, they were hearing well over 100. So, the notion that the Court is appropriately hearing 53 merits cases and can’t handle 85 or 90 is belied even by recent history.

Mr. JOHNSON of Georgia. The gentleman is welcome.

Next, we will proceed to the gentleman from Arizona, Mr. Stanton, for 5 minutes.

Mr. STANTON. Thank you very much, Mr. Chair.

Over the last 2 years, we have increasingly seen in our country a tale of two Supreme Courts—one that we are all familiar with, one in which oral arguments are made before the Justices, one in which parties who have an interest in the case can make their case heard too, and one in which the rational for the Court’s decision sees the light of day.
Another one has emerged in recent years. It is one where decisions with sweeping implications are made in the dark, in the shadows, with rationale and legal reasoning hidden from the public.

The so-called shadow docket was created for emergency situations, where a party had to show irreparable harm to skip the line and forego the traditional path to the U.S. Supreme Court. That is why it has been so often used to handle death penalty cases. Now it is used much more broadly, used strategically by litigants of a certain ideology who didn’t like or agree with a district court decision to skip the appellate courts and go straight to a more sympathetic Supreme Court.

Lower court decisions on election integrity, for example, are undermined by the Supreme Court without a hearing and without any rationale shared with the American people. That is not how it is supposed to work.

Why is this such an important issue? Because the Supreme Court plays an essential role in our constitutional system of government as part of our system of checks and balances. When the Court does not provide any rationale, any explanation for its decision, does not record its vote, does not allow for the affected parties to make their case, it is the Court that is going unchecked, and the American people are left to question what is happening behind closed doors.

Concerns have been raised that the Supreme Court, through the shadow docket, sometimes seems to ignore its own professed standards of giving deference to district court findings in reaching its decisions.

Professor Vladeck, do you agree with this? If so, what justifies second-guessing the trier of fact like this?

Mr. VLADECK. Yeah, Congressman, I think it is a fair point in some of the cases we have seen. This is going to be, a broken record that you are going to hear from some of the Witnesses today. It is hard to make definitive statements about why the Court has done things and about specific things the Court has done, because we so rarely get signed opinions from the Court in this context.

I think Mr. Ali can speak to some of the death penalty cases, where there were factual findings by district courts that were not credited or were at least just sort of completely ignored when the case came to the Supreme Court.

I will just say, on that front, Congressman, I don't think that that problem is limited to the shadow docket. I think we have seen the Supreme Court even in merits cases show increasingly less respect, whether deserved or not, right, to lower courts even in plenary appeals.

Mr. STANTON. Solicitor General AliKhan or Mr. Ali, what is the impact of bypassing the normal standard of deference given to the district court factual findings in this manner?

Mr. ALI. I think that the impact in death penalty cases and particularly execution issues is immense for public confidence. I can give an example of a recent execution in the case of Dustin Higgs. In that case, you had a Maryland district court question the very legality of executing Mr. Higgs.
The Fourth Circuit looked at the issue and said, this is actually a difficult issue. We need 12 more days. That is what they were asking for, 12 more days, to have an expedited argument in which we consider this claim. The Supreme Court reached down and stopped the Fourth Circuit from even taking those 12 days.

When we look back at the historical record, I think it is going to look like a real stain in terms of public confidence in the operation of what is often referred to as the machinery of death.

Mr. STANTON. Professor Vladeck, somebody suggests that justices shouldn’t be held to the decisions in emergency orders, because there wasn’t a lot of time to decide and they don’t have the full benefit of a hearing and they don’t give their reasoning, so they aren’t bound for future cases.

What do you say in response to that?

Mr. VLADECK. That is certainly what the Supreme Court has said, Congressman. I think the problem—and this goes back to the colloquy between Congressman Issa, Mr. Morley, and Professor Morley.

The Supreme Court may have that view about itself. It is telling lower courts otherwise. So, the COVID restriction, the California indoor worship case that Congressman Issa was talking about, 3 days after that decision, the Court issued something called a GVR, a grant, vacate, and remand, in a different case called Gish v. Newsom, which I cite in my written statement, where the Court told the district court to go back and try again in light of its decision in the South Bay II case. Congressman, its decision in the South Bay II case was an unsigned order with no analysis.

So, it very well may be the case that the Supreme Court doesn’t feel like anything it says on the shadow docket is binding it. It is clearly the case that it views what it is saying on the shadow docket or not saying, as the case may be, as binding lower courts.

Mr. JOHNSON of Georgia. The gentleman’s time has expired.

Mr. STANTON. Thank you so much, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you.

Next, we will hear from the gentleman from Ohio, Mr. Chabot, for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chair, for holding this really very interesting meeting on this interesting topic.

Professor Morley, as you know, there are nearly 700 Federal district court judges throughout the country and territories, any one of whom could issue a nationwide injunction to block the executive branch from acting in a certain way. I would note that the majority has scheduled a hearing next week, I believe, which will presumably make the case for additional lower court judges, who could issue even more injunctions against things that they disagree with.

Now, as we know, during the Trump Administration, the previous Administration, Federal district courts issued nationwide injunctions, for example, stopping construction of our southern border wall, stopping efforts to limit travel from high-security risk nations into the United States, and preventing the Food and Drug Administration from enforcing in-person dispensing and signature requirements for abortion-inducing drugs during the coronavirus pandemic.
In my view, nationwide injunctions place far too much power in the hands of a single judge, ultimately allowing that one judge to control how the Federal Government will Act towards all Americans, not just towards the aggrieved party in a particular case or controversy.

Until the last 50 years or so, it is my understanding that these types of injunctions were rarely used, very seldom used. In fact, it has only been in the last few years that they have been used extensively to really upend the authority of our former President.

This has created a system where politically motivated attorneys can essentially forum shop for an activist judge who will help them achieve their political goals. It seems highly problematic that actions taken by Congress or the President can be stymied by a single activist judge, but they certainly are.

Professor Morley, how significant a problem is this forum shopping, and have I essentially set out the situation and the problems as many people see them at this point in time?

Mr. Morley. Yes, Congressman, that is absolutely correct. One of the consequences of allowing Federal Courts to issue nationwide defendant-oriented injunctions completely barring the Federal Government from enforcing the legal provision is that, as you explained, it exacerbates the consequences of forum shopping, because if a plaintiff goes to an ideologically sympathetic judge, that judge’s interpretation of the law then is given binding force for right holders throughout the entire Nation, including in other circuits where other litigants’ claims would ordinarily be judged and adjudicated under the law of those other circuits.

So, what you systematically see is, depending on the ideological balance of the case, right, there are certain jurisdictions that conservative plaintiffs will go to when they want to seek a nationwide defendant-oriented injunction against what they view to be progressive measures. There are certain jurisdictions that left-leaning plaintiffs will go to when they are seeking a nationwide defendant-oriented injunction against what they perceive to be conservative measures. You are having constitutional law driven by judges who don’t reflect a fair cross-section of the Federal judiciary, who deviate substantially from the median Federal judge, so to speak.

In terms of both the choices of cases that wind up being brought, the way in which the district court adjudicates those cases, the opinions that then are sent up for review, this affects not only the practical consequences of the Court’s ruling, but it has an impact on what the Court is actually holding in those opinions.

So, you are absolutely right, the effects of forum shopping go far beyond just impacting a particular case to shaping constitutional law for the Nation.

Mr. Chabot. Thank you. I am about out of time. So, just to sum it up, to me—
Mr. Johnson of Georgia. Thirty seconds left.
Mr. Chabot. Pardon me?
Mr. Johnson of Georgia. Thirty seconds.
Mr. Chabot. Okay. It seems inherently unfair to allow one judge in a specific jurisdiction to issue a ruling, which essentially binds the entire Nation, when there is a score, a huge number of judges in other districts who would come to just the opposite point of view.
We may have hated that happening in the previous Administration. I think the Democrats are going to come to hate that in this particular Administration. So, we do need to work together in a bipartisan manner to do something about this.

I yield back my time. Thank you.

Mr. JOHNSON of Georgia. I thank the gentleman.

Next, we will go to the gentleman from Hawaii, Mr. Lieu, for 5 minutes. Mr. Lieu.

Mr. LIEU. Thank you, Mr. Chair, for calling this hearing on this very important issue.

The issue today isn't really about how lower courts or appellate courts happen to look at injunctions and how the Supreme Court looks at injunctions. It is actually about the Supreme Court issuing orders in the dark and not even putting their names on it.

So, one of the Witnesses had testified that a mystery Justice has signed onto a particular order. Can you just explain a little more what happened in that specific issue?

Ms. ALIKHAN. Of course. So, that was a situation in which there was a decision to stay an execution and four Justices put their name on it, but it takes five Justices to Rule on something. So, there was clearly someone lurking in the background that cast that vote but did not want to be accountable for it.

So, Justice Scalia wrote extensively about why having public records of one's votes is very important in the system, because it protects—and I talk about this in my written testimony—someone from taking one position one day and the polar opposite position the next day.

So, when we don't have visibility and insight into what votes the Justices are casting, because they don't have to give them to us unless they want to, then we end up with a situation where we don't know who the majority of the Court is on any particular case.

Mr. LIEU. Has the Court or any Justices ever offered any rationales for why they believe they can sign onto orders without disclosing their name?

Ms. ALIKHAN. So, I think this gets back to something that Professor Vladeck was alluding to, which is on the general orders docket, most of the decisions that are made are routine docket management questions that don't end up needing to have any judge's name on it. Some of them can be disposed of by one Justice. Some of them might go to the full court, but they don't need to have an opinion, have any explanation.

So, the problem that we are seeing is that these quasi-merits cases are now being disposed of on the orders docket. So these normal processes with the orders docket of not having a name, not having an opinion, not having the full process and briefing, are now being used in these cases that should be on a merits docket or should at least have more process, including having Justices announce what their votes are, having majority opinions that provide reasoning and having concurring and dissenting opinions as are appropriate.

Mr. LIEU. Does Congress have the power to write legislation requiring Justices to sign their names to quasi-merits orders or decisions?
Ms. AliKhan. I would defer to Professor Vladeck on this question.

Mr. Lieu. Thank you, Ms. AliKhan, for your answers.

Professor Vladeck?

Mr. Vladeck. Congressman, I think it is a close question. Congress has never tried to before. Even if it might be within Congress' raw constitutional power, I am not sure it would have the desired result. I mean, there have been proposals for a while to have the Court disclose the vote count on grants of certiorari or denials of certiorari. I think what the Court would do if any proposal was ever enacted into law is have the public vote count always be unanimous even if the private vote count wasn't.

The better way to think about reform—and Mr. Ali talked about this in his opening statement—is to think about ways of taking pressure off the shadow docket. To Solicitor General AliKhan's point about how these are quasi-merits adjudications try to figure out if there are ways to help the Court actually have merits adjudications if these cases really present circumstances warranting that kind of dramatic expedition.

Congressman, we saw that already this term with the apportionment case, which the Court got all the way onto its merits docket and decided in a signed decision pretty quickly.

So, I think the reform conversation ought to start with ways of taking pressure off the shadow docket before it moves to punishing the Justices or prohibiting certain kinds of behavior.

Mr. Lieu. So, thank you.

Solicitor General AliKhan, back to that issue talking about where the mystery Justice signed on. Why is it that we knew the names of the other Justices in that particular case?

Ms. AliKhan. Because they disclosed them. So, in cases where they want to write separately, they want to provide even if it is one sentence or one paragraph of analysis, the Justice that is writing it will announce who they are, and then anyone who joins that will add their name to it as well.

So, in this mystery Justice case, we have someone that agreed with the ultimate result, which was to grant the stay, but did not subscribe to the opinion or the order that had been published in that matter.

Mr. Lieu. Thank you.

Then one last question. Professor Vladeck, what if there was a congressional law that said, because death penalty cases are so important and not reversible if the execution happens, that when you have orders in those cases, they have all got to disclose who the Justices are?

Mr. Vladeck. Yeah, and I think that would be a narrow approach. Another way I would be thinking about death penalty cases, Congressman, is something Mr. Ali alluded to, which is perhaps restoring the Supreme Court's mandatory appellate jurisdiction in such cases, where it actually has to hear those appeals on the merits and, therefore, can't simply dispose of them on the shadow docket.

We already have at least one example of a Federal Court that's jurisdiction is otherwise discretionary but must hear capital cases. That is the Court of Appeals for the Armed Forces. I don't know
why we couldn't talk about doing the same thing for the U.S. Supreme Court.

Mr. Lieu. Thank you.

Mr. Johnson of Georgia. Thank you. The gentleman's time has expired.

Next, we will go to the distinguished gentleman from Texas, Mr. Gohmert, for 5 minutes. Mr. Gohmert.

Mr. Gohmert. Thank you, Mr. Chair. Thanks to our Witnesses. I am a big fan of Justices—judges and Justices making clear who is making the decision, and I would welcome, you know, reforms that required that. Unlike one of our Witnesses, I think the Congress does have authority to do such a thing, require such a thing, since, as my constitutional law professor said many years ago, there is only one Federal Court that is mentioned in the Constitution. All others rely on Congress for their very existence. We brought them into the world. We can take them out. We can create rules that are appropriate for them.

I do take some offense to the term “shadow docket” to the point that they are not in the shadow. They are legitimate, basically should be considered, I think, preliminary judgments.

I do have, again, the concern. People ought to know who it is that is formulating a decision. I have a problem with per curiam, en banc as a way to hide who actually wrote a decision. I would like to see who wrote those decisions.

When it comes to this docket that is the subject of the hearing today, there are times when particularly the factor mentioned regarding irreparable harm requires quick action, and there is not time when you have a rogue Federal judge that decides to take on and negate all the knowledge and information the executive branch and the President have and make his own decision.

Professor Morley, speaking hypothetically, if China were to know that it had a potential pandemic disease and it had planeloads of people wanting to leave the area that potentially had the disease and fly to the United States, and some Federal judge says, a President can't have a temporary travel ban, we need to welcome those people, I am going to overrule the travel ban, not just national effect, but internationally, would that kind of situation justify a decision quickly by the quick docket of the Supreme Court rather than having a long, drawn-out process of applying for certiorari?

Mr. Morley. Yes, Congressman. Under the scenario that you laid out there, there would certainly be a very strong argument that having a potential pandemic spread, if you know people are from a particular area where you have like a highly infectious disease being spread, once they are allowed into the country, right, once they are allowed into contact with the general public, you can't unring that bell, right? Once the virus has spread, even if a court later then were to reverse that ruling, were to try to undo that ruling, the Court can't order the virus out of people's bodies.

So, yes, that would be exactly the sort of situation where the Supreme Court would be likely to find that there was irreparable harm, where there would be a balance of hardships tilting sharply in the government's favor.

I should add, that is exactly the sort of situation, I would suggest, that the House Judiciary Committee was contemplating,
where when it shifted constitutional litigation away from direct appeals to the Supreme Court and back to the usual appellate process that most other cases go through, the House Judiciary Committee emphasized that we are not trying to stop the Court from getting involved when there is a need to directly do so where a Federal law or other Federal measure has been enjoined.

Mr. Gohmert. Thank you. Of course, the unprecedented numbers, as has been pointed out, having maybe 27 of these type cases in the whole 20th century and 55 just in the first 3 years of the Trump Administration, is a clear indication consistent with the Democrats refusing to acknowledge the legitimacy of the 2016 election and the legitimacy of the President. It was lawfare on display. It was certainly appropriate for the Supreme Court to step in and say, wait, this isn’t right. I appreciate your time today.

Thank you. I yield back.

Mr. Johnson of Georgia. I thank the gentleman.

Next, we will go to the gentlelady from California, as is the gentleman who I misidentified as coming from Hawaii, Mr. Lieu. He is from California also.

I recognize the gentlelady from California, Ms. Lofgren, for 5 minutes.

Ms. Lofgren. Thank you very much, Mr. Chair.

Although Mr. Gohmert and I don’t agree on a lot of things, I do actually agree with his observation that calling this the shadow docket probably is unnecessarily pejorative, but there are still issues that I think are of concern.

One of the things that struck me is that several of the Trump Administration’s requests for extraordinary relief really relate to disputes about discovery in district courts and, for example, litigation over the Census and the DACA cases. Usually district courts, when it comes to evidentiary discovery, have wide discretion to make decisions, and it struck me as unusual or even odd that the Court would intervene at this stage of the proceedings.

I am wondering, Professor Vladeck, were these decisions unusual? What are the problems with the highest court getting involved in district court cases at this stage of the game?

Mr. Vladeck. Yes, Congresswoman, I do think they were unusual in the sense that one cannot find many prior examples of the Supreme Court issuing writs of mandamus in a couple of cases or sort of hinting at issuing writs of mandamus, the Supreme Court issuing cert before a judgment, the Supreme Court blocking an order to take deposition testimony from a Cabinet Secretary.

I think, Congresswoman, there are defenders of the Administration who would say that district courts have been taking unusual steps in discovery against the government witnesses. All I would say in response to that is two things. First, I think the government witnesses were behaving remarkably deceptively in a couple of those cases. Second, this again underscores the point that if the Supreme Court thinks lower courts are misapplying the relevant legal standards when deciding when they can and can’t take discovery of Cabinet Secretaries and other senior government officials, it ought to say so, and it ought to issue an opinion that says, here are the circumstances in which it is appropriate to depose someone like Secretary Ross, for example, and here is where it is not, as op-
posed to leaving us to guess when it is appropriate and when it is not.

One last point very quickly, Congresswoman. In the Ross example specifically, the Supreme Court went out of its way to issue multiple grants of extraordinary relief, to try to get the case up very quickly on the question of whether the district judge could rely on extra-record evidence. It even set that issue for oral argument.

The district court had never actually relied on extra-record evidence. Indeed, his final decision was based solely on the administrative record. So, it was all for naught, which goes again to why this is not just, I think, unhelpful in not telling us what is going on, but oftentimes unnecessary in the sense that we never get to the actual harm the government was claiming.

Ms. LOFGREN. I know that my time is running out, but I would just say that, you know, we have concerns about transparency, but it really goes to two things. One, the credibility of the Court, and it is absolutely important that the Court have credibility in the land, and transparency relates to that, but also transparency in terms of the implementation of decisionmaking. I was interested in the Ranking Member’s comment about the COVID religion cases.

I think the Court’s decisionmaking there fell so short, because it was not clear what they were doing. I will give you an example. Right now, in my county, Santa Clara County, there were restrictions, but they were not related to the type of activity, whether you were a church or a gym or whatever. It had to do with occupation standards and air and the like. Yet there is ambiguity on whether the Supreme Court really meant to exempt religious organizations from rules about COVID that related to all organizations.

So, they have created a mess here in a way, and the mess really is serious, because the virus can kill people. I do think that their procedures fell far short here.

I am very interested, Mr. Chair, in what kind of thoughtful deliberation we might have to put some guiderails on this so we can protect the reputation of the Court and make clear the decision-making and take action that will require the Court in some of these very important cases to have more transparency and a more deliberative process than sometimes has been shown, causing confusion in the land.

With that, Mr. Chair, thank you for recognizing me, and I would yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady. Her point is well taken.

We will now go to the gentleman from Louisiana, Mr. Johnson, for 5 minutes.

Mr. Johnson, you may want to unmute.

Hearing no response from Mr. Johnson—he may not be on the line—I am not looking at the list—we will now go to the gentleman or gentlelady from Wisconsin, Mr. or Ms. Tiffany, for 5 minutes.

I am sorry, we have not fully met yet.

It is Mr. Tiffany, but Mr. Tiffany is apparently not on the line either. So, we shall next go to the gentleman from Kentucky, Mr. Massie, for 5 minutes.

Mr. MASSIE. Thank you, Mr. Chair.
I think that we also would benefit from knowing which judges ruled in which way in these cases. Before I jump to that conclusion, which seems obvious that we would want that transparency, are there any Witnesses who can think of a benefit to having the judges be anonymous in these extraordinary cases that require them to Rule quickly?

Ms. AliKhan. Not at all. If it is going to be a merits determination, I think that the public needs to know who is in the majority and who is not. That is consistent with how they normally treat merits cases. It is just the sort of vagary that these merits decisions or quasi-merits decisions are being made on a docket that is historically used for routine pedestrian and procedural orders that we are seeing this problem. I think that judges and academics on both sides of the spectrum would think that there is a real interest in knowing who is voting how.

Mr. Massie. It seems to me to set up sort of a perverse incentive to take these cases on in this setting instead of the merit-based track of cases. If they wanted to remain anonymous, then there would be more incentive to take the case under this situation.

Also, I don’t know if this is practical or not. It would also restore the incentive to hear these cases in the right sort of setting. Would it make sense, or would it even be possible for judges to go back, after quickly ruling, to flesh out sort of the opinions? How would Congress go about requiring that? We couldn’t require a certain number of paragraphs, for instance.

Is there any way that you can imagine, any of the Witnesses, frankly, where the judges could still Act quickly, but then go back and do the work? It would set up an incentive where they are going to have to do just as much work and be just as transparent under this quick situation than they would under a typical merit-based hearing. Any of the Witnesses are welcome to answer that.

Mr. Vladeck. Congressman, you may be familiar with the World War II era case of Ex Parte Quirin. This was the famous Nazi saboteurs’ case in the U.S. Supreme Court where the Supreme Court did exactly that, where it issued a very, very short per curiam order allowing the military commission trial of the saboteurs to go forward. Then, I think it was about 2 months later, after six of the eight saboteurs had been executed, the Court finally issued an opinion setting forth the rationale.

There is a fairly broad consensus that that was, as Justice Scalia put it, not the Court’s finest hour, that it is actually a problematic setup when the Court is actually writing opinions after they have done the thing that matters to try to explain why they did the thing in the past.

I think the far better approach—and this is something you are hearing consistently from me and Mr. Ali and Solicitor General AliKhan—is to give the Court more of an ability to hear these cases on their merits quickly. I mean, we have examples. Bush v. Gore, the Court went from granting the case to a merit decision in 3 days. The Pentagon Papers case, it was a week.

The Court has the ability to move very quickly even on its merits docket; it has just fallen out of practice. I think one of the questions is how we can create incentives for the Court to return to that.
Mr. MASSIE. Right.

Mr. ALLI. Just in the death penalty context, I think it would be particularly problematic to have explanations come afterwards.

Mr. MASSIE. Okay. I didn’t think it would work. I just wanted to hear your opinion on that.

Professor Morley, what are the most critical problems that you see raised by defendant-oriented nationwide injunctions?

Mr. MORLEY. Most basically, there are strong article III problems. There is a question as to whether a plaintiff has standing to ask a court to invalidate a law or to enjoin a law for third-party nonlitigants, where the plaintiff typically has standing only to enforce its own rights, only to assert its own rights.

So, under the Court’s standing doctrine, there is a strong argument, in my view, that the plaintiff doesn’t have standing, and a court, accordingly, doesn’t have jurisdiction to grant relief that is unnecessary to redress the harm to that plaintiff that is tailored for the benefit of third-party nonlitigants.

As I have mentioned before, we already have a mechanism if a plaintiff wants to enforce the rights of third parties, to bring them before the Court through the class action device. In particular, Rule 23(b)(2) was adopted specifically to allow civil rights class actions in order to enforce the rights of the broad classes of people.

Most basically, they are contrary to the structure, the way that Congress has chosen to structure the Federal judicial system. Under the Evarts Act of 1891, Congress chose to create separate circuits with distinct bodies of law. If Congress wanted the first judge to Rule on an issue to give that opinion the force of law throughout the Nation, Congress could have structured the judiciary that way, but it chose not to.

Mr. JOHNSON of Georgia. The gentleman’s time has expired.

Mr. MASSIE. I thank the Witnesses and yield back.

Mr. JOHNSON of Georgia. I thank the gentleman.

Next, we will hear from the illustrious gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you. I appreciate the illustrious Chair of the Subcommittee, Mr. Johnson.

Professor Vladeck—and maybe one of the other Witnesses would be better to ask, I don’t know—do you believe that most of these decisions are made because of the desire for anonymity, the desire for alacrity, or difficulty in the work product fitting into the time available to the Court?

Mr. VLADECK. Congressman, it is a fair question. All I can do is speculate, but I think it is probably the last of those most of all. I don’t think it is the anonymity that is driving the bus with regard to the rise of the shadow docket. I think it is just a salutary benefit for some of the Justices.

I think then the question becomes, do we really accept that all of these cases present the kind of emergent circumstances that require that kind of compressed schedule?

I will just note, there was a very significant shadow docket ruling in mid-January about Mifeprax, about medicinal abortions, where the application from the Federal Government had been briefed in August and the decision finally comes down in January. That doesn’t strike me as an emergency, Congressman.
So, one of the questions—one of the things we have seen in the last 4 years, there will always be cases that present real emergencies that cannot be avoided, but we have seen the sort of idea of an emergency slide a bit, where now cases that the Court is sitting on for perhaps weeks are still being handled through its procedures designed for expediency in circumstances where expediency was not necessary.

Mr. COHEN. So, you said the latter, meaning that they don’t have enough time to hear the cases. Is that what you think is their situation, they are doing this because of a failure of the Congress to modernize and reform the Court to give the adequate amount of Justices to be able to adequately hear the cases?

Mr. VLADECK. So, I think the size of the Court is probably a different conversation for a different time. I do think that there is quite a lot of play in the joints of timelines, Congressman, in how long parties have to appeal, in how the party that won below can slow things down.

I do think one of the reforms Congress can and should consider to take pressure off of the shadow docket would be identifying a particular class of cases where those timelines ought to be significantly compressed. Those can include cases in which State or Federal policies are subject to an injunction from a lower court. Those can include capital cases, where the parties really do have to move quickly, not necessarily a matter of hours, Congressman, but certainly a matter of days and weeks, as opposed to the very, I think, generous and conservative schedule that applies to most Supreme Court appeals.

Mr. COHEN. Let me ask you this. While you are exactly right that this is not necessarily the topic of this discussion and it does merit its own hearing, are you familiar with the increase in the Court’s cases over the last 20, 30 years and the limited amount of time they have to give justice to the amount of work they have to do?

Mr. VLADECK. The docket, I actually think the overall docket in the Supreme Court has not increased dramatically in the last 20 or 30 years. In the lower courts we have seen more of that, which I think is also why there is a stronger argument for—and this Committee is even considering it—for whether there ought to be new lower court judges.

I will just say, Congressman, to me the problem we are seeing in the last 4 years is not a problem of an inadequate number of Justices, right? It is a problem of a court for which it has become too, in Justice Sotomayor’s words, reflexive to grant emergency relief in circumstances in which in the past the Court would have been far more skeptical.

Mr. COHEN. Professor AliKhan, do you agree the Supreme Court has got enough time, and do you agree the circuit courts need maybe to be expanded and reformed to meet the caseload?

Ms. ALIKHAN. Yes, I do, Congressman. So, I think Professor Vladeck had alluded to this before, but the Court is hearing fewer merits cases than ever. So, they could easily translate this kind of 20 to 30 odd cases that we are talking about as the problematic shadow docket cases onto a merits calendar and I think get that worked on pretty quickly.
As for the lower courts, yes, I think that there is a lot of work out there talking about the delays that we are seeing in Federal Courts and in Courts of Appeals due to the uptick in litigation and a lack of resources.

So, I do think reprogramming resources to the district court or the Courts of Appeals, whether in the form of judges or court personnel, like law clerks, would be very helpful.

Mr. COHEN. Thank you.

Mr. Ali, do you have an opinion about the courts and the need for more to adequately address the justice of the 21st century?

Mr. Ali. Yes. I would say that this actually makes even more urgent the conversation we are having today. I come back to Representative Lieu’s question about deference to fact finding.

Here we have the very busy lower court judges we are talking about holding hearings, hearing evidence from Witnesses and testimony, issuing opinions and then making fact findings, as they are supposed to do. When it gets up to the Supreme Court, after all of that work has been done and the actual standards are considered in writing, it is swept aside, unsigned, and unreasoned opinion. So, I think it just makes the whole process all the more offensive.

Mr. COHEN. I thank each of you.

I yield back the balance of my time.

Mr. JOHNSON of Georgia. I thank the gentleman.

We will next go to the gentleman from North Carolina, Mr. Bishop, for 5 minutes.

Mr. BISHOP. Thank you, Mr. Chair.

Mr. Vladeck, as I was listening to the testimony and questions so far in this pretty enlightening hearing, I want to focus on the question of whether or not some might have an interest in limiting the ability of the Supreme Court to Act in a summary fashion, because that would augment the power of lower courts to be a little less supervised.

So, we have a hierarchical court system. For the Rule of law to prevail, lower courts have to acquiesce in what the Supreme Court decides, and they have to, it seems to me, be a more circumscribed power than that court.

Mr. Morley in his testimony describes nationwide defendant-oriented injunctions that exceed lower courts’ power and can undermine the functioning of the circuit court system. He points out the possibility of forum shopping that that could give rise to cause district court judges who are more ideologically extreme to handle more, a disproportionate number of cases.

It seems to me also that it stands to reason that if numerous lower courts could in a sheer volume of cases flout or fail to acquiesce to the Supreme Court, they could essentially sabotage its supervisory capacity, its supervisory function, unless that court could Act in a summary fashion, just by bogging it down.

Also, in the case of the South Bay II case and the other religious cases that have arisen, they have arisen, it seems to me, to the extent that caused an uptick in the shadow docket, as you call it, arisen from an historically unprecedented situation of local orders to prohibit millions of people from attending church, which is sort of a fundamentally unusual situation.
So, I was looking at the end of your testimony, your written testimony, about the things that you might do to take the pressure off the shadow docket. It seems to me that those treat the symptom of the shadow docket maybe rather than any of those causes. Like, you could limit or terminate nationwide injunctive power of district court judges. You could implement a system to discipline lower court judges who flout or refuse to acquiesce in authority from the Supreme Court.

Particularly, Solicitor General AliKhan spoke about the South Carolina case that arose concerning the ballot—the absentee ballot deadline. I think it was a violation of Purcell, as one example.

So, all your reforms that you suggested focus on limiting the ability of the Supreme Court to do this kind of summary activity or shadow docket or orders list activity. I wondered what you think of the alternative instead that Professor Morley suggests of attacking the problem at its cause, which is limiting the sort of emergency problems that spring up from the lower court.

Mr. VLADECK. So, Congressman, with respect, I think perhaps I haven't conveyed my proposals accurately in my testimony, because I don't think that is a fair summary of them.

I don't believe I have suggested that we should limit the Court's power to issue these decisions. The question is, how can we create circumstances where the Court will feel less of an obligation to do so.

Mr. BISHOP. What about the other side of it, attacking the supply side, if you will, to evaluate whether the problems are coming up? What do you think maybe of his thesis, Mr. Morley's thesis, about the nationwide or defendant-oriented objections.

Mr. VLADECK. Congressman, I would like to say just two brief things. First, I think, insofar as nationwide injunctions or defendant-oriented injunctions are the problem, there are other ways to solve them, right? For example, I propose in my testimony the possibility of allowing the Federal Government to transfer any lawsuit seeking such relief to the D.C. District Court, so that the Federal Government has it.

More broadly, and I think this is the critical point, nationwide injunctions are not a majority, and they are not even a significant plurality of the source of the shadow docket rulings. So, insofar as there is concern about district judges running amok, I am not here to defend those district judges.

I am here to suggest that the problem is not district judges with regard to the shadow docket, because, Congressman, keep in mind, the only way these cases get to the Supreme Court is not just that the district court has ruled in a particular way, but that the Court of Appeals has refused to upset that ruling. So, now we are not just talking about a single forum selected hand-picked district judge. We are talking about an entire Court of Appeals not disturbing that decision before it gets to the Supreme Court.

Mr. BISHOP. Professor Morley, I have only got about 20 seconds remaining. Do you have any response to that general line of questioning? Just would like to get your thoughts.

Mr. MORLEY. Sure. I would just add, one of the reasons why I think it is better to focus on defendant-oriented injunctions rather than nationwide is because a lot of these orders dealt with State
laws. So, for the orders that applied to third-party nonlitigants across the State rather than the Nation, if you are targeting defendant-oriented injunctions, you will pick up those as well.

Mr. BISHOP. All right. I yield back.

Mr. JOHNSON of Georgia. The gentleman's time has expired.
At this time, I will call upon the learned gentleman from New York, Mr. Jones, for 5 minutes.

Mr. JONES. Thank you, Mr. Chair. You are too kind.
I will say that any discussion about the Supreme Court’s rogue, highly secretive process called the shadow docket, we have spent more time, or at least my Republican colleagues have, talking about the process by which nationwide injunctions are issued. I say this as a former candidate just a few months ago who successfully obtained a nationwide injunction that I think helped to save our democracy and ensure a free and fair election. I successfully, along with co-plaintiffs, obtained an injunction to suspend Postmaster General DeJoy’s proposed operational changes that were meant to undermine that election, which was largely facilitated by mail-in ballots.

In any event, many thanks to all our Witnesses for helping to shed light on the Supreme Court’s shadow docket. I am troubled that the Court decides many of our Nation’s most consequential cases, from elections to executions, with such speed and such secrecy. Many of these shadow docket decisions seem to betray our constitutional commitment to due process.

I especially want to thank the litigators appearing before us, Mr. Ali, Solicitor General AliKhan, and, of course, Professor Vladeck. As a lawyer, I recognize that it takes great courage to question the Court when you may have to argue future cases before the Justices.

Professor Morley, you have written that you see nothing partisan in the Trump Administration’s unprecedented exploitation of the shadow docket and the Supreme Court’s disproportionate five-four rulings in Trump’s favor. The partisanship of this far-right court is obvious.

Take immigration, for example. When President Obama wanted to protect immigrants by expanding Deferred Action for Childhood Arrivals, DACA, and also creating Deferred Action for Parents of Americans, DAPA, the Supreme Court did nothing as the lower court stopped him.

When President Trump wanted to ban Muslims and build a wall, the Supreme Court issued special shadow docket decisions to let him get away with it.

Or consider equity for transgender people. When President Obama directed public schools to provide equitable accommodations for transgender students, the Supreme Court did nothing as the lower court stopped him. When President Trump wanted to ban transgender people from serving in the military, the Supreme Court issued a special shadow docket decision to let him get away with it.

Or think about the right to vote. When President Obama asked the Supreme Court to stop Texas from disenfranchising voters of color, one of the few times that President Obama even asked for emergency relief, the Court let Texas disenfranchise those voters
anyway. When President Trump's Republican allies waged war on our democracy in the midst of a pandemic, the Court issued special shadow docket decisions putting voters' lives at risk in places like Alabama, Florida, Idaho, Oregon, South Carolina, Texas, and twice in Wisconsin.

So, Professor Morley, do you see any pattern of right-wing bias in these shadow docket decisions? A simple yes or no, please.

Mr. Morley. Congressman, that wasn't what I wrote. I was referring specifically to the use of certiorari before judgment. I said that one tool was consistent with the legislative intent embodied in the House Judiciary Committee's report. I never made a broad defense of the Trump Administration's use of the shadow docket.

Mr. Jones. I so appreciate that response.

Professor Vladeck, let me turn to you. As you have testified, the Supreme Court issues thousands of shadow docket decisions every year, unsigned orders that almost never include any reasoning at all. Most often, they are one or two sentences. You are on Twitter, Mr. Vladeck, so maybe you can help me figure this out. To your knowledge, are any Supreme Court Justices active on Twitter?

Mr. Vladeck. Not so far as we know, Congressman, although there is a widely circulating rumor that at least one of the Justices has a burner account that she uses to follow people like us, unfortunately.

Mr. Jones. Interesting. Are Supreme Court opinions limited to 280 characters?

Mr. Vladeck. No, although sometimes in some of these orders, it seems like they are. I think that it seems like it is not hard even in a quick-turning case, Congressman, right, for the Court to write more than 280 characters.

The issue is, we are increasingly seeing one, two, and three-sentence orders, not just in the thousands of cases that no one would raise a stink about, but in cases where the Court is actually disrupting the status quo and affecting, for better or for worse, thousands of people's lives.

Mr. Jones. Then, Professor Vladeck, is there any good reason the Supreme Court should be deciding matters of life and death in anonymous rulings the length of tweets? Donald Trump governed by tweet too, but at least he had the decency to use his real name on his account.

Thank you, Mr. Chair. I yield my time.

Mr. Johnson of Georgia. I thank the gentleman.

We shall now go to the esteemed gentleman from Wisconsin, Mr. Fitzgerald, for 5 minutes.

Mr. Fitzgerald. Thank you, Mr. Chair. Fascinating discussion. I don't have any specific questions right now. So, I would just yield back my time to the Ranking Member, if needed. Thank you.

Mr. Issa. I appreciate that.

Let me briefly follow up and explore a little further with Professor Morley and the other Witnesses. You are currently having a bit of a debate about the number of merit cases taken. What do you think would be the maximum number of these cases that could be moved to merit? There has been a lot of discussion about—not all of them need to be done immediately and so on. I certainly look
at the death penalty cases, for example, where these pleadings come in the final days or hours almost always, and if that one fails, there is usually one right behind it.

Would you really ever be able to put, for example, the death penalty reevaluation onto a merit calendar without the judges essentially working 24/7?

Mr. Johnson of Georgia. If I may interrupt, Mr. Issa, would you please allow us to see you by camera?

Mr. Issa. I am so sorry.

Mr. Johnson of Georgia. That is quite okay. Thank you.

Mr. Issa. I didn't even realize I was off. I apologize. I am so sorry.

Mr. Johnson of Georgia. Thank you.

Mr. Morley. So, I think it varies dramatically by the nature of the case. Different cases are going to involve different types of irreparable harm. Different cases are going to be on different timelines.

With the election-related cases, for example, where the Court was dealing with COVID-related changes that had been ordered by lower courts, but, obviously, the election was on a date certain. So that wasn't something where if the Court wanted to get involved or if the Court even just wanted to send a signal to lower courts about the types of modifications that would or would not be appropriate or the circumstances under which modifications would or wouldn't be appropriate, it didn't really have the option of waiting for cases to go through the ordinary process.

In terms of a highly expedited procedure of the type, you know, some of the Witnesses referred to Bush v. Gore and New York Times v. Sullivan, certainly the Supreme Court can do that, but there is only a limited number of times in a given year you can do that, right? Having intense 18-hour days 7 days a week, putting all your attention on one case, you can do that occasionally, you can do that periodically, but that can't be like part of standard operating procedure. That can't be, I would suggest, a monthly occurrence.

Mr. Issa. So, it would be fair to say that every litigant believes his should be the exception, but not every litigant can be pleased?

Mr. Morley. That is probably true, Congressman.

Mr. Issa. Okay. Lastly, I want to ask the other Witnesses, because it is one of those major questions that won't happen overnight.

Using the Fed Circuit as historic for patents and trademarks, patents specifically, and now looking at some of these cases, could each of you opine on what cases could be either forced to be moved to the district, in other words, compelled to be brought in the District of Columbia and taken through that process, or ones in which the appellate could be to a court of specific jurisdiction, based on the desire for them to consider merit without burdening the Court?

Mr. Vladeck. I will take a stab at both of those. I think there would be nothing beyond Congress' power to provide the D.C. District Court with either exclusive or concurrent jurisdiction in any lawsuit against the Federal Government. So, whether you wanted to mandate that those cases go to DC or give the Federal Govern-
ment the choice of litigating them in a particular district court or moving them, I think those would be within Congress’ power.

I am not, Congressman, a fan of specialized courts. I think the Federal Circuit is actually a pretty good example of why they don’t always work the way Congress intends. The Federal Circuit’s track record in the Supreme Court as of late has not been what anyone would call good. So, I think that specialized courts strike me as sort of the wrong solution to the wrong problem.

Mr. Issa. So, coming back very briefly, would it be fair then to say that you support the Biden Administration being able to, if they are sued based on one of their actions somewhere in the country other than the District of Columbia, being given the authority to move and have that removed to the District of Columbia, thus binding themselves to a national decision?

Mr. VLADECK. Not just the Biden Administration, Congressman. I would think consistently across any executive branch. That would be—especially if that was an option and not a mandate. That would be a way of preserving lots of things we could all probably agree on as salutary values.

Mr. Johnson of Georgia. The gentleman’s time has expired.

Mr. Issa. Thank you. Thank you, Mr. Chair.

Mr. Johnson of Georgia. I thank the gentleman.

We will next go to the well-studied gentlelady from North Carolina, Ms. Ross, for 5 minutes.

Ms. Ross. Thank you very much.

I have a couple of questions on where you seem to be going when you are responding to an emergency and how the Court may have strayed from what an emergency is, whether there is truly irreparable harm going on.

Could you talk a little bit about whether you think the Court has moved too far away from considering something that is a true emergency and how it might be better to have categories of things that could be decided quickly—obviously, a death penalty case would be at the top of the list—versus things that should not be allowed to be considered emergencies?

Mr. VLADECK. Congresswoman, you broke up a little, so I assume that question is for me.

Ms. Ross. Yes. I am sorry.

Mr. VLADECK. On the emergency part—so there will always be—and I hope my colloquy with Congressman Bishop drove this home. There will always be cases where the Court has to Act exceedingly expeditiously.

That what we have seen in the last couple of years is more and more cases where the Court is sitting on these issues for a week or 2 weeks or in the Mifeprex case, 5 months, and still issuing a so-called—a ruling that is bound by its emergency procedures.

I am wary of drawing a bright line between what is an emergency and what isn’t because part of what slows down the decision-making process in these cases is that the Justices themselves are taking some time to write their opinions.

I do think that the taking pressure off of the emergency, right—the death penalty cases do not have to be 11th hour appeals. We can provide more mechanisms for prisoners to bring claims perhaps before an execution date is set, right? Just ways of sort of making
sure, making clear to the Justices that they don’t need to treat every-
ting as an emergency even if we might disagree about where
the line is.

So, that to me is the concern, is that the context has clearly ex-
panded. I don’t know how we could bring it back by drawing a line.
The better way to bring it back is just by saying, here are contexts
where you really don’t need to use this procedure, you can use your
better normal merits procedure.

Ms. Rossi. Well, but how would you define those cases? Do they
have to define them, or could there be examples where this should
have gone to the merits, this shouldn’t have gone to the merits, so
that there would be guardrails there?

Mr. Vladeck. Yeah. No, it is a fair question, Congresswoman. I
don’t have a great answer. This is where I think I do agree with
Professor Morley. The Court really should be thinking about certio-
rari before judgment more often as a way of getting merits cases
to the Court faster.

Requiring mandatory direct appeals, Congresswoman, in cases in
which you have an execution set, in cases in which you have a
death sentence, Congresswoman, perhaps in cases in which a dis-

tric court has entered some kind of universal or defendant-or-
ented injunction and it has been affirmed by the Court of Appeals,
requiring the Supreme Court to take that quickly.

One of the ways to do this is to speed up the Court’s merits dock-
et, which is unquestionably something Congress has the power to
do.

Ms. Rossi. Okay. Thank you very much.

My next question is for Solicitor General AliKhan. This is about
these close cases where the dissent has to write, the majority has
not.

Could you tell me how that affects the State of the law, whether
that dissent seems to have more weight because somebody went to
the trouble of putting it in there? How would you assess whether
this should go forward or whether we are really just leaving people
hanging where we have a dissent, but we have no majority opin-
ion?

Ms. AliKhan. Congresswoman, you cut out a bit, but I under-
stand the question to be situations where you have a dissenting
opinion but not an explanation of the majority. So, in those cir-
cumstances, you are only relying on the dissent to try and read the
tea leaves to determine what the majority was thinking. So that
can be quite problematic.

So, to go back to the COVID California cases, it could very well
be that the majority, or the votes that comprise what was ulti-
mately the majority were concerned about differences in how
churches were being treated than from how restaurants were. But
that doesn’t—if they don’t say so, how do we know, right?

So then how does a jurisdiction that might have a full ban on
any kind of indoor activity because they have very high COVID
numbers, would they be able to think that there was a litigation
risk associated with that, and how could they assess their need to
balance public health against any potential litigation?

So, when you are really just guessing, it makes it very hard for
lawyers, especially lawyers for State and local governments, to do
the real risk assessment of what do we do to protect public health, at the same time minimizing any risks of any kind of litigation.

Mr. JOHNSON of Georgia. The gentlelady’s time has expired.

Ms. ROSS. Thank you. I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady. Thank you.

Now we will turn to the accomplished gentleman from Oregon, Mr. Bentz, for 5 minutes.

Mr. BENTZ. Thank you, Mr. Chair. An incredibly interesting conversation.

I really don’t have any focused questions, but I would like Mr. Morley to take an opportunity, if he would like to do so, to expand upon his last several answers if he wishes to do so.

Mr. MORLEY. Thank you very much, Congressman.

One of the reasons why, as Professor Vladeck had referred to, certiorari before judgment, one of the things that distinguishes that from the other aspects of the shadow docket is that once the case is before the Court then, now the Court has a full-dress hearing, so to speak, right? There is the opportunity for merits briefings, the opportunity for amicus briefs, oral argument with written opinion, where you know what Justices sign onto the majority or the dissent.

So, it might be worthwhile, unpacking this concept of shadow docket to treat certiorari before judgment differently from some of the other types of orders that the Court grants. Again, as I had alluded to earlier, that is consistent with the legislative history underlying the Court’s current jurisdictional structure.

The Department of Justice, in lobbying for our current jurisdictional statutes, emphasized the ready availability of certiorari before judgment in constitutional cases. As I mentioned, this Committee emphasized the importance of it. In a previous reform in the 1970s, when this then-Congress began the process of repealing of the mandatory three-judge court requirements, some of the direct appeal as a right requirements, the Senate Judiciary Committee similarly pointed to the availability of certiorari before judgment.

One point that I would also bring up as this Committee considers possible alternatives, throughout the 20th century, we had direct appeal as a right to the Supreme Court throughout much of the 20th century in constitutional cases. If a lower court, whether it upheld, whether it struck down a State law, a Federal law, those cases were appealable directly as a right. It was because of concerns about the Court’s caseload that Congress repealed those jurisdictional grants, shifted constitutional litigation to the ordinary appellate docket.

So, in considering ways of reforming the shadow docket, one concern would be to not return to the system that Congress itself consciously brought us away from.

One final point—

Mr. JOHNSON of Georgia. Would the gentleman allow me to interject? With Mrs. Spartz waiting for someone to yield, would the gentleman see fit to yield some moments to the gentlelady, Mrs. Spartz?

Mr. BENTZ. Of course. I so yield.

Mr. JOHNSON of Georgia. At your discretion, sir.

Mr. BENTZ. Let’s—how much time do we have left?
Mr. Johnson of Georgia. You have about 2—well, let’s see—yeah, about 2 minutes.

Mr. Bentz. Okay. Let’s take another 30 seconds with our witness and then go to Mrs. Spartz.

Mr. Johnson of Georgia. Thank you.

Mr. Morley. The one final point that I had wanted to quickly add is one aspect of defendant-oriented injunctions I didn’t have a chance to allude to.

If courts can issue these nationwide defendant-oriented injunctions, it doesn’t matter how many times the government wins. The government can win four cases in a row, nine cases in a row. When a plaintiff loses, that doesn’t stop other plaintiffs from winning the same exact claims.

Yet all it takes is one person to win anywhere, then, to be able to get an order that shuts down the law or the executive order across the entire Nation. So, they involve a fundamental asymmetry.

Mr. Bentz. Thank you.

I yield to Mrs. Spartz.

Mrs. Spartz. Thank you.

Thank you, Mr. Chair. I actually don’t have any particular questions, but it is an interesting discussion, and I learned a lot.

I was actually very surprised with the recent case that happened in Pennsylvania relating to election and constitutional extension, but that supreme court—actually, our supreme court has procedures, so it is a very good process.

So, I will yield back to Representative Bentz if he has specific questions, but this is a wonderful discussion. I appreciate it.

Mr. Johnson of Georgia. Thank you.

Mr. Bentz. Thank you. I have no further questions. I will yield my time back to the chair.

Mr. Johnson of Georgia. Okay. I thank you both.

With that, we are at the conclusion of today’s hearing. I want to thank the panelists for attending and for your testimony.

Without objection, all Members will have 5 legislative days to submit additional written questions for the Witnesses or additional materials for the record.

Mr. Johnson of Georgia. With that, the hearing is adjourned. Thank you.

[Whereupon, at 4:05 p.m., the Subcommittee was adjourned.]
APPENDIX
EMBARGOED FOR RELEASE
May 15, 2000, 2:00 p.m., e.d.t.

REMARKS OF CHIEF JUSTICE WILLIAM H. REHNQUIST
AMERICAN LAW INSTITUTE ANNUAL MEETING
MAYFLOWER HOTEL
MAY 15, 2000

The Judicial Conference of the United States is, I think I can say without fear of contradiction, not a well-known organization. But one of the decisions reached by the Conference at its meeting last March has attracted considerable public interest—a decision relating to the publication of federal judges’ financial disclosure reports on the Internet. This afternoon I would like to tell you some of the background of these deliberations.

The Judicial Conference of the United States was created by statute back in 1922 and today is composed of the 13 chief judges of the federal Courts of Appeals, 13 elected District Court representatives from each of the circuits, and the Chief Justice. The Conference is assisted in its work by 19 committees. It meets here in Washington semi-annually, in September and March.

The Conference oversees the operation of the Administrative Office of the federal courts, an organization ably headed by its Director, Leonidas Ralph Mecham—who has been in his position longer than I have been in mine. The Administrative Office furnishes support systems for the federal courts throughout the country.

The Judicial Conference passes upon many matters relating to the administrative side of the federal judiciary. Some of them are quite arcane, and of virtually no interest to the general public. I remember at one meeting we debated whether the second secretary for the chief judge of a District Court should have a personnel classification of GS-12 or GS-13. But the Judicial Conference also debates matters of great importance to the Judges and speaks for the Judiciary with respect to pending legislation in Congress.

The Ethics in Government Act requires that federal judges, among other federal employees, must file financial reports annually. The Act mandates that federal judges file their reports with the Judicial Conference’s Financial Disclosure Committee. It also sets forth the general content requirements of the reports and provides for public access to the reports. There are, it seems to me, legitimate purposes served by the Act. Among them, insofar as judges are concerned, is to expose the judges’ financial holdings to public scrutiny which assists judges in avoiding conflicts of interest. The requirement that publishing the full extent or even a range of the financial holdings may not be necessary because a judge should recuse himself whether he holds one share or a thousand shares of stock in a corporation that is a party in a case before his court. But few would argue that there is no need to publicize a list of judges’ holdings for conflicts purposes.

Yet for all of the public benefits of the Ethics in Government Act, the Act also presents judges with troubling security issues as well and it may be in need of some legislative adjustments which I will discuss. The security issue presented by requirements in the Ethics in Government Act came to a head a few months ago when, pursuant to the Act’s provisions for public access, a news organization sought copies of every Article III and federal magistrate judge’s financial disclosure report for the express purpose of placing those reports on the organization’s Internet website. The Financial Disclosure Committee of the Judicial Conference initially denied the company’s request for all of the reports and withheld them from disclosure. Contrary to some press reports, the Financial Disclosure Committee’s actions were not without some foundation.

First, in reviewing the company’s request for the reports, the Financial Disclosure Committee concluded that the company’s intentions to publish the reports on the Internet would contravene the
requirements in the Act that prohibit disclosure to any person who has not made a written application. The written application requirement provides a mechanism to spot requests from individuals who have threatened judges. Additionally, the Committee thought that the all-encompassing request for Internet publication would thwart the Committee’s authority to approve redactions of information in the reports when it determined (in consultation with the U.S. Marshals Service) that certain personal or sensitive information in the report could endanger the judge who filed the report.

Simply put, by placing all judges’ financial disclosure reports on the Internet, there would no longer be a means to filter information on those reports that could endanger the individual judge. Anyone who wanted the financial information about the judge - in particular, those individuals who may pose a threat to the judge - could obtain it on the Internet without the judge’s (or the Committee’s) knowledge and opportunity to redact sensitive information.

The Financial Disclosure Committee’s concern for the safety of judges was a well-founded one. Unfortunately, there are too many examples of federal judges - particularly trial judges - having been the targets of violence and threats in our country. Three federal judges - Robert Vance of Alabama, Richard Darroch of New York and John Wood of Texas - have been killed in recent years. Trial judges in general are exposed to the criminal element in our society in ways that most federal employees who must file financial disclosure reports, such as Senators, Congressmen (and appellate judges for that matter) are not. Sentencing judges sit face to face with the criminal defendant. Some of the disclosure requirements in the Ethics in Government Act may also expose where a judge’s spouse works, the spouse’s income, where a family member is attending school if the school has made a loan to the student, or even where a judge may reside if, for example, the judge is on a condominium board. Thus, the risks to federal trial judges are real and deserving of careful consideration. The Financial Disclosure Committee’s view was overwhelmingly supported by the Federal Judges Association, consisting of several hundred members.

I should note at this point that all judges’ financial disclosure reports have always been available to the public, but only by request to the Administrative Office. Typical requesters under this regime are reporters covering the courts, attorneys participating before cases before the courts, and perhaps an occasional litigant.

But, as many of you probably realize, publication on the Internet makes these statements “publicly available” not just to those who seek them out by way of request to the Administrative Office, but to anyone who wishes to make a “hit” on the Internet site. This surely illustrates one of the changes wrought by the so-called “technological revolution” and illustrates the difference between requiring some effort to acquire public information and requiring virtually no effort to acquire it. It was this far broader disclosure - albeit of the same material - that raised the concerns of the judges and of the Financial Disclosure Committee.

Without in any way desiring to minimize or downgrade those concerns, when the matter came up for discussion at the March meeting of the Judicial Conference, a large majority of the members, myself included, felt that the Financial Disclosure Committee’s willingness to withhold financial disclosure reports in their entirety - well intentioned as it might be - could not be supported in view of the statutory language. Congress specifically provided in the Ethics in Government Act an exemption from the prohibition on use of the reports for commercial purposes to “news and communications media for dissemination to the general public.” That is to say that the news media can use the reports for “commercial purposes” to disseminate the reports to the public. And there are no exceptions to this for the Internet.

The statute also provides that the disclosure statements can be redacted if the Judicial Conference, in consultation with the U.S. Marshals Service, finds that “revealing personal and sensitive information could endanger” the judge. The reports may be redacted “only to the extent necessary . . . and for as long as the danger . . . exists.” Clearly, these provisions contemplate some production
of some portion of the reports at some point in time. They provide only for delay in production, conditions on the production, and redaction in the production of the reports, and do not provide for withholding the production entirely.

So, the Executive Committee of the Judicial Conference, in cooperation with the Financial Disclosure Committee, undertook to prepare a set of regulations which would, in their view, fully conform to the current statute. These regulations are being designed to facilitate redacting the sensitive information in the reports to avoid an en masse production, that in the words of the statute, "could endanger" the judges.

The Judicial Conference may also request Congress to consider amendments to the Ethics in Government Act filing requirements so as to reduce security risks to federal judges. That Act already provides that individuals engaged in intelligence activities - such as the CIA, for example - need not make their reports publicly available. I don't think the Judicial Conference has any desire to obtain a complete exemption for judges, but simply wishes to assure its membership that their legitimate concerns are adequately addressed in the Act.

For the most part, the Judicial Conference of the United States operates in relative anonymity. Occasionally, however, an issue arises that captures the public's attention. With regard to the issue of posting all judges' financial disclosure statements on the Internet, I believe the Judicial Conference has acted responsibly and demonstrated a good faith effort to comply with a law that frankly poses some risks to judges. The Conference now hopes that Congress will also act responsibly and balance the legitimate needs for public disclosure of judges' financial holdings with the judges' needs for security.

Thank you for inviting me to be with you today.
JUDICIAL ETHICS AND SUPREME COURT EXCEPTIONALISM

Amanda Frost

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Judicial Ethics and Supreme Court Exceptionalism

AMANDA FROST*

ABSTRACT

In his 2011 Year-End Report on the Federal Judiciary, Chief Justice John Roberts cast doubt on Congress’s authority to regulate the Justices’ ethical conduct, declaring that the constitutionality of such legislation has “never been tested.” Roberts’ comments not only raise important questions about the relationship between Congress and the Supreme Court, they also call into question the constitutionality of a number of existing and proposed ethics statutes. Thus, the topic deserves close attention.

This Essay contends that Congress has broad constitutional authority to regulate the Justices’ ethical conduct, just as it has exercised control over other vital aspects of the Court’s administration, such as the Court’s size, quorum requirement, and even the words of the oath the Justices must take as they are sworn into office. The Essay acknowledges, however, that Congress’s power to regulate judicial ethics is constrained by separation of powers principles, and, in particular, the need to preserve judicial independence. Furthermore, legislation directed at the Supreme Court Justices in particular must take into account the Court’s special status as the only constitutionally required court, as well as its position at the head of the third branch of government. Although these are important limitations on Congress’s power, existing and proposed ethics legislation fall well within them.
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I. INTRODUCTION

In his mild-mannered way, Chief Justice John Roberts has set the stage for a constitutional conflict between Congress and the Supreme Court. Roberts’ 2011 Year-End Report on the Federal Judiciary focused on judicial ethics, a subject that has been much in the news lately.\(^1\) In the course of that year, several of the Justices were publicly criticized for their alleged involvement in political fundraisers;\(^2\) acceptance of gifts\(^3\) and travel expenses paid for by groups with political viewpoints;\(^4\) failure to report a spouse’s employment;\(^5\) and, most controversially, refusal to recuse themselves from the constitutional challenges to the health care reform legislation despite alleged conflicts of interest.\(^6\) Existing laws

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2. See, e.g., Jeff Shesol, Op-Ed, Should the Justices Keep their Opinions to Themselves?, N.Y. TIMES, Jun. 28, 2011, at A23 (describing Justice Alito’s attendance at the American Spectator’s fund-raising dinner, where he had previously given the keynote address, and Justices Thomas’s and Scalia’s attendance at political strategy meetings hosted by the conservative Koch brothers); R. Jeffrey Smith, Professors Ask Congress for an Ethics Code for Supreme Court, WASH. POST, Feb. 23, 2011 (describing public interest group’s criticism of Justices Thomas and Scalia for attending political events hosted by the Koch brothers); Nan Aron, Op-Ed., An Ethics Code for the High Court, WASH. POST, Mar. 13, 2011 (same).
3. I do not take a position on the merits of these allegations of unethical conduct by the Justices, in part because some of the facts underlying these claims are in dispute. The allegations are noted here only to support the point that the Justices’ ethical conduct is regularly the subject of public debate, which in turn supports calls for congressional oversight.
4. See Mike McIntire, Friendship of Justice and Magnate Puts Focus on Ethics, N.Y. TIMES, June 19, 2011, at A1 (describing real estate magnate Harlan Crow’s gifts to Justice Thomas and his wife, as well as his financial support for projects in which they have an interest).
6. See Jeffrey Toobin, Partners, NEW YORKER, Aug. 29, 2011, at 41 (reporting that in January 2011, Justice Clarence Thomas amended several of his financial disclosure forms because he failed to record his wife’s employment).
7. See, e.g., Editorial, The Supreme Court’s Recusal Problem, N.Y. TIMES, Dec. 1, 2011, at A38 (“Liberals in Congress have called for Justice Clarence Thomas to recuse himself from the review of the health care reform law because his wife, Virginia, has campaigned..."
already cover some of this claimed misconduct, and the spate of negative publicity inspired the introduction of new federal legislation that would further regulate the Justices' behavior.\(^7\) Roberts' Year-End Report acknowledged these accusations of impropriety, as well as the legal framework that governs in this area.\(^8\) Then, in a shot across Congress's bow, he stated that the Court had "never addressed" Congress's constitutional authority to prescribe ethics rules for the Supreme Court\(^9\)—which many took to be a broad hint that, at least in the Chief Justice's view, Congress lacks that authority.\(^10\)

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7. See Smith, supra note 2, at 41 (describing the controversies regarding the Justices' political activities and reporting that Representative Chris Murphy was planning to introduce legislation to address the problem); see also Erich Lichtblau, Democrats Seek to Impose Tougher Supreme Court Ethics, N.Y. TIMES, Sep. 8, 2011, available at http://thecaucus.blogs.nytimes.com/2011/09/08/democrats-seek-to-impose-tougher-supreme-court-ethics/?scp=4&sq=ginsburg%20ethics%20%22supreme%20court%22&st=cse; Robyn Haig Cain, Rep. Slaughter Wants a Supreme Court Code of Ethics, Mar. 9, 2012, available at http://blogs.findlaw.com/supreme_court/2012/03/rep-slaughter-wants-a-supreme-court-code-of-ethics.html (describing a letter signed by Representative Louise Slaughter and thirty other members of Congress calling on the Supreme Court Justices to adopt a formal code of ethics).


9. Id. at 6 ("The Court has never addressed whether Congress may impose [financial reporting requirements and limitations on the receipts of gifts and outside earned income] on the Supreme Court. The Justices nevertheless comply with those provisions."); see also id. at 7 ("As in the case of financial reporting and gift requirements, the limits on Congress's power to require recusal have never been tested.").

To be sure, the Chief Justice was careful to note that his “judicial responsibilities preclude [him] from commenting on any ongoing debates about particular issues or the constitutionality of any enacted legislation or pending proposals.” But he went on to say that the “Court has never addressed whether Congress may impose [ethical] requirements on the Supreme Court,” and noted that the constitutionality of the recusal statute in particular has “never been tested.” With those words, Roberts put the nation on notice that Congress’s authority to regulate the Justices’ ethics is an open question.

The Chief Justice’s Report raises serious questions about the constitutional status of existing ethics legislation, as well as the Supreme Court Justices’ willingness to abide by laws that at least some of them may consider to be invalid, and thus non-binding. His comments also cast doubt on the constitutionality of the Supreme Court Transparency and Disclosure Act of 2011—a bill pending at the time of the Report’s publication that would subject the Justices to investigation and possible sanctions for ethics violations, and require external review of an individual Justice’s recusal determinations. Although the Report has provoked vociferous responses from those on either side of the issue, thus far there has been little academic analysis of the constitutional issues involved.

12. Id. at 4.
13. Id. at 7.
14. After stating that the constitutionality of ethics legislation is an open question, Roberts went on to declare that the “Justices nevertheless comply with these provisions.” See id. at 6. However, his basis for this assertion is unclear.
This Essay seeks to fill that gap. As is true for most constitutional questions, Congress’s authority to regulate the Justices’ ethical conduct turns not just on the Constitution’s text, but also on its structure, the original understanding, and longstanding tradition in this area.\textsuperscript{18} Accordingly, the Essay examines the relevant text of Articles I and III of the Constitution to locate the source of Congress’s authority to enact laws regulating the Justices’ ethical conduct, as well as constraints on any such power, and then discusses the history of Congress’s oversight and administration of the Supreme Court Justices’ ethical conduct. As part of this analysis, the Essay considers whether Congress is more constrained when regulating the ethical conduct of Justices on the U.S. Supreme Court than judges serving on lower federal courts, as the Chief Justice seemed to suggest in his Report.

The Essay is structured as follows: Part II provides an overview of existing and proposed ethics legislation and briefly describes the constitutional objections to that legislation, particularly as applied to the Supreme Court. Part III analyzes the Constitution’s text and structure to determine the scope of, and limits on, Congress’s authority to regulate the Supreme Court Justices’ ethics. Although the Constitution requires that there be a Supreme Court, it did not make that institution self-executing, and thus Congress was empowered by the Necessary and Proper Clause to enact legislation implementing the judicial power. For example, vital matters such as the Court’s size, the dates of its sessions, and even the words of the oath each Justice takes before ascending to the bench are all set by federal legislation. Ethics statutes, which promote the effective and

\textsuperscript{18} Depending on one’s theory of constitutional interpretation, some of these sources for ascertaining constitutional meaning are more significant than others. See, e.g., Martin H. Redish, Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis, 72 S. CAL. L. REV. 673 (1999) (explaining why he puts more emphasis on constitutional text than the framers’ or ratifiers’ intent). Because my goal in this essay is to raise all the reasonable arguments on either side of the issue, I canvas all the mainstream sources typically used by courts and commentators when attempting to ascertain constitutional meaning.
legitimate exercise of the “judicial power,” fall well within Congress’s broad legislative authority over the Court’s administration and operation. That said, Congress’s power to regulate the Supreme Court’s ethical conduct is limited by separation of powers concerns, such as the need not only to preserve judicial independence, but also to demonstrate respect for the Court’s status as the head of a co-equal branch of government. Part III describes how these constitutional principles serve both to empower and restrain Congress’s legislative authority to regulate the Justices’ ethical conduct. Part IV examines the history of congressional-Court interactions regarding judicial ethics, which further bolsters this Essay’s claim that Congress has the constitutional authority to regulate the Justices’ ethical conduct, albeit within limits.

Two caveats are in order. First, the Essay addresses Congress’s constitutional authority to regulate the Justices’ ethical conduct, and does not discuss in any detail the costs and benefits of such legislation. Constitutional questions are frequently raised by opponents of such legislation, derailing the policy questions that are also worthy of attention. Hopefully, this Essay will help to clear away the obstacles that have too often prevented a full and frank discussion of whether such legislation would prove beneficial.

Second, it is worth acknowledging that the Court itself may have the final say on these constitutional questions if litigants or government institutions seek to enforce ethics regulation against sitting Justices. In other words, unlike most separation of powers cases, this is an issue on which the very individuals with a personal stake in the matter may ultimately decide the constitutional issue. Human nature being what it is, the Justices may find such legislation hard to swallow, whatever the merits of the constitutional arguments in its favor. More importantly, even if

19. Judicial independence is a component of the separation of powers, though the two concepts are not identical. See Charles Gardner Geyh & Emily Field Van Tassel, The Independence of the Judicial Branch in the New Republic, 74 CHI.-KENT L. REV. 31, 32 (1998) (“Although separation and independence are not synonymous, structural separation among the branches cannot be maintained unless each branch is independent enough to prevent the other two from usurping its powers, for which reason some measure of independence may be inherent in a system of separated powers.”).
20. Cf. Amanda Frost, Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal, 53 U. KAN. L. REV. 531, 538 (2005) (describing judges’ tendency to narrowly construe recusal statutes). Thus far, however, the Justices comply with most of
Congress has the authority to enact such legislation, it may be preferable as a matter of both policy and precedent for the Court to regulate itself. Thus, the best course of action going forward would be to convince the Court that it should take the lead in regulating the ethical conduct of its members to protect its own reputation, which would diminish the need for Congress to do so. Whatever one's views of Congress's constitutional authority in this area, one thing is clear: If the Supreme Court policed itself, Congress would not need to do so.

II. OVERVIEW OF ETHICS LEGISLATION

This Part surveys the current and proposed legislation regulating judicial ethics, and then describes potential constitutional problems raised by congressional regulation of the Justices' ethical conduct. Although much of the discussion focuses on Congress's power to regulate the ethics of all Article III judges, some scholars claim that the Supreme Court's special constitutional status imposes additional constraints on Congress.

A. FEDERAL LEGISLATION REGULATING JUDICIAL ETHICS

1. RECusal STATUTES

In 1792, Congress passed the first statute requiring lower federal court judges to recuse themselves under certain circumstances. Over the years, Congress repeatedly modified and broadened the law, but continued to limit its application to judges on the "inferior" courts. It was not until 1948 that Congress expanded the law to include the Justices.

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21. See, e.g., Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. PA. L. REV. 209, 212 (1993) ("As scholars have noted, the existence of authority to devise mechanisms other than impeachment for judicial discipline does not itself prove that instituting those other mechanisms is desirable."); Editorial, Trust and the Supreme Court, N.Y. TIMES, Feb. 20, 2012, at A18 ("The court should embrace sensible ethics rules . . . on its own.").
23. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (1992)). Congress did not discuss this change at any length in the legislative history. The only mention of the decision to include the Justices in the recusal
Today, three different statutes govern recusal of federal judges, of which only Title 28, Section 455 of the United States Code applies to the Supreme Court. That statute requires "[a]ny justice, judge, or magistrate judge of the United States" to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," as well as for other listed grounds, such as bias or prejudice, personal participation in the case, pecuniary interest, or a family connection to a lawyer or party to the case.

When a party to litigation asks a judge on a lower federal court to step aside, that judge usually decides the question for herself, though she is free to refer the matter to another judge on the same court. If she does not recuse herself, however, the party can appeal that decision to a higher statute comes in the House Report, which simply describes the amended language. See H.R. Rep. No. 80-308 at A53 (1947) ("Section 24 of title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.").
24. Section 144 of Title 28, which applies only to district court judges, requires the recusal of a judge who has a "personal bias or prejudice in the matter." A third statute, Section 47 of Title 28, provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." Although this statute applies only to lower court judges, Supreme Court Justices generally recuse themselves from cases they heard or decided when sitting on the lower courts. For example, Chief Justice Roberts recused himself from *Lambert v. Rumsfeld*, 548 U.S. 557 (2006), presumably because he had served on the panel of the D.C. Circuit that issued the decision in which certiorari had been granted.

25. See *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (noting that "a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a different judge," though "no reported case or accepted principle of law compels her to do so . . .").

Chief Justice Roberts observed that a "court normally does not sit in judgment of one of its own members' recusal decisions in the course of deciding a case." 2011 Year-End Report on the Federal Judiciary, supra note 1, at 8. Although typically a district court judge decides for him or herself whether to recuse, on occasion district court judges have referred that question to another judge on the same court. See, e.g., *Bradley v. Miliken*, 426 F. Supp. 929 (E.D. Mich. 1977); *United States v. Zagurski*, 419 F. Supp. 494, 497 (N.D. Cal. 1976). Furthermore, a litigant who loses a motion asking a circuit court judge to recuse may also seek rehearing before a new panel or a rehearing en banc. See *Jeffrey W. Stempel*, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 639 (1987). Thus, in contrast to the Supreme Court, it is not unprecedented in the lower courts for the recusal decision to be made by another judge on that court.
court—although admittedly doing so is difficult as a practical matter.\textsuperscript{26} Nonetheless, there is at least the potential for review of a district or circuit judge’s decision to remain on a case.\textsuperscript{27} The same is currently not true for the Justices on the U.S. Supreme Court. Although there are no written rules governing recusal procedures, the longstanding practice has been for each Justice to decide for him or herself whether to step aside, usually without issuing any explanation.\textsuperscript{28} Conceivably, a litigant could ask the entire Supreme Court to review a Justice’s decision not to recuse him or herself,\textsuperscript{29} but none has ever done so.\textsuperscript{30}

\textsuperscript{26} If a trial court denies a motion to recuse, the moving party may seek interlocutory review by petitioning for a writ of mandamus. Most circuits make such interlocutory review hard to obtain by “placing a heavy burden on the movant.” Federal Judicial Center, \textit{Recusal: Analysis of Case Law under 28 U.S.C. §§ 455 & 144, 69} (2002). A party may also appeal the trial judge’s refusal to recuse after final judgment, but this is an exceedingly expensive and inefficient method by which to try to obtain a new trial before a new judge.

\textsuperscript{27} See supra note 25.

\textsuperscript{28} In a letter responding to inquiries by Senators Patrick Leahy and Joseph Lieberman, Chief Justice Rehnquist stated that “[t]here is no formal procedure for court review of the [recusal] decision of a justice in an individual case. That is so because it has long been settled that each justice must decide such a question for himself.” See David G. Savage, \textit{High Court Won’t Review Scalia’s Recusal Decision}, \textit{L.A. TIMES}, Jan. 27, 2004, at A12.

\textsuperscript{29} In \textit{Cheney v. United States District Court for the District of Columbia}, 541 U.S. 913 (2004), the Sierra Club filed a motion seeking the recusal of Supreme Court Justice Antonin Scalia. Alan Morrison, who served as lead counsel for the Sierra Club, was planning to file a second motion asking the entire Court to review Justice Scalia’s decision to remain on the case if Scalia did not respond to the initial recusal motion. See E-mail from Alan Morrison, Lerner Family Associate Dean for Public Service Law, The George Washington University Law School, to author (Oct. 2, 2012, 4:23 pm EST) (on file with author). Shortly before the oral argument, however, Justice Scalia filed a 21-page opinion in which he explained his reasons for refusing to recuse himself. \textit{Cheney}, 541 U.S. at 916, 923 (Scalia, J., mem.).

\textsuperscript{30} The Supreme Court’s decision to hear a constitutional challenge to the Patient Protection and Affordable Care Act prompted questions about whether Justices Clarence Thomas and Elena Kagan should recuse themselves from the case. Section 455 of Title 28 requires a Justice to disqualify herself if her “impartiality might reasonably be questioned,” or if she “participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” Some Members of Congress called for Justice Thomas to recuse himself because his wife was paid to lobby against that statute, which they contend casts doubt on Justice Thomas’ ability to remain impartial. See Toobin, supra note 5, at 41 (reporting that in February 2011, 74 members of Congress “called on Thomas to recuse himself

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2. THE ETHICS IN GOVERNMENT ACT OF 1978

The Ethics in Government Act of 1978 requires most high-level federal officials in all three branches of the federal government to file annual reports in which they publicly disclose aspects of their finances, such as their outside income, the employment of their spouses and dependent children, investments, reimbursements for travel-related costs, gifts, and household liabilities. Any person who “knowingly and willfully” falsifies such a report, or fails to file a report, is subject to civil and criminal penalties.

The Act applies to all federal judges, including Supreme Court Justices. Judges and Justices alike are required to file their disclosure forms with the Judicial Conference of the United States—the administrative and policy-making body for the federal courts—and with the clerk of the court on which the judge or Justice sits. Those reports are then made publicly available. The Act also requires the Judicial Conference to refer to the Attorney General any person who the Conference “has reasonable

from any legal challenges to President Obama’s health-care reform, because his wife has been an outspoken opponent of the law”). Others asserted that Justice Kagan should step aside, arguing that she “participated as counsel” or “advisor” on the legislation while serving as Solicitor General. See The Supreme Court’s Recusal Problem, supra note 6, at A38; Segall, supra note 16. However, none of the litigants filed a motion seeking the recusal of either Justice, and neither recused themselves. Amicus curiae Freedom Watch filed a brief asking Justice Kagan to recuse herself. See Brief of Amicus Curiae Freedom Watch, filed in National Federation of Independent Business v. Sebelius and Florida v. Department of Health and Human Services (Nos. 11-393 and 11-400).

32. 5 U.S.C. app. 4, § 104(a).
33. 5 U.S.C. app. 4, § 101(b)(1).
34. 5 U.S.C. app. 4, § 103(b)(1)(B).
35. Congress created the Judicial Conference of the United States in 1922 to assist in the administration of the federal judiciary. The Chief Justice chairs the Judicial Conference, and its members include the chief judge of each of the 13 federal circuits as well as a district court judge from each regional circuit and the chief judge of the Court of International Trade. See 28 U.S.C. § 331.
36. 5 U.S.C. app. 4, § 103(a).
cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported.\footnote{5 U.S.C. app. 4, § 104(b).}

3. \textbf{The Ethics Reform Act of 1989}

The Ethics Reform Act of 1989 placed strict limits on outside earned income and gifts for all federal officials, including federal judges. Judges and Justices are prohibited from most outside employment, with the exception of teaching, for which any compensation must be pre-approved by the Judicial Conference.\footnote{See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 7 § 502(a)(5).)} In addition, they may not accept honoraria for an appearance, speech, or article, though reimbursement for travel expenses is permitted. Finally, the Act bars judges and Justices from receiving gifts from anyone whose “interests may be substantially affected by” the performance of their duties.\footnote{5 U.S.C. § 7353(a)(2) (2011). The statute authorizes the Judicial Conference to adopt rules and regulations implementing these provisions, and to make “reasonable exceptions” to the gift restrictions when “appropriate.” Id. at § 7353(b)(1). In June 2011, the \textit{New York Times} reported that Justice Thomas received gifts and free transportation from Harlan Crow, a wealthy real estate magnate. McIntire, supra note 3, at A1. Crow has also contributed financially to projects in which Justice Thomas and his wife have an interest, such as an historical museum in Justice Thomas’s hometown of Pin Point, Georgia. Id. Ethics experts debate whether Justice Thomas was prohibited from accepting such gifts under the Ethics Reform Act because it is unclear whether Crow’s “interests may be substantially affected” by Justice Thomas’ work on the Court. Id.}

4. \textbf{The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980}
The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980\textsuperscript{40} ("Judicial Conduct and Disability Act") authorizes anyone to file a complaint alleging that a judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."\textsuperscript{41} Complaints are then reviewed by the Chief Judge of the Circuit, who may dismiss them, conclude the proceedings after finding that "appropriate corrective action has been taken" or that "action on the complaint is no longer necessary," or appoint a committee of district and circuit court judges to investigate further.\textsuperscript{42} The committee is required to submit a report of its investigation to the judicial council of the circuit\textsuperscript{43}—a pre-existing administrative body headed by the Chief Judge of the Circuit and made up of an equal number of district and circuit judges from that circuit\textsuperscript{44}—which may conduct a further investigation, dismiss the complaint, or take action to "assure the effective and expeditious administration of the business of the courts."\textsuperscript{45} The "possible action" the council may take includes a public or private censure of the judge, an order that no further cases be assigned to the judge for a "time certain," or a request that the judge voluntarily retire.\textsuperscript{46} Finally, the council may refer the matter to the Judicial Conference of the United States, which in turn can recommend impeachment to the House of Representatives.\textsuperscript{48}

The Act applies to circuit judges, district court judges, bankruptcy judges, and magistrate judges, but not Supreme Court Justices.\textsuperscript{49} The Supreme Court Transparency and Disclosure Act of 2011, pending at the

\textsuperscript{40} Pub. L. No. 96-458, 94 Stat. 2035 (1986).
\textsuperscript{42} 28 U.S.C. §§ 352, 353 (2006). Either the complainant or the judge may petition for review of the Chief Judge's final order under section 352 by the judicial council for the circuit.
\textsuperscript{43} 28 U.S.C. § 353(c).
\textsuperscript{49} 28 U.S.C. 351(d)(1) (2006) (defining "judge" as "circuit judge, district judge, bankruptcy judge, or magistrate judge").
time that Roberts wrote his annual report, would change that by placing the Justices under a similar, though not identical, level of oversight for alleged ethics violations.  

4. The Code of Conduct for United States Judges

The Code of Conduct for United States Judges is not a federal statute, but rather a set of ethical guidelines adopted by the Judicial Conference in 1973 to guide the conduct of federal judges. The Code is connected to the Judicial Conduct and Disability Act, however, in that violations of the Code can be cause for complaint, investigation, and sanction under the Act. Like the Act, the Code excludes the Supreme Court Justices.

The Code lays out a set of ethical principles to protect the “integrity and independence of the judiciary.” Its five Canons are broadly worded. For example, Canon 2 instructs judges to “avoid impropriety and the appearance of impropriety,” and Canon 3 requires them to “perform the duties of the office fairly, impartially, and diligently.” Although the Code is at times more specific—for instance, declaring that a judge “should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin”—it of course cannot address every ethical dilemma facing judges. The Judicial Conference has authorized its Committee on Codes of Conduct to issue advisory opinions about the Code “when requested by a judge to whom this Code applies.” These advisory opinions provide further guidance for judges seeking to avoid ethics problems.

The Code’s primary purpose is to provide judges with “guidance” on ethical matters. Nonetheless, its canons are not optional; federal judges who violate the Code may be subject to investigation and sanction.

50. For further description of the bill, see infra Part II.A.6.
52. See Code of Conduct for United States Judges at 2–3, Canon 1 cmt.
Commentary to Canon 1 of the Code explains that the Code “may . . . provide standards of conduct for application in proceedings under the . . . Judicial Conduct and Disability Act of 1980,” although that commentary also cautions that “[n]ot every violation of the Code should lead to disciplinary action.”

6. THE SUPREME COURT TRANSPARENCY AND DISCLOSURE ACT OF 2011

On March 1, 2011, Representative Christopher Murphy introduced the Supreme Court Transparency and Disclosure Act of 2011 (hereinafter “Murphy Bill”), which would impose additional ethics obligation on Supreme Court Justices to bring them into parity with judges on the lower

courts. The Murphy Bill has not been the subject of committee hearings or referred to the full House for a vote, but its contents have nonetheless inspired debate over Congress’s power to regulate the Justices’ ethical conduct.

The Murphy Bill provides that the Code of Conduct for United States Judges “shall apply to Supreme Court justices to the same extent as it applies to circuit and district court judges.” The Bill then delegates to the Judicial Conference the responsibility to “establish procedures modeled after the procedures set forth in [the Judicial Conduct and Disability Act of 1980]” for “review[ing] and investigat[ing]” a complaint that a Justice of the Supreme Court has violated the Code of Conduct, and then taking “further action, where appropriate . . . with respect to such complaints.”

The Bill also creates new procedures to govern the Justices’ recusal decisions under Title 28, Section 455 of the United States Code. The Justices must publicly state their reasons for recusing themselves or, alternatively, their basis for denying a party’s motion seeking recusal. The Bill also requires the Judicial Conference of the United States to “establish a process” by which a Justice’s refusal to recuse is reviewed by “other justices or judges of a court of the United States”—a group that includes retired Justices and senior judges—who “shall decide whether the justice with respect to whom the motion is made should be so disqualified.”

The legislation is unusually open-ended, giving the Judicial Conference discretion to establish procedures for reviewing complaints regarding the Justices’ conduct and Justices’ refusal to recuse themselves. For example, theoretically the bill would allow the Judicial Conference to assign a single district court judge the power to “review” a Supreme Court Justice’s refusal to recuse—an unseemly and potentially unconstitutional arrangement. On the other hand, it would also permit the Judicial Conference to delegate review of the recusal decision to the entire Supreme Court sitting en banc—a procedure on much stronger

58. See, e.g., 2011 Year-End Report on the Federal Judiciary, supra note 1 (taking note of the pending legislation); Virelli, supra note 17, at 1205 n.140 (questioning the constitutionality of the pending legislation).
60. Id.
constitutional footing. Thus, if the Murphy Bill were to become law as written, its constitutionality could turn on the Judicial Conference’s methods of implementation.

B. CONSTITUTIONAL OBJECTIONS TO ETHICS LEGISLATION

The constitutionality of the ethics laws described above has never been addressed by the U.S. Supreme Court. Although a few critics—including some of the Justices themselves—have raised constitutional concerns about applying ethics laws to the Supreme Court, there has been no focused academic analysis of Congress’s authority to regulate the Justices’ ethical conduct.

No one doubts that Congress has constitutional authority to enact legislation regarding at least some aspects of judicial administration, including judicial ethics, under its Article I authority to make all laws “necessary and proper” to carry out its constitutional mandate. But its powers are not unlimited. Congress must not legislate in ways that undermine the separation of powers, and in particular in ways that threaten judicial independence, both of which are constitutionally enshrined values. Furthermore, Congress may be specially constrained when it comes to regulating the ethical conduct of U.S. Supreme Court Justices. Unlike the lower federal courts, the Supreme Court’s existence is mandated by the Constitution, and it sits atop the judicial hierarchy.

61. See infra Part III.B.
63. Justice Anthony Kennedy recently testified before Congress that Congress would encounter a “constitutional problem” were it to attempt to make the Code of Conduct binding on the justices because it would be “structurally unprecedented for district and circuit court judges to make rules that Supreme Court judges have to follow.” See Malloy, supra note 54, at 2389; see also 2011 Year-End report on the Federal Judiciary, supra note 1, at 6–7.
65. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).
Congress therefore lacks the power to control the jurisdiction and structure the Supreme Court to the same degree it does the lower federal courts, and cannot alter the Court's position at the head of the judicial department. A few scholars argue that some of the provisions in the existing and proposed ethics legislation transgress these boundaries, and a few Justices have suggested that they share this view.

These constitutional questions regarding Congress's authority to regulate the Justices' ethical conduct are worthy of closer analysis than they have thus far received in the academic literature. Parts III and IV will address these issues, elaborating on them and responding to them with reference to the Constitution's text and structure, as well to the original understanding and longstanding practice.

III. CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE THE SUPREME COURT JUSTICES' ETHICAL CONDUCT

The text of the Constitution is a useful starting point for thinking about Congress's power to regulate the Justices' ethical conduct, but it provides no easy answers. The Constitution is a remarkably sparse document, and Article III, which establishes the federal judiciary, is no exception. The three short sections of that Article contain almost no discussion of how federal courts are to exercise the "judicial Power," leaving many gaps to be filled by reference to constitutional structure, original intent, and longstanding practice.

Section 1 of Article III states: "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." The second and final sentence of Section 1 provides that judges on both the "inferior" and "supreme" courts "shall hold their Offices during good Behavior" and prohibits Congress from reducing their compensation. Section 2 describes the subject matter jurisdiction of the "Cases" and "Controversies" that federal courts are empowered to hear. Section 2 then lists those few categories of cases that fall within the Supreme Court's original jurisdiction and states that the Supreme Court shall have appellate jurisdiction over all other categories of cases "with such Exceptions, and
under such Regulations as the Congress shall make.”\textsuperscript{66} That is all Article III has to say about the structure and activities of the judicial branch.

Further information about the relationship between Congress and the courts can be found in Article I, which provides that Congress has the authority to “constitute Tribunals inferior to the supreme Court.”\textsuperscript{67} Also relevant is Congress’s Article I power to make Laws “which shall be necessary and proper” for executing its powers.\textsuperscript{68} Finally, Congress can remove federal judges, like other federal officers, through the impeachment process.\textsuperscript{69}

As this brief overview suggests, the Constitution leaves many important questions unanswered about Congress’s power to enact legislation affecting the federal courts. Nonetheless, some textualist arguments can be marshaled in favor of Congress’s power to regulate the Justices’ ethical conduct, albeit within limits.

A. THE SOURCES OF CONGRESS’S CONSTITUTIONAL AUTHORITY TO REGULATE THE JUSTICES’ ETHICS

1. NECESSARY & PROPER CLAUSE

Congress’s authority to enact ethics legislation, like its power over judicial administration more generally, is rooted in the Constitution’s implicit assumption that Congress would play a major role in effectuating the Supreme Court’s exercise of judicial power. In contrast to the executive and legislative branches, the judicial branch is not self-executing, and thus the political branches had to take action for it to come into being.\textsuperscript{70} Article III leaves vital questions about the Supreme Court’s daily activities unanswered, such as the size of that Court and the dates of its sessions. As a textual matter, then, Congress’s power to manage the federal courts arises from the gaps in Article III, coupled with its Article I authority to “make all Laws which shall be necessary and proper for

\textsuperscript{66} The third and final section of Article III defines the crime of treason and describes how it shall be adjudicated, and thus is not relevant to the topic of this Essay.

\textsuperscript{67} U.S. Const. art. I, § 8.

\textsuperscript{68} U.S. Const. art. I, § 8.

\textsuperscript{69} U.S. Const. art. I, § 2, cl. 5; § 3, cl. 6.

carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.”

These sources of authority justify a wide range of legislation concerning judicial administration, including the ethical conduct of the judges and Justices who serve on those courts.

The Constitution contains no information about how the Supreme Court would exercise the judicial power as a practical matter. Nor does it explicitly give the federal courts the power to control their internal operating rules, as it does for the House and Senate. Accordingly, the first Congress was constitutionally empowered—perhaps even obligated—to enact legislation settling these crucial logistical and administrative matters. As Professor James Pfander has observed, Article III “leaves

71. U.S. Const. art. I, § 8. Congress’s control over the lower federal courts is further bolstered by its Article I, section 8 authority to “constitute Tribunals inferior to the Supreme Court.” This provision, of course, cannot provide any constitutional authority for Congress’s regulation of the U.S. Supreme Court.

72. In contrast, the Constitution provides that Congress must “assemble at least once in every Year” on the “first Monday in December, unless they shall by Law appoint a different Day.” U.S. Const. art. I, § 4. The Constitution also establishes that a majority of the members of each House must be present to constitute a quorum. U.S. Const. art. I, § 5.

73. “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” U.S. Const. art. I, § 5.

74. See Edward S. Corwin, The Constitution and What It Means Today 209 (Harold W. Chase & Craig R. Ducat eds. 14th ed. 1978) (“Although a Supreme Court is provided for by the Constitution, the organization of the existing Court rests on an act of Congress.”); Fallon et al., supra note 70, at 20 (“The judiciary article of the Constitution was not self-executing, and the first Congress therefore faced the task of structuring a court system . . . .”); James E. Pfander, One Supreme Court 2 (2009) (Article III “creates a framework for the federal judiciary and leaves Congress in charge of many of the details.”); Edward A. Hartnett, Not the King’s Bench, 20 Const. Comment. 283, 284 (2003) (“Until an Act of Congress spelled out such specifics, there would be no Supreme Court . . . .”); William R. Casto, The Supreme Court in the Early Republic 25 (1995) (“[The] Constitution created only the bare bones of a federal judicial system and left many details to be fleshed out by the legislative, executive, and judicial branches.”).

If Congress had not enacted legislation establishing the Supreme Court, the Court might nonetheless have come into existence had the President nominated a Chief Justice who was then confirmed by the Senate. Thus, congressional legislation was perhaps not required to establish the Supreme Court, though such legislation was surely envisioned by the Framers, as evidenced by the First Judiciary Act.
Congress in charge of many of the details” necessary to implement federal judicial power, and “Article I confirms this perception of congressional primacy by empowering Congress to make laws necessary and proper for carrying into execution the powers vested in the judicial branch.”75 In short, federal legislation brought the Supreme Court into being, and such laws must therefore be well within Congress’s power under the Necessary and Proper Clause.76

The first Congress readily assumed this authority when it enacted the Judiciary Act of 1789, which established the federal court system.77 The Act created a Supreme Court consisting of a Chief Justice and five associate Justices, established a quorum of four, and provided that the Court would meet at the “seat of government” twice a year, commencing the first Monday in February and the first Monday in August.78 It even covered mundane details of judicial administration, such as granting the Court the authority to hire a clerk of the Court.79 Congress also mandated that Supreme Court Justices do double-duty as circuit court judges. In addition to meeting in the nation’s capital as the Supreme Court, each Justice was required to travel the country to hear cases in his dual capacity as circuit court judge. For more than 100 years, the Justices accepted Congress’s authority to force them to perform this onerous, and sometimes dangerous, task.80

75. PFLANDER, supra note 72, at 2. See John Harrison, The Power of Congress Over the Rules of Precedent, 50 DUKE L.J. 503, 532 (2000) (“Congress’s necessary and proper power is precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively.”).
77. See generally An Act to Establish the Judicial Courts of the United States, ch. 20, 1 STAT. 73 (1789). The First Judiciary Act has special constitutional significance because it was enacted by a Congress composed of the Framers’ contemporaries, including a number of the Framers themselves. Accordingly, that Act is “widely viewed as an indicator of the original understanding of Article III.” FALLOON ET AL., supra note 70, at 21. If nothing else, then, the Act reveals that the First Congress assumed it had the constitutional authority to regulate the day-to-day operations of the Supreme Court.
78. Id.
79. Id.
80. See Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting a constitutional challenge to law obligating Supreme Court Justices to sit as circuit judges); see also
Congress continues to control by legislation most of the areas over which it initially assumed authority in 1789. For example, federal laws currently in place authorize the Justices to hire librarians, marshals, clerks, law clerks, and secretaries to assist them in their work.\textsuperscript{81} The size of the Court,\textsuperscript{82} quorum requirements,\textsuperscript{83} dates of the Court’s sessions,\textsuperscript{84} and oath of office\textsuperscript{85} all continue to be set by statute. A federal statute even purports to control the outcome of a case should the Court foresee the absence of a quorum for two Terms in a row. Under such circumstances, the Court must issue an order affirming the lower court’s judgment, which shall “have the same effect” as an affirmance by an equally divided Court—that is, no precedential effect at all.\textsuperscript{86} Almost everyone accepts Congress’s broad authority to enact legislation affecting the day-to-day operations of the Court.

Congress’s control over judicial administration generally provides important context for its authority over judicial ethics specifically. If the Constitution had spelled out the details of the Supreme Court’s operation, or delegated to the Court the power to establish its own internal operating rules, then perhaps Congress would not have the authority to enact ethics legislation—or, for that matter, any legislation regarding judicial administration. But the Supreme Court is not an isolated institution intended to operate entirely free from the political branches; to the contrary, it has always depended on the political branches to lay out the parameters governing its exercise of judicial power. Ethics legislation is not sui generis, but rather is simply one particular category of legislation within the broader field of judicial administration—a field in which Congress has always played a major role. Congress’s authority over judicial ethics is less surprising once one realizes that Congress has long

\textsuperscript{83} Id.
\textsuperscript{86} 28 U.S.C. § 2109 (2012). Congress’s power over the rules of precedent is hotly debated. See, e.g., Harrison, supra note 73.
assumed the power to regulate many important aspects of the Court’s daily activities.

2. Objections

Opponents of ethics laws might argue, however, that legislation setting the Court’s size and the dates on which it is to hold its sessions are necessary for the Court to function, but laws regulating ethics are not. Although ethics rules might promote and enhance the Supreme Court’s reputation, they are not as vital to the Court’s exercise of judicial power as those regarding membership and meetings dates. Furthermore, once the Court was up and running, it could write its own code of ethics if it so chose, and thus Congress had no reason to take such action on the Justices’ behalf.

The problem with these arguments is that they prove too much. Congress has enacted many statutes that are not essential to the Court’s very existence—such as laws dictating the oath of office for new Justices and the responsibilities of circuit Justices—without any Justice raising a constitutional complaint. Furthermore, as soon as the first Supreme Court was confirmed and began to meet regularly it could have taken charge of all aspects of its administration, including its composition and the dates of its sessions, and yet no one argues that Congress’s administrative authority over the Court began and ended with the Judiciary Act of 1789. Accordingly, there is no reason to conclude that Congress lacks authority to regulate the Justices’ ethical conduct just because the Justices could conceivably assume that responsibility for themselves.

89. See, e.g., Peter Graham Fish, The Politics of Federal Judicial Administration 20–21 (1st ed. 1973) (“The separation of powers doctrine could conceivably have provided the federal courts with a rationale for developing inherent plenary power over their own procedures and administration. But instead, judges and their allies looked then, and would continue to look, to Congress for enabling legislation.”). The Justices of course do exercise significant control over the procedures by which they hear cases. The point is not that the Court has no authority to manage its own internal operations, but rather that Congress has significant authority in this area as well.
90. U.S. Const., amend. V. Furthermore, the Fifth Amendment provides an additional source of legislative authority over judicial ethics. Ethics statutes not only enhance the
Skeptics might also question whether Congress’s authority under the Necessary and Proper Clause to regulate judicial administration supports more intrusive regulation of the Justices’ ethical conduct. But a closer look reveals that even the more mundane housekeeping measures share the same purpose as the ethics legislation discussed in Part II: to ensure that the Court’s exercise of judicial power is both effective and legitimate.\footnote{See, e.g., Gordon Berman & Russell R. Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 45 Mercer L. Rev. 835, 846 (1995) (“Settled constitutional practice demonstrates that [judicial] independence is consistent with Congress’s exercise of its authorization, appropriation, and oversight powers, as well as its authority to regulate judicial rulemaking, internal disciplinary procedures, and general administrative operations.”) (footnotes omitted); Stephen B. Burbank, The Past and Present of Judicial Independence, 80 Judicature 117, 122 (1996) (noting that “[f]or most of our history the federal courts had no central organization and were dependent on the political branches not only for budget allocations but for administrative support,” which, he argues, supports the constitutionality of legislation affecting the administration of the federal courts).}

For example, the quorum requirement protects the Court as an institution from being co-opted by a small subset of Justices. Likewise, laws enabling the Justices to hire law clerks and librarians directly support the Justices’ ability to research legal questions and write reasonable and just opinions resolving cases. Similarly, ethics legislation seeks to protect the quality of judicial decision-making, as well as the reputation of the judiciary itself, by mandating that the Justices avoid potential conflicts of interest.

Indeed, some laws long viewed as purely administrative seek to control judicial behavior in much the same way that ethics legislation does. For example, Congress requires all newly confirmed Justices to “solemnly swear” that they will “administer justice without respect to persons, and do equal right to the poor and to the rich” and “faithfully and impartially discharge and perform all the duties incumbent upon me” before taking their place on the Court.\footnote{28 U.S.C. § 453.} The purpose of requiring the
Justices to take this oath is to promote fair and impartial judicial decision-making, which is the same goal fostered by laws requiring recusal and restricting the Justices from accepting gifts and outside income. In other words, it is hard to argue that Congress lacks authority to enact laws concerning the Justices’ ethical conduct and yet at the same time concede that Congress can control vital administrative matters such as the Court’s staff size and the words of the oath, once one realizes that these laws all serve the same purposes and intrude in similar ways on the Court’s exercise of judicial power.

More specifically, Congress’s authority to mandate recusal procedures and standards for the Justices is supported by its uncontested power to establish both the total number of Justices who will sit on the Court and the number that constitutes a quorum of that Court. Some Justices and commentators have argued that the Supreme Court cannot, or should not, be subject to the same recusal standards as the lower courts because recused Justices cannot easily be replaced, leading to the possibility that a recusal will bar the Court from hearing a case because of a lack of quorum, or that the recusal will effectively operate as a vote against the Petitioner both at the certiorari stage and then on the merits. Another concern is that recusal will lead to affirmance by an evenly divided court, preventing the Court from setting precedent on the matter. But these outcomes, even if not ideal, are surely constitutional. Congress initially

93. See, e.g., Statement of Recusal Policy (1993) (statement signed by seven of the Justices on the Court at the time, which outlined their policies regarding recusal and declared more generally that they should not recuse themselves “out of an excess of caution” because “[e]ven one unnecessary recusal impairs the functioning of the Court.”); Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 915–16 (noting that possibility of a tie vote and the fact that recusal operates as a vote against petitioner); Laird v. Tatum, 409 U.S. 824, 837 (1972) (memorandum of Rehnquist, J., denying motion to recuse) (“There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court, and thereby establish the law for our jurisdiction.”); 2011 Year-End Report on the Federal Judiciary, supra note 1, at 9 (The “Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership.”). But see Lisa T. McElroy & Michael C. Dorf, Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court, 61 DUKE L.J. 81 (2011) (discussing the constitutional and policy concerns raised by a proposal to allow retired Justices to sit by designation in place of recused Justices).
staffed the Court with only six Justices, then expanded and contracted its membership over the next eighty years before finally settling on its present size of nine in 1869.\textsuperscript{94} These changes in the Court's membership raise some of the same issues that a recusal of one of the nine would create today. Yet no one claims that Congress transgressed constitutional limits on its authority over the Court by altering the Court's size permanently, which provides support for the conclusion that Congress can require recusals for actual or perceived conflicts of interest.

Some scholars contend that even if Congress has the authority to regulate the ethics and recusal standards for lower the federal courts, that authority does not extend to the U.S. Supreme Court. (And Chief Justice Roberts appears to agree, though the statements in his 2011 Year-End Report were intriguingly cryptic on this point.\textsuperscript{95}) Admittedly, Congress's authority to create or abolish the lower federal courts gives it more leeway over the structure and subject matter jurisdiction of those courts than it has over the Supreme Court, which is a constitutionally-required institution. That said, it is hard to see how this distinction strips Congress of power over the Justices' ethical conduct. As just discussed, the Necessary and Proper Clause enables Congress to enact legislation to facilitate the federal courts' exercise of judicial power. Ethics legislation protects the federal courts' reputation and the legitimacy, as well as the accuracy, of judicial decisions, and thus is a valid exercise of Congress's power. The fact that the Supreme Court is constitutionally required means that Congress cannot eliminate or disempower it completely, but does not strip Congress of he power to enact legislation enabling the Court to function effectively.

3. Conclusion

In sum, Article III's silence, coupled with Congress's authority under the Necessary and Proper Clause, empowers Congress to enact legislation to regulate judicial ethics, just as it enables Congress to enact legislation concerning the Court's size, meeting dates, and other vital administrative matters. That said, Congress's power over the Supreme Court's internal operations is not unlimited. As discussed further below, Congress's authority over the administration of the Court, including Justices' ethical

\textsuperscript{94} See \textit{Fallon et al.}, supra note 68, at 27.
conduct, is limited by the need to protect the Court’s decision-making from external interference and preserve its position atop the judicial hierarchy.

B. LIMITS ON CONGRESS’S POWER TO REGULATE JUDICIAL ETHICS

Although Congress has constitutional authority to regulate judicial ethics, its powers are constrained by other constitutional values, such as the separation of powers and the need to preserve judicial independence. This Part describes the constitutional constraints on Congress’s powers to establish ethical rules for federal judges generally, and for Supreme Court Justices in particular.

1. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

The terms “separation of powers” and “judicial independence” appear nowhere in the Constitution, but rather are implied by the Constitution’s text and structure. Although the boundaries between the three branches are far from clear, the judiciary must be free to exercise the “judicial Power” without undue inference from the political branches. The Constitution protects federal judges’ decisional independence—that is, their ability to issue judicial decisions free from fear that their compensation will be diminished or that they will be forced from office.\(^96\) This principle is derived in part from the fact that the Constitution established three separate and co-equal branches of government. More specifically, Article III provides judges with life tenure and protection against reduction in compensation, and the only mechanism for removing federal judges is impeachment and conviction for “Treason, Bribery, or other high Crimes and Misdemeanors.”\(^97\) As Alexander Hamilton explained in Federalist No. 79, the purpose of these provisions is to ensure

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that judicial decision-making is insulated from political branch influence. Accordingly, congressional regulation of judicial ethics must respect these boundaries.

However, the constitutional protection provided for judicial decision-making does not mean that the judiciary as an institution enjoys complete autonomy. To the contrary, as previously discussed, Congress has significant authority under the Necessary and Proper Clause to regulate the federal judiciary’s subject matter jurisdiction, budget, structure, size, and even the dates and locations of its sessions. Congress may exercise some control over the judiciary through these mechanisms, even if it must do so in ways that avoid interfering with judges’ and Justices’ decisions in specific cases.

The ethics legislation described in Part II does not directly conflict with the Constitution’s Good Behavior and Compensation Clauses. No such argument could reasonably be made with respect to financial reporting or limitations on outside gifts and income. Nor are laws requiring judges to recuse themselves from specific cases in which they have a conflict of interest equivalent to permanent removal from the bench. The disciplinary measures permitted under the Judicial Conduct

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100. See Geyh, supra note 99, at 163 (describing the decisional independence/institutional dependence dichotomy).
101. Six federal judges challenged the constitutionality of the Ethics in Government Act’s financial reporting requirements shortly after the law was enacted, in part on the ground that penalty for failing to file would unconstitutionally diminish their salary. The Fifth Circuit rejected all of their arguments, and the Supreme Court denied their petition for a writ of certiorari. See Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981). The leading treatise on judicial ethics states, “Following this holding, the validity of financial disclosure statutes seems certain.” James A. Alfini et al., Judicial Conduct and Ethics § 8.02a (4th ed. 2007).
and Disability Act, although serious, do not violate these textual limits on Congress's authority over the courts. 102

But are such ethics statutes at odds with the purpose of the Good Behavior and Compensation Clauses, and with separation of powers principles generally? Conceivably, these facially-neutral laws could be administered so as to influence judicial decision-making, thereby undermining the Constitution's goal of ensuring judicial independence. For example, an appellate court might vote to disqualify a district court judge from a high-profile case because the appellate judges object to her judicial philosophy rather than because they believe she has any recusal-worthy conflict under Title 28, Section 455 of the United States Code. Or if a committee of judges investigating an allegation of misconduct under the Judicial Conduct and Disability Act might penalize a judge for his votes in previous cases rather than because they found the judge had engaged in misconduct. If the Murphy Bill becomes law, some of those who are

102. There is some debate whether the provision permitting significant caseload suspensions might come close to an attempt to remove a judge without impeachment. The Judicial Conduct and Disability Act permits the circuit judicial council to order that no further cases be assigned to a judge for a "time certain" if the committee thinks it necessary to "assure effective and expeditious administration of the business of the courts." 28 U.S.C. §354(a). Judge Stephen Chandler challenged the constitutionality of the disciplinary system in place in 1970 under which the Judicial Council of the Tenth Circuit barred him from hearing new cases, but the Court sidestepped the issue. See Chandler, 398 U.S. at 77. Thus, the constitutionality of such indefinite suspensions remains an open question.

However, the Supreme Court's own practice supports the constitutionality of such suspensions. In 1975, seven of the Justices agreed that they would not assign the writing of any opinions to Justice William Douglas or issue a judgment in any 5–4 decision in which he was in the majority because they feared he had become mentally incompetent. See Letter of Oct. 20, 1975, reprinted in DENTON J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 463–65 (Free Press 1998); see also ROSS E. DAVIES, THE RELUCTANT RECUSANTS, 10 GREEN BAG 79, 89–90 (2006) (describing the incident and concluding that the "constitutionality of what amounts to collusive compulsory informal secret recusal is an open question, but the raw fact that the Court has engaged in this form of self-management is not") (internal footnote omitted).

Nonetheless, taking cases away from an Article III judge for any significant period of time comes uncomfortably close to the constitutional line. Thus, this provision of the Judicial Conduct and Disability Act should not be extended to the Supreme Court. Aside from this one provision, however, the ethics laws do not come close to conflicting with the letter of the Good Behavior and Compensation Clauses.
unhappy with the outcome of the Supreme Court’s decisions are sure to file ethics complaints, without regard to whether the Justices violated their ethical obligations. Although Article III judges are less likely to manipulate ethics laws to influence judicial decision-making than their political branch counterparts, it is certainly possible. Does this risk of abuse place the constitutionality of these laws in doubt?

The answer must be no. The possibility that a neutrally-worded law could be administered in an unconstitutional manner is a problem that afflicts legislation regulating any aspect of the federal judiciary. As previously discussed, federal legislation controls many aspects of judges’ and Justices’ lives, ranging from the number of administrative assistants they can hire, to courtroom security, to the budget for office supplies. All of these laws are written in neutral terms and yet could conceivably be manipulated to penalize judges for their decisions. Surely Congress is not barred from enacting such legislation simply because it could be misused in this way. Of course, Congress cannot seek to control the outcomes of cases in the guise of regulating judicial ethics. But as long as such legislation is neutral in its application—applying to all judges and Justices,

103. See, e.g., Raoul Berger, Impeachment: The Constitutional Problems 134–35, 174 (1973) (arguing that statutes providing for judicial self-regulation are constitutional because they do not give Congress power to sanction judges); Shane, supra note 21, at 240 (noting that the threat to judicial independence from judicial self-regulation is limited by the “traditions and training of the federal judiciary, as well as the institutional caution invariably exhibited in all systems of self-regulation”).

104. See, e.g., Michael J. Gerhardt, The Constitutional Limits to Impeachment and Its Alternatives, 68 Tex. L. Rev. 1, 76–77 (1989) (“To be meaningful, article III’s [Good Behavior and Compensation Clauses] must protect judges not only collectively from other branches, but also individually from harassment by other judges.”); see also Chandler, 398 U.S. at 141–43 (Black, J., dissenting) (arguing that judicial self-discipline can be abused).

105. Cf. Harrison, supra note 73, at 540 (“To say that a power may be misused, however, is by no means to say that it does not exist. All power is subject to misuse, and virtually any governmental function can be carried out irresponsibly.”). See Geyh, supra note 99, at 160–61 (discussing the potential constitutional limits on Congress’s power to retaliate against federal judges’ for their decisions); see also Martin H. Redish, supra note 18, at 69, (discussing the potential constitutional limits on legislation reducing support staff or other judicial resources).
and to all litigation—it does not undermine the decisional independence protected by the Constitution. 106

Finally, it is worth noting that separation of powers generally, and judicial independence in particular, are constitutional values that protect all Article III judges, not just the Justices on the Supreme Court. 107 Thus, any independence-based limits on Congress’s authority to legislate regarding recusal and judicial misconduct apply equally to legislation affecting all three existing tiers of the federal judiciary. The conclusion that Congress is barred from regulating any aspect of judicial ethics is hard to square with the decades-old (and in some cases, centuries-old) ethics legislation. 108

2. THE IMPEACHMENT CLAUSE

Applying the interpretive principle of expressio unius est exclusio alterius, the Constitution’s express grant of the power of impeachment to Congress could be read as an implied bar on Congress’s authority to use any other method to sanction Article III judges or remove them from individual cases. 109 If a Supreme Court Justice violates an ethical norm, such as sitting on a case in which she has a conflict of interest, some scholars argue that the Constitution provides one remedy—

106. Cf. Charles G. Geyh, Rescuing Judicial Accountability from the Realm of Political Rhetoric, 56 CASE W. RES. L. REV. 911, 919 (2006) (“Congress has traditionally afforded the courts considerably greater branch independence than the text of the Constitution requires and has rarely tested the limits of its power to hold the judiciary accountable as an institution.”).
107. See U.S. CONST. art. III, § 1; see also Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 221 (1985) (asserting that all Article III judges have “structural parity” because they all benefit from life tenure and protection against salary reduction).
108. See infra Part IV (discussing the history of congressional regulation of judicial ethics).
109. The Latin phrase expressio unius est exclusio alterius means the “expression of one is the exclusion of another.” This canon of interpretation is most often invoked in statutory interpretation, in which it is cited for the proposition that a legislature’s decision to include specific items in a statute suggests that it meant to exclude items not mentioned.
impeachment—and nothing short of that is permitted.\textsuperscript{110} The Framers may have hoped or assumed that the threat of impeachment would keep judges and Justices in line, allowing Congress to remove bad apples and at the same time barring Congress from interfering with the exercise of judicial power.\textsuperscript{111}

Judicial discipline is not equivalent to impeachment, however. Publicly reprimanding a judge, or even temporarily suspending a judge from receiving new cases, is not equivalent to permanently removing a judge from the bench. Thus, the negative implication from the Impeachment Clause prohibits stripping judges of their judicial power permanently through any method short of impeachment, but should not be read to bar milder forms of discipline.\textsuperscript{112}

In any case, it is worth noting that \textit{expressio unius} arguments are often suspect, particularly in constitutional interpretation. The Constitution failed to spell out many aspects of the federal judiciary’s organization and operation, and yet no one questions Congress’s power to legislate on at least some matters that affect the day-to-day operations of the federal

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110. Shane, supra note 21, at 220 ("[I]t is suggested that all politically controlled disciplinary mechanisms short of impeachment are precluded by implication because any such mechanisms would undermine the value of judicial independence that the [Good Behavior and Compensation Clauses] are intended to protect."); id. at 223 ("A number of commentators assert that the arguments demonstrating the exclusivity of impeachment as a political device for judicial discipline exclude any possibility of judicial discipline through judiciary-dependent devices such as prosecution or judicial self-regulation."); Virelli, supra note 17, at 1211 ("The constitutional principles at stake similarly support a literal reading of the Impeachment Clauses that would exclude unmentioned remedies like recusal.").

111. See, e.g., Chandler, 398 U.S. at 141–42 (Black, J., dissenting) ("[N]o word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate."). \textit{But see} McBryde v. Comm. to Review Cir. Council Conduct and Disability Orders of the Judicial Conference of the United States, 264 F.3d 52, 64–65 (D.C. Cir. 2001) (rejecting Judge McBryde’s argument that the impeachment clause precludes all other methods of disciplining judges).

112. See, e.g., McBryde, 264 F.3d at 67 ("In short, the claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification . . . .")
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courts, including the U.S. Supreme Court. The Constitution is a broadly-worded document sketching out the framework of the United States government; it was never intended to address every question that could arise regarding the relationship between the branches. In other words, despite the Constitution’s silence on these questions, it is understood that Congress must play an active role in the administration of the federal courts. With this as the background rule, the impeachment clause should not be read as an implied bar to all legislation regarding judicial ethics.

Furthermore, the impeachment-or-nothing argument is dangerous for jurists and for litigants, and thus it is hard to imagine that by including impeachment the Framers meant to prohibit all other forms of discipline. For example, a judge might commit a minor ethical violation—failing to report a spouse’s employment, for example—which would be troubling, but would not rise to the level of serious misconduct for which impeachment has always been reserved. If the only method of regulating judicial misconduct were impeachment, Congress might resort to this ultimate sanction more often than the Framers intended, and more often than would be healthy for judicial independence. Alternatively,

113. See, e.g., Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 357 n.140 (2006) (“Congress is indisputably authorized to engage in some regulation of the federal courts.”)
114. See supra Part II.A.
115. See, e.g., McBryde, 264 F.3d at 65 (stating that the Impeachment Clause should not be read to bar methods of judicial discipline that fall short of removal).
116. See Stephen Shapiro, The Judiciary in the United States: A Search for Fairness, Independence, and Competence, 14 Geo. J. Legal Ethics 667, 680 (2001) (“At both the federal and state level, impeachment has proved to be an unwieldy and insufficient method of disciplining judges.”); see also Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 95 (1970) (“But if one judge in any system refuses to abide by such reasonable procedures [regarding the effective administration of the courts] it can hardly be that the extraordinary machinery of impeachment is the only recourse.”); Edward D. Re, Judicial Independence and Accountability: The Judicial Council’s Reform and Judicial Conduct and Disability Act of 1980, 8 Ky. L. Rev. 221, 233 (1981) (“That impeachment is cumbersome and unwieldy, and is no real deterrent to aberrant behavior, may perhaps be best demonstrated by our national experience.”).
117. Federal Judge John Pickering was impeached and convicted in 1804. Although Pickering was “hopelessly insane,” he had not committed “treason, bribery, or other high crimes and misdemeanors,” which are the only constitutional grounds for impeachment. As experts on federal judicial administration observed, “[Pickering’s] removal
Congress might refrain from taking any action, leaving judges free to engage in serious, but not impeachment-worthy, offenses without fear of consequences. Either way, the result would diminish the courts’ legitimacy in the eyes of the public—a result at odds with the Framers’ goals. 118

Litigants would also suffer in a regime in which impeachment was the only method of disciplining a Justice. Due process demands an impartial judge 119, impeachment is a post hoc remedy that will do nothing to alleviate the due process violation suffered by a litigant whose case was decided by a biased decision-maker. Recusal statutes are a means of removing biased or incompetent judges before harm is done, which impeachment cannot do. 120

3. JUDICIAL HIERARCHY

The Constitution states that the judicial power “shall be vested in one supreme Court.” The creation of the lower federal courts is left to Congress’s discretion, and the Constitution declares that those courts are “inferior to” the Supreme Court. Thus, the Supreme Court is the only constitutionally required Court, and it sits atop the federal judiciary.

Arguably, the Court’s special status constrains Congress’s power to enact ethics legislation in two ways. First, Congress must show proper


118. But see Louis J. Virelli III, Congress, the Constitution, and Supreme Court Recusal, 69 WASH. & LEE L. REV. 1535, 1535-36 (2012) (arguing that Congress should use various indirect constitutional tools, such as impeachment, to “influence the Justices’ recusal practices”).


120 Virelli suggests that litigants seek to recuse biased Justices pursuant to the Due Process Clause. See Virelli, Congress, the Constitution, and Supreme Court Recusal, supra note __ at 1604-05. But the Court’s current practice is to allow each Justice to decide for him or herself whether recusal is required, which demonstrates that the Court has not been sensitive to the Due Process concerns raised by recusal requests.
respect for the Court’s role at the head of a co-equal branch of
government; and second, Congress cannot disrupt the constitutionally-
required hierarchy that places the Supreme Court above the “inferior”
courts.\textsuperscript{121} For these reasons, some scholars have expressed doubts about
Congress’s power to regulate Supreme Court Justices’ ethical conduct,
particularly if such legislation would give lower federal court judges the
power to discipline the Justices.\textsuperscript{122}

\section*{a. Status}

The Court’s status does not pose an obvious obstacle to federal
legislation regulating the Justices’ ethical conduct as \textit{individuals}. Most
ethics regulation applies to the Justices’ conduct off the bench, and not to
the Supreme Court as an institution. For example, existing ethics
legislation bars judges and Justices from engaging in political activity and
from taking money or gifts from parties with matters before the court—
that is, extra-judicial activities. Although these laws are intended to
protect the legitimacy of judicial decisions, they do not directly regulate
exercise of the judicial power.

Because these laws seek to regulate the behavior of judges and
Justices off the bench, the Court’s status would appear to be irrelevant. As
a constitutional matter, Article III judges are treated alike, in that they all
benefit from the same life tenure and compensation guarantees, and they
all exercise the same “judicial Power.” In fact, Justices can and do serve
as judges on the lower courts on a regular basis. In other words, the
Supreme Court’s special constitutional status as an \textit{institution} does not translate into special constitutional status for the Justices.

Unlike most other ethics legislation, recusal laws do apply to the
Supreme Court Justices acting in their judicial capacity, and thus directly
raise the question whether Congress can regulate the head of a co-equal
branch of government. However, the Constitution does not bar Congress

\textsuperscript{121} A few scholars argue that the lower federal courts are not constitutionally required
to be subordinate to the Supreme Court. For further discussion of this debate, see infra
note 125.

\textsuperscript{122} \textit{Cf.} Shane, \textit{supra} note 21, at 236 (stating that the “argument for maximum judicial
independence is fairly compelling at the Supreme Court level.”).
from enacting legislation seeking to safeguard the executive and judicial branch’s exercise of their constitutional authority. Rule of law concerns, and the principle that “no man is above the law,” justifies legislation affecting all federal officials in all three branches of government. In fact, the financial disclosure requirements that apply to Supreme Court Justices also require annual disclosures by the President and Vice-President of the United States. Thus, there is no constitutional basis for concluding that Congress lacks the power to regulate the conduct of Supreme Court Justices simply because of their position at the head of the federal judiciary.

b. Hierarchy

Article III specifies that there shall be “one supreme Court and describes all other Article III courts as “inferior.”123 Most federal courts scholars conclude from this language that the lower courts must be subordinate to the Supreme Court and that Congress cannot enact legislation that would disrupt this relationship. For example, James Pfander argues that this language bars Congress from completely insulating lower federal court decisions from Supreme Court review.124 Similarly, Evan Caminker contends that “inferior” courts are constitutionally obligated to follow the decisions of their superiors, rendering vertical *stare decisis* a constitutional requirement that cannot be

123. U.S. CONST. art. III, § 1. The Constitution also grants the Supreme Court “appellate jurisdiction” to review the judgments of “inferior” courts, which places these inferior courts in a subordinate position to the Supreme Court on at least those matters over which the Supreme Court can review and reverse them. See James E. Pfander, Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers, 101 COLUM. L. REV. 1515, 1518–19 (2001); see also James E. Pfander, *supra* note 72, at xii (“Apart from creating one ‘supreme’ court with supervisory authority, the Constitution takes care to ensure that all other adjudicative bodies remain inferior to that one court . . . Inferiority means that the courts and tribunals in question must remain subject to the oversight and control of the Supreme Court.”). However, Congress’s power to make “Exceptions” to the Supreme Court’s appellate jurisdiction undermines the Supreme Court’s power over the “inferior” courts. See Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the Harris Execution, 102 YALE L.J. 255, 276 (1992) (stating that Article III’s Exceptions and Regulations Clause “plainly diminishes the extent to which the Supreme Court is hierarchically dominant over the inferior courts.”).
124. Pfander, *supra* note 72, at xii.
overridden by federal legislation. 125 A few scholars disagree, however, asserting that the supreme/inferior dichotomy refers not to the lower courts’ subordinate status, but rather to their restricted geographic and subject matter jurisdiction, which would allow Congress to elevate the lower courts over the Supreme Court on at least some matters. 126

If the inferior courts must remain subordinate to the Supreme Court, then arguably Congress cannot assign the lower federal court judges a supervisory role over the Justices’ ethics. The Murphy Bill could be problematic in that regard, because it delegates to the Judicial Conference of the United State the authority to “establish procedures” to “review” and “investigate” complaints against the Justices, and to take “further action where appropriate.” It also gives the Judicial Conference the authority to “establish a process” by which a Justice’s refusal to recuse herself is reviewed by “other justices or judges of a court of the United States.” The Judicial Conference is chaired by the Chief Justice, but its membership consists of judges on the circuit and district courts. If one adopts the strictest reading of the supreme/inferior dichotomy by concluding that it requires that lower courts be subordinate to the Supreme Court, and that it bars judges on those courts from policing the Justices’ ethical conduct, then the Murphy Bill’s delegation of authority to the Judicial Conference is constitutionally problematic. 127 To avoid this result, and to avoid the

126. See, e.g., David E. Engdahl, What’s in a Name? The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L.J. 457 (1991) (“The same legislative branch that pyramidized the judiciary may refashion it however political wisdom directs, without doing violence to the Constitution.”); Harrington, supra note 72, at 314 (observing that the “supreme” and “inferior” language may not mean that the lower courts are subordinate to the Supreme Court, but rather may refer to “breadth of geographic and subject matter jurisdiction”); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1180 n.139 (1992) (noting that “supreme” and “inferior” were probably used to distinguish between courts “subject to narrow geographic and subject matter constraints” and those without such constraints). See also Barrett, supra note 113, at 344–53 (2006) (summarizing the academic debate on this question and concluding that the Constitution is unclear).
127. Justice Anthony Kennedy recently testified before Congress that Congress would encounter a “constitutional problem” were it to attempt to make the Code of Conduct binding on the Justices because it would be “structurally unprecedented for district and circuit court judges to make rules that Supreme Court judges have to follow.”
oddlity of allowing a lower federal court judge to discipline the Justices, the best practice would be for the Justices to sit in judgment of each other’s alleged ethical violations.

However, the constitutionally-obligated hierarchy does not bar the Judicial Conference from playing a role in creating the ethics rules that the Justices would be required to follow. Although hierarchical purists might argue that the Judicial Conference has no authority to require the Justices to follow those rules because that would upend the subordinate position the Constitution intended for the inferior courts, a view is hard to defend. The Judicial Conference is an administrative body, not a court, and it consists of judges from all three levels of the federal judiciary, including the Chief Justice who serves as its chair. Granting it authority to establish ethics rules for the Supreme Court should have no effect on the subordinate status of the inferior courts.

4. "ONE SUPREME COURT"

The first sentence of Article III states that the judicial power shall be vested in “one supreme Court.” Some interpret this clause to mean that one indivisible Supreme Court must decide all the cases and controversies that come before it, which would raise constitutional doubts regarding

Malloy, supra note 54, at 2389; see also Shane, supra note 21, at 236 n.106 (arguing that it would be “incongruous” to “allow judges whose work is routinely reviewed by the Supreme Court . . . to discipline the justices reviewing them”).

128. See Malloy, supra note 54, at 2389 (reporting that Justice Kennedy testified before Congress that it would be constitutionally problematic to require the Justices to follow ethical rules created by district and circuit courts).

129. In fact, the Justices are already required to file annual reports disclosing their incomes and obligations to the Judicial Conference, which then bears the responsibility of reporting to the Attorney General if a Justice fails to file a report or files a report containing false information. 5 U.S.C. app. 4, § 104(b).

130. See, e.g., Letter from Chief Justice Hughes to Senator Wheeler (Mar. 21, 1937), reprinted in 81 Cong. Rec. 2813, 2815 (1937) (“The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.”); Ross E. Davies, A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court, 90 MINN. L. REV. 678, 680 (2006) (stating that the Framers did indeed read ‘one supreme Court’ to mean “one [indivisible] supreme Court”—a single body consisting of all of its available and qualified members to conduct its business’); cf. 2011 Year-End Report of the Federal Judiciary, supra note 1, at 9 (asserting that there is “no higher court to review
any legislation that required outside review of a Justice’s refusal to recuse him or herself.¹³¹ For example, the Murphy Bill provides that the Judicial Conference must “establish a process” by which a single Justice’s decision not to recuse him or herself would be reviewed by “other justices or judges of a court of the United States,” including retired or senior justices, and then delegates to the Judicial Conference discretion over the composition of the panel. Such a two-tiered decision-making process—and one that results in the composition of a new “Supreme Court” for the purpose of reviewing the single Justice’s recusal decision—violates a narrow reading of the Constitution’s mandate that there be only one Supreme Court.

The “one supreme Court” language has never been the subject of litigation or even much close academic scrutiny, and thus its contours remains hazy.¹³² Most commentators agree that it prohibits Congress from establishing multiple Supreme Courts populated by different sets of Justices, all empowered to issue decisions binding on the nation as a whole.¹³³ Far less clear is whether this language bars the Court from

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¹³¹ Russell Wheeler, What’s So Hard About Regulating Supreme Court Justices’ Ethics?—A Lot, BROOKINGS INST. (Nov. 28, 2011) (stating that the “one supreme Court” requirement might bar review of a single Justice’s recusal decision), available at www.brookings.edu/research/papers/2011/11/28-courts-wheeler. Virelli, supra note 17, at 1205 n.140 (stating that proposals to allow lower court judges to review Supreme Court recusal decisions have “significant constitutional problems . . . including Article III’s mandates that there be only ‘one supreme Court,’ and that Congress have power to create only ‘inferior courts.’”).

¹³² See Daniel M. Gonen, Judging in Chambers: The Powers of a Single Justice of the Supreme Court, 76 U. CIN. L. REV. 1159, 1197 (2008) (Noting that the “one supreme Court” requirement suggests that there are limits on Congress’s ability to structure the Court’s decision-making, but further observing that the “constitutional text . . . neither indicates what the extent of the ‘judicial power’ is nor how much delegation of the Supreme Court’s powers would go too far.”) (internal footnote omitted).

¹³³ See, e.g., EUGENE GERSHMAN ET AL., SUPREME COURT PRACTICE 2–3 (9th ed. 2007). But see Byron R. White, Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections, 51 ANTITRUST LJ. 275, 281 (1982) (“Rather than one Supreme Court, there might be two, one for statutory issues and one for constitutional cases; or one for criminal and one for civil cases.”).
breaking into subdivisions to decide cases or components of cases,\textsuperscript{134} or whether it would prohibit the entire Court from reviewing the decision of one or more of the Justices, particularly on a matter that was separate from the merits (such as recusal).

In fact, the Court has a long history of empowering a single Justice to make decisions on preliminary or ancillary matters that continues to this day, suggesting that the Court itself has never read the "one supreme Court" requirement as an obstacle to this practice. For example, a single Justice can decide whether to grant an extension of time to file a petition for a writ of certiorari,\textsuperscript{135} order a stay of a lower court's decision,\textsuperscript{136} issue a writ of habeas corpus,\textsuperscript{137} or recuse him or herself.\textsuperscript{138} These are all collateral issues, but they can nonetheless be significant to the litigants and to the outcome of a case.\textsuperscript{139}

Although a single Justice’s decision often stands as the final word on the matter, a party may ask another Justice or the full Court to review the decision. Supreme Court Rule 22 provides that the "party making an application [to an individual Justice] . . . may renew it to any other Justice,

\textsuperscript{134} Tracey George and Chris Guthrie recently proposed doing just that to enable the Supreme Court to hear a greater number of cases, and they assumed that doing so would not violate the "one supreme Court" requirement. In their view, dividing the Court into panels would not create more than one Supreme Court, since each panel would be a stand-in for the full Court. They point out that the courts of appeals currently sit in three- or five-judge panels to hear most cases, and yet each circuit is still viewed as a single court despite these congressionally-mandated subdivisions. Tracey E. George & Chris Guthrie, Remaking the United States Supreme Court in the Courts of Appeals Image, 58 DUKE L.J. 1439 (2009).

\textsuperscript{135} 28 U.S.C. § 2101(c).


\textsuperscript{137} 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by the Supreme Court [or] any justice thereof . . . ."). In practice, however, individual Justices always refer matters regarding habeas to the full Court. See GRESSMAN ET AL., supra note 132, § 17.15 at 884–85, § 11.3 at 662.

\textsuperscript{138} See S. Ct. R. 22 (describing the process by which a party makes an application to a single justice).

\textsuperscript{139} See Gonen, supra note 131, at 1161. Moreover, in 1802 Congress assigned to a single justice the power to decide matters arising during the Court’s August session—a practice that continued for thirty-seven years without constitutional objection. Ross Davies gives fascinating discussion of this "rump" Court in his article, A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court, 90 MINN. L. REV. 678 (2006).
subject to the provisions of this Rule." \(^{140}\) When renewed applications do occur, they are usually referred to the full Court, perhaps to avoid the awkward situation in which one Justice essentially reverses the decision of a colleague. \(^{141}\) Although it is rare for the full Court to overturn a single Justice’s decision, it is not unprecedented, particularly if there has been a change in circumstances. \(^{142}\)

The long practice by which a single Justice makes decisions for the Court, which may then be reviewed by the en banc Court, is at odds with an interpretation of the “one supreme Court” language requiring that the Court make decisions as a single, indivisible entity. One way around the problem is to characterize the decision of a single Justice as tentative rather than a final decision by “the Court.” Today, when a Justice decides not to recuse him or herself, that decision is final, and thus is usually considered a decision by the Supreme Court itself. If the recusal question is reviewable by the rest of the Court, however, then the single Justice’s decision not to step aside should more accurately be viewed as a preliminary assessment rather than a final, binding decision of the Court.

\(^{140}\) S. Ct. R. 22.4. However, such renewals are “disfavored.”

\(^{141}\) See, e.g., Holtzman v. Schlesinger, 414 U.S. 1316, 1316 (1973) (Douglas, J., in chambers) (stating that referrals of renewed applications to the full Court “is the desirable practice to discourage ‘shopping around,’”). Holtzman involved just such a back-and-forth between individual Justices issuing conflicting in-chambers decisions. Congresswoman Elizabeth Holtzman filed suit seeking to enjoin the United States from bombing Cambodia. The district court issued an injunction, which was then stayed by the Second Circuit. Holtzman then appealed to Justice Marshall to vacate the stay, which he declined to do. Holtzman, 414 U.S. 1304 (Marshall, J., in chambers). Holtzman then renewed her application with Justice Douglas, who issued a stay, noting that “while the judgment of my brother Marshall is not binding on me, it is one to which I pay the greatest deference.” Id. at 1317. The Solicitor General then applied to Justice Marshall once again. Marshall again stayed the district court’s decision, and noted that he had been in communication with the other members of the Court, all of whom agreed with him. Id. at 1321, 1322 (Marshall, J., in chambers). Justice Douglas dissented from that decision, arguing that only a quorum of the Court had the power to reverse his decision and that “seriatim telephone calls cannot . . . be a lawful substitute.” Id. at 1323. These events are described in more detail in Gonen, supra note 131, at 1177–79.

\(^{142}\) See also Rosenberg v. United States, 346 U.S. 273, 286 (1953) (observing that although the court has “made no practice of vacating stays issued by single Justices . . . reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power”).
Thus, the one and only Supreme Court decision in the case would be that of the en banc Court. In fact, the leading treatise on Supreme Court practice describes all decisions by individual Justices in these terms, explaining that when an individual Justice grants or denies motions, those decisions are

\[ \text{[N]ot a final resolution of the merits of any case or controversy pending before the Court . . . [but rather] are merely preliminary steps toward invoking the ultimate power of the “one supreme Court” to resolve a case or controversy that is properly before the Court for final disposition.}^{143} \]

In short, the requirement that there be “one supreme Court” suggests that the best practice is to require that a single Justice’s decision not to recuse him or herself be open to review by the full Court.

Of course, another way to reconcile practice with the Constitution’s text is to conclude that the language should not be read so narrowly—a position taken by a number of scholars.\(^4\) After all, we consider each federal court of appeals to be a single court, even though those judges decide most cases in three-judge panels that can then be reviewed by the entire court en banc.

Accordingly, the Judicial Conference would be on fairly safe constitutional ground were it to implement the Murphy Bill by delegating to the full Court the power to review a single Justice’s refusal to recuse him or herself from a pending case. Certainly, it would be difficult to argue that this practice violates the Constitution’s “one supreme Court” mandate when the Court’s own Rules permit applications to individual Justices followed by full Court review of that Justice’s decisions.\(^5\)

The harder question is whether the Constitution would permit a panel that included lower federal court judges or retired Justices to review an individual Justice’s refusal to recuse, as the Murphy Bill would allow (but not require). Professors Michael Dorf and Lisa McElroy addressed a closely related problem in their article describing potential roles for retired

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143. GRESSMAN ET AL., supra note 132, at 3.
144. See, e.g., George & Guthrie, supra note 133; see also McElroy & Dorf, supra note 91, at 111 (labeling such an interpretation as “highly formalistic”).
145. See S. Ct. R. 22.
Justices. Although they do not read the “one supreme Court” language to prohibit retired Justices from substituting for recused Supreme Court Justices in specific cases, they point out that even if it did, Congress could get around that problem through legislation manipulating the Supreme Court’s appellate jurisdiction. Congress has the power under Article III to make “Exceptions” to the Court’s appellate jurisdiction, and thus it can take away matters that would permissibly fall within the Court’s subject matter jurisdiction, assigning those cases to lower courts. The Constitution permits active and retired Justices to sit on lower courts. Thus, Congress could enact a jurisdictional statute that eliminates most of the Supreme Court’s appellate jurisdiction and reassigns those cases to a new court made up entirely of active Supreme Court Justices. (The same nine Justices would also continue to sit as the Supreme Court, but now the Supreme Court’s jurisdiction would consist only of those few cases over which the Constitution grants the Supreme Court original jurisdiction, and perhaps a small number of cases within their appellate jurisdiction to avoid any argument that the Exceptions Clause does not permit Congress to strip the Supreme Court of all of its appellate jurisdiction.) Because this new court would technically be an “inferior” court, the “one supreme Court” language would not bar review of a Justice’s refusal to recuse herself by a specially constituted recusal court that included lower court judges and retired Justices. Admittedly, this is an inellegant workaround, but it demonstrates that review of a Justice’s decision not to recuse herself by judges who are not currently sitting on the Supreme Court can be reconciled with even the narrowest interpretation of the “one supreme Court” language.

In short, legislation mandating that a Justice’s decision not to recuse herself be reviewed by other judges can be implemented in a variety of ways to satisfy the “one supreme Court” requirement. The safest course would be for Congress to assign the recusal question to the full Court to resolve, ensuring that a single Justice does not have sole discretion to

146. See McElroy & Dorf, supra note 91, at 109.
148. In fact, a similar arrangement existed for many years when the Justices were required to sit on circuit courts whose decisions could be reviewed by the entire Supreme Court.
149. McElroy & Dorf, supra note 91, at 111.
decide that sensitive question. Whatever the policy implications of such a practice, it would pass constitutional muster.

C. CONCLUSION

The text of the Constitution does not speak directly to Congress's authority to regulate the Justices' ethical conduct. Nonetheless, the Constitution does provide the sources of Congress's constitutional authority to enact ethics legislation while suggesting important limits on that authority. Most of the ethics legislation summarized in Part II fits comfortably within Congress's authority under the Necessary and Proper Clause to establish the Court's structure and daily operations, including ethics rules. That said, there are a few provisions of the Judicial Conduct and Disability Act, as well as the Murphy Bill, which raise some constitutional questions, and thus their application to the Supreme Court should be avoided. 150 Moreover, Congress must take care to craft legislation that avoids undermining the Justices' constitutionally-protected independence, and the Court's status as the preeminent court in the federal judiciary. 151

The Constitution's text and structure alone are not the last word on constitutional meaning, however. Longstanding practice also plays an important role in arriving at constitutional meaning. The history of Congress's regulation of the Justices' ethical conduct is addressed below in Part IV.

IV. THE HISTORY OF CONGRESSIONAL REGULATION OF JUDICIAL ETHICS

Congress has long assumed the power to regulate judicial ethics, including the ethical conduct of Supreme Court Justices. "[T]radition" is an "important source of constitutional insight" 152 and is frequently cited by courts and commentators as support for practices that otherwise lack a clear textual basis. 153 Accordingly, Congress's longstanding practice

150. See supra notes 64 to 150 and accompanying text.
151. See supra notes 64 to 150 and accompanying text.
153. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of
regarding the regulation of judicial ethics is an essential element of the constitutional analysis.

Aside from the Murphy Bill, the legislation described in Part II has existed for many decades: Recusal statutes have been in place for over two-hundred years; judges have been required to publicly disclose their household finances for over thirty years; judges have been subject to gift and outside income limitations for over twenty years; and judges have been statutorily subject to investigations and sanctions for ethical violations for over thirty years. Furthermore, criminal laws have long been applied to federal judges prior to, and even in the absence of, impeachment. Federal judges, including Supreme Court Justices, can be convicted and incarcerated for committing crimes, and thus effectively removed from the bench, without first being impeached (though the two penalties typically go hand in hand). As these statutes demonstrate,

the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by s. 1 of Art. II.' (Frankfurter, J., concurring). Cf. Stephen B. Burbank, The Architecture of Judicial Independence 72 S. CAL. L. REV. 315, 320 (1999) ('[T]he verdict of history has confirmed some understandings about federal judicial independence that cannot fairly be imputed to the language of the Constitution alone.').

154. See supra Part II.A.

155. Scholars debate whether the Constitution permits criminal prosecution in advance, or in lieu, of impeachment. Compare Shane, supra note 21, at 225–232 (concluding that "the founders probably did not intend impeachment and conviction to be prerequisites to criminal prosecution") and Gerhardt, supra note 104, at 29, with Robert S. Catz, Removal of Federal Judges by Imprisonment, 18 RUTGERS L.J. 103, 116–18 (1986). Although the Supreme Court has not ruled in this issue, a number of circuit courts have concluded that a federal judge may be prosecuted without first being impeached. See, e.g., United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984) ("[T]he Constitution does not immunize a sitting federal judge from the process of criminal law."); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.) (holding that life tenure does not immunize federal judges from criminal prosecution), cert. denied, 417 U.S. 976 (1974). There is also some evidence that the Framers did not view the power to impeach as a prohibition against criminal prosecution. In 1795, the House of Representatives chose not to impeach Judge George Turner after being informed by the Attorney General that the Judge would be prosecuted. See Warren S. Grimes, Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges, 58 UCLA L. REV. 1209, 1217 n.43 (1991).

Congress has long assumed it has the authority to regulate the Justices’ ethical conduct, and the Justices appeared to concur, at least until Chief Justice Roberts’ 2011 Year-End Report raised new questions.

Over the decades that these laws have been in existence, the Justices have diligently filed their financial disclosure forms, abided by income and gift restrictions, and written opinions in which they acknowledge being bound by the recusal statute, all without questioning the constitutionality of these laws. On the relatively rare occasions when Justices have failed to meet the requirements of the law, they have subsequently corrected their mistakes rather than deny that Congress has authority to make them do so. The long-standing existence of legislation regulating the Justices’ ethical conduct, together with the Justices’ compliance with these laws, supports the conclusion that this legislation is within Congress’s constitutional authority.

Admittedly, however, Congress has hesitated to apply some of the more intrusive ethics and disability legislation to Supreme Court Justices. Congress first enacted legislation mandating recusal of lower federal court judges in 1792, but did not extend that statute to the Supreme Court

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159. For example, when Justice Thomas filed an amended financial disclosure report in January 2011, he explained that he had “inadvertently omitted” information about his wife’s employment for several years due to a “misunderstanding of the filing instructions.” See Letter from Clarence Thomas, Justice, U.S. Supreme Court, to Committee on Financial Disclosure, supra note 37.
Justices until 1948.\textsuperscript{160} The Judicial Conduct and Disability Act still does not apply to the Justices (though the Murphy Bill seeks to change that). Likewise, Congress authorized judges on the lower federal courts to set ethical standards for each other, but has not required the Supreme Court to follow the resulting \textit{Code of Conduct}. One scholar contends that the historic exclusion of the Justices from some ethics and recusal legislation suggests that Congress lacks authority to regulate Supreme Court Justices as it does judges on the inferior courts.\textsuperscript{161}

Congress has never acknowledged such a limit on its authority, however. Rather, Congress has explained its decision to exclude the Justices from some of its legislation regulating judicial ethics on policy grounds. For example, the House Report accompanying the Judicial Conduct and Disability Act states that the legislation does not apply to the Justices because the “high public visibility of Supreme Court Justices makes it more likely that impeachment can and should be used to cure egregious situations.”\textsuperscript{162} In other words, the Report concluded that the Justices’ public prominence reduced the need for ethical oversight, but never suggested that Congress lacked the power to engage is such oversight if it wished.

The House Report further states that it would be “unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system” because doing so might “dilute[]” the “independence and importance” of the Supreme Court. Although the reference to judicial “independence” has constitutional overtones, Congress’s use of the term “unwise” suggests it was making a policy choice and not acknowledging a constitutional limit on its powers over the

\textsuperscript{160} Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (2012)). Prior to 1948, the recusal laws applied only to district court judges. Nothing in the legislative history explains the reason for expanding the law to apply to appeals court judges and Supreme Court justices.

\textsuperscript{161} See Virelli, supra note 17, at 1200–02 (noting that Congress waited 150 years before extending the recusal statute to the Supreme Court Justices, and arguing that this delay has constitutional significance). Cf. Shane, supra note 21, at 236 n.106 (citing Congress’s exclusion of the Supreme Court from the Judicial Conduct and Disability Act in support of his conclusion that it would be constitutionally “incongruous” to allow lower court judges to play a role in disciplining Justices on the Supreme Court).

\textsuperscript{162} H.R. Rep. No. 96-1313, 96th Cong., 2d Sess., at 10 n.28 (1980).
Court. In any case, it is hard to see how the constitutionally-enshrined
guarantee of judicial independence limits Congress’s power to regulate the
Justices’ ethical conduct but not the conduct of lower court judges. As
discussed in Part III, the judicial independence guaranteed by the
Constitution’s life tenure and salary protections covers all Article III
judges; Supreme Court Justices have no special or additional claim to
independence that does not apply to all.163

* * *

Congressional regulation of the federal courts will always raise hard
constitutional questions about the need to balance legislative power with
judicial independence. Legislation concerning the Supreme Court
Justice’s ethical conduct is a particularly sensitive topic, and one that
Congress should approach with caution. Chief Justice Roberts’ Year-End
Report has elevated these questions in importance, demanding that
legislators, jurists, and academics think carefully about the limits on
congressional authority to dictate the behavior of Supreme Court Justices.
Hopefully, this Essay will contribute to that discussion.

V. CONCLUSION

163. U.S. CONST. art. III, § 1. See also Amar, supra note 107, at 221 (asserting that all
Article III judges have “structural parity” because they all benefit from life tenure and
protection against salary reduction). But see Shane, supra note 21, at 236–38 (arguing
that the Supreme Court merits greater independence because it is the only constitutionally
required Court and because of its status as the head of the federal judiciary).

The Justices’ relationship to the Judicial Conference, which is responsible for
investigating and sanctioning unethical conduct under the Act, differs in important ways
from that of lower federal court judges. The Judicial Conference is chaired by the Chief
Justice, but the rest of its members are district and circuit court judges. Accordingly, the
dilution of the Supreme Court’s “independence and importance” that concerned the
House Committee might stem not from congressional regulation of the Justices’ ethical
conduct per se, but rather from oversight by lower court judges. If so, the problem could
be solved by allowing the Justices themselves to investigate and sanction each other,
rather than delegating that task to the Judicial Conference. As noted earlier, this option is
available under the Murphy legislation. For further discussion of the constitutional
implications of allowing lower court judges to investigate and sanction Supreme Court
Justices, see supra Part III.B.5.
This Essay concludes that Congress has broad, but not unlimited, authority to regulate the Supreme Court Justices' ethical conduct. The source of Congress's power is derived from the fact that Article III mandates the existence of a Supreme Court, but then leaves the creation of that Court up to Congress, triggering Congress's authority to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States." The Supreme Court came into existence through the enactment of federal legislation establishing its size and providing the dates of its sessions, among other vital matters. Ethics legislation should be viewed as part and parcel of Congress's power to establish, as well as to administer, the operation of the high Court. Congress's authority over the Supreme Court is cabined, however, by the judiciary's constitutionally enshrined judicial independence and by the need to preserve the Supreme Court's role at the head of the third branch of government. That said, Congress has considerable leeway to regulate the Justices' ethics, just as it has long exercised authority to decide other vital administrative matters for the Court.

164. U.S. CONST. art. I, § 8, cl. 18. Congress's control over the lower federal courts is further bolstered by its authority to "constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 9. But this provision of course cannot provide any constitutional authority for Congress's regulation of the U.S. Supreme Court.
Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal

Amanda Frost

I. INTRODUCTION

The laws governing judicial recusal are failing at one of their primary objectives: protecting the reputation of the judiciary. The problems with the recusal process were front and center during the recent controversy surrounding Justice Antonin Scalia's decision to sit on *Cheney v. United States District Court for the District of Columbia* despite having vacationed with Vice President Richard Cheney shortly after the Supreme Court agreed to hear the case. Whatever one's opinion about whether Justice Scalia should have recused himself, most would agree that the manner in which the issue entered public debate and then was decided—beginning with front-page news stories about the trip, followed by Congressional inquiries, editorials calling for his recusal, a rash of political cartoons, and ending with Scalia's remarkable 21-page memorandum decision defending his decision to sit on the case—injured the reputation of the judiciary.

At the end of the day, two competing versions of the Scalia-Cheney vacation emerged. Those who think Scalia should have recused himself note that he and members of his family traveled together on the Vice President's plane, at government expense, and then spent several days in an intimate setting where the two would have had ample opportunity to discuss a case in which the Vice President's reputation was at stake. Those who think recusal was unwarranted point out that Scalia and his family bought round-trip airline tickets and thus did not save any money.

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* Assistant Professor of Law, American University Washington College of Law. I wish to thank Richard Fallon, John Leubsdorf, Laura Rosenbury, John Sharretta, Brian Wolfman, and David Zaring, as well as the faculty at American University Washington College of Law, for helpful comments on drafts of this Article. I also note that I was an attorney at Public Citizen Litigation Group at the time that Alan Morrison, another Litigation Group attorney, served as counsel of record for Sierra Club in *Cheney v. United States District Court for the District of Columbia*. However, I did not participate in that litigation, and this Article reveals no confidential information and reflects no one's views but my own.

by traveling with Cheney; note that the suit was brought against the Vice President in only his official, and not his personal, capacity; and rely on Scalia’s assurances that the two never spoke about the case or even were alone together during the trip.

Central to the debate was not just whether Justice Scalia would in fact be biased in Cheney’s favor as a result of their social contact, but also whether the trip would create the appearance that he might be. The federal law’s requirement that a judge recuse himself when his “impartiality” might “reasonably be questioned” creates an objective standard for evaluating partiality, meaning that a judge should recuse himself not only in cases where he is actually biased, but also in cases where the facts and circumstances could create that appearance. Congress intended judges to recuse themselves in such cases so that “justice satisfies the appearance of justice,” which will in turn “promote public confidence in the integrity of the judicial process.” Appearances matter because the judiciary’s reputation is essential to its institutional legitimacy—that is, to the public’s respect for and willingness to abide by judicial decisionmaking. Indeed, scholars of the federal court system suggest that the public’s perception of the judiciary’s independence and integrity is the primary source of its legitimacy, and ultimately its power.

The furor over whether Justice Scalia should have recused himself from the Cheney case demonstrates that recusal law has not succeeded in protecting the judiciary’s reputation. This is not the first time that the judicial branch has been criticized for its application of the laws governing judicial recusal and disqualification. On many occasions during the past 200 years the public has focused on a judge’s questionable decision not


For an interesting discussion of the difficulty of disentangling concerns over the “appearance of justice” from actual injustice, see Note, Satisfying the “Appearance of Justice”?: The Uses of Apparent Impropriety in Constitutional Adjudication, 117 HARV. L. REV. 2708, 2710–21 (2004).

4. See discussion infra Part II.

5. The terms “recusal” and “disqualification” have slightly different meanings. “Recusal” refers to a judge’s voluntary decision to remove himself from a case, while “disqualification” refers to a statutorily mandated removal of a judge. Randall J. Littenecker, Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U. CHI. L. REV. 236, 237 n.5 (1978). However, the same standard governs recusal and disqualification under federal law. Id. The terms are used interchangeably in this Article.
to recuse and has found the laws governing that decision to be wanting.\(^6\) Nor is it likely to be the last time that a judge makes an unpopular decision to remain on a case. Even before the debate over Justice Scalia’s trip with the Vice President had died down, new concerns were being raised, both in the press and by members of Congress, about Justice Ruth Bader Ginsburg’s connections to the National Organization for Women—an entity that frequently has cases before the Court.\(^7\)

This Article does not seek to answer the specific question whether Justice Scalia should have recused himself from the *Cheney* case, but rather uses that particular incident to illuminate the method by which such decisions should be made to best further the goal of protecting the reputation of the judiciary. How should the facts and arguments in favor of or against recusal be discovered, particularly when it is usually the judge, not the parties, who has first-hand knowledge of the circumstances? Should the opinions of editorial writers, pundits, and political cartoonists be taken into account? If not, just whose opinion are judges supposed to consider when determining whether their impartiality might “reasonably be questioned”? Finally, who gets to decide whether a judge or justice must be disqualified from sitting on a case—the very judicial officer whose impartiality is being questioned, or a neutral decision-maker?

Rather than answer these process-oriented questions, the academic literature has mainly focused on reforming the substantive standard for judicial disqualification. With each new scandal or crisis has come a flurry of scholarship advocating an expansion of the grounds for disqualification,\(^8\) and Congress has often responded by amending the

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6. See discussion *infra* Part II.B.


recusal laws as suggested. However, altering the substance of the recusal standard has proven to be an ineffective method of reforming this sensitive area of judicial self-governance. As discussed in more detail below, history shows that each time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves. The very self-dealing that makes recusals necessary in the first place has operated to prevent disqualification statutes from being employed as fully and broadly as Congress intended. Moreover, even when the recusal standards are vigorously applied, the ad hoc and informal processes by which the decision to disqualify is made undermines public confidence in the judiciary.

In any case, it would be troubling to broaden the substantive standard for recusal to require judges to step down every time the public questions their impartiality. In his memorandum defending his decision to remain on the Cheney case, Justice Scalia rejected the argument that he should recuse himself solely because dozens of editorial boards and political pundits had called for him to do so. That seems right. Surely even unanimous cries for recusal by the media cannot govern such a politically sensitive question.

In part, this is because the media may not be an accurate proxy for public opinion. But even assuming that it could be demonstrated that the majority of citizens believed that a particular judge could not be impartial, it is not clear as a matter of constitutional law or even just good public policy that the judge should then automatically step aside. To give the public such control is antithetical to the role federal judges are intended to serve in the constitutional structure. Judges are given life tenure and salary protections not just so they can hold their own against the other two branches of government, but also so that they can take positions opposed by the majority of the public. As Robert Bork put it, "[f]ederal judges, alone among our public officials, are given life tenure precisely so that they will not be accountable to the people."
It is time to stop tinkering with the substantive standard for recusal, and instead to propose reforming the process by which the recusal decision is made. The solution I offer is to incorporate into recusal law the core tenets of adjudication identified fifty years ago by Legal Process theorists as essential to maintaining the judiciary’s legitimacy—tenets that legal commentators continue to cite today as serving a vital legitimating function. Chief among these are the adversarial system in which the parties present facts and arguments to an impartial judge, who then issues a reasoned explanation for her ruling.

These elements of adjudication were not invented by Legal Process theorists; rather, this school of legal scholars described the basic attributes of adjudication that had long existed and then explained why these qualities legitimized the judiciary’s counter-majoritarian role in a democracy. Even scholars who would not be described as Legal Process theorists have recognized the value of using procedures to cabin judicial discretion and improve the quality of judicial decisionmaking. In addition, recent literature has observed that the traditional forms of adjudication described by the Legal Process school are also enshrined in the Constitution’s description of the judicial role and reflect the judiciary’s core competencies vis-à-vis the other branches of government.

Furthermore, judges should be especially careful to adhere to the traditional forms of adjudication when addressing sensitive questions that will affect the reputation of the judiciary. Recusal laws are deeply concerned with protecting the integrity of the judiciary, which is an important element in maintaining the legitimacy of judicial decisionmaking. Thus, it is particularly appropriate to seek their fix in Legal Process methodology, which itself arose as a defense against the Legal Realist

(Robert Seiglino ed., 2000). Hamilton further stated that the judiciary needed life tenure to ensure that it served as a bulwark against the vagaries of popular opinion:

Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges’] necessary independence. If the power of making them was committid... to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Id. at 502.

14. See discussion infra Part III.
15. See discussion infra Part II.
16. Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 YALE L.J. 27, 32 (2003) (describing how the characteristics of the judicial role described by Lon Fuller are also incorporated into the constitutional framework and reflect the judiciary’s institutional competence).
17. See infra notes 73–75 and accompanying text.
charge that adjudication is an undemocratic, and thus illegitimate, form of decisionmaking.\(^\text{18}\)

Ironically, the recusal process is unique in the degree to which it has eschewed the basic procedural elements that have been viewed as indispensable to maintaining the legitimacy of adjudication.\(^\text{19}\) Unlike almost any other area of the law, the process by which judges decide whether to recuse themselves ignores the systems usually employed to resolve disputes in a fair and impartial manner. As a general matter, the recusal process is usually not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision. Most importantly, the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself, even though that judge has an obvious personal stake in the matter. My contention is that it is this very ad hoc and informal process, rather than any problem with the substantive standards for recusal, which has led to the recurring dissatisfaction with the law.

Part II of this Article describes the evolution of federal judicial disqualification laws in the United States. For two centuries the substantive standards for disqualification have continually been amended by Congress in response to periodic controversial decisions by judges not to recuse themselves in high profile cases. However, these laws are then narrowly construed by the judges who apply the legal standards to themselves, undermining Congressional intent to protect the reputation of the judiciary. This history demonstrates that as long as judges decide recusal questions outside the boundaries of the traditional forms of adjudication, recusal law will not serve its intended legitimating function.

Searching for a solution, Part III describes the traditional forms of adjudication lauded by Legal Process scholars, among others, as essential to legitimizing judicial decisionmaking. At the core of the adjudicatory process is the conception that the parties must frame and present their dispute to a neutral decisionmaker who makes a reasoned decision cab-

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\(^{19}\) John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) (noting that judges have more leeway to decide whether to recuse themselves than they have in other matters).
ined by existing law. This Part, which is the normative heart of the Article, explains how the presence of each of these elements legitimizes judicial decisionmaking.

Part IV describes how judicial disqualification operates in a procedural vacuum that has prevented the disqualification laws from protecting judicial integrity. To illustrate the problem, Part IV describes the process (or rather, the lack thereof) accompanying the public disclosure of the Scalia-Cheney vacation and Justice Scalia’s decision to continue to sit on the Cheney case even after the respondent sought his disqualification. Using this recent controversy as its example, this Part explains how the absence of the traditional adjudicatory procedures in recusal law undermines the reputation of the judiciary.

Part V suggests reforms that would incorporate the traditional forms of adjudication into the recusal process. Putting the theory into practice, I then return to the Cheney case and describe how the reforms suggested in this Article would have operated in the context of that case to better protect the reputation of the judiciary.

II. THE EVOLUTION OF JUDICIAL DISQUALIFICATION LAW

An impartial decisionmaker has always been considered an essential component of the Anglo-American legal system, as well as the legal systems of many other cultures. Yet despite this longstanding and

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20. See Harrington Putnam, Recusation, 9 CORNELL L.Q. 1, 1 (1923) (describing the judicial obligation to recuse for bias or interest in medieval times). The concept of recusal for interest is found in the Code of Justinian, which incorporates references to judicial recusal dating back to 530 A.D. Id. at 3, 3 n.10. Putnam quotes the following passage (in translation) from the Code of Justinian:

It is the clearest right under general provisions laid down from the exalted seat, that before hearings litigants may recuse judges. Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue joined, so that the cause go to another; the right to recuse having been held out to him ...

Id. at 3 n.10; see also Schultz, A New Approach to Bracton, 2 SEMINAR 41, 42–50 (1944) (providing a history of medieval recusal practices). Lack of judicial independence was also one of the principal grievances listed in the Declaration of Independence, which complained that the king had “made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

21. For example, Roman Law adopted in Spain in the fourteenth century provided for recusal of judges for personal hostility. Putnam, supra note 20, at 5–6. The same law applied in the Spanish-speaking republics of South America. Id For other cultural examples, see Seth E. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 CASE W. RES. L. REV. 662, 662 (1985) (“One of the most fundamental and self-evident principles of any fair
near-universal principle, the rules establishing when a judge is disqualified for interest or bias from hearing a dispute have varied widely over time and across jurisdictions. Even today in the United States, recusal in the federal courts alone is governed by three overlapping statutes and by the Code of Judicial Conduct, all of which set out different standards and procedures for recusal. So, even though all agree that judges must recuse themselves under some circumstances, no uniform rule or procedure for recusal exists.

A. The Origins of Judicial Disqualification Laws in the United States

The development of the law of judicial disqualification in the United States has followed a recognizable pattern. First, Congress sets the standard governing when judges must remove themselves from sitting on cases in which they are not able, or might not be able, to be impartial. That standard is then narrowly construed by the judges who must apply it to decide whether they themselves should be disqualified from a case. Eventually, a particularly egregious situation arises in which a judge sits on a case when most outside observers think that she should have stepped aside. The situation comes to the attention of the press, the public, and ultimately Congress, which amends the law to provide stiffer standards for recusal. And then the whole process begins anew.

Although the concept of recusal was firmly established in English common law by the time the American judicial system was being developed, it was a pale version of the standard we embrace today. The rule that “[n]o man shall be a judge in his own case” had been recognized in

system of justice is that judges must be neutral and impartial.”); R. P. Lamond, Of Interest as a Disqualification in Judges, 23 SCOT. L. REV. 152, 152 (1907) (referencing English and Scottish cultures).

22. 28 U.S.C. §§ 47, 144, 455 (1998). Sections 144 and 455 are discussed in detail below. Section 47 of Title 28 provides simply that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” Because the application of this law has been straightforward and uncontroversial, it is not included in the discussion below.


24. All states have recusal statutes as well, but again, those statutes differ as to when a judge should recuse herself and how that decision is to be made. A detailed discussion of the variations in state recusal laws is beyond the scope of this Article. For a description of some of the state practices, see generally FLAMM, supra note 9; Leslie W. Abramson, Deciding Recusal Motions: Who Judges the Judges?, 28 VA. L. REV. 543 (1994).

English law since at least the seventeenth century, but that potentially broad principle was limited in application, operating to disqualify judges from hearing only those cases in which they had a direct pecuniary interest. Blackstone squarely rejected the idea that a judge should be prohibited from hearing a case in which he might have a bias unrelated to financial gain or loss, and English courts followed Blackstone’s lead—for example, by holding that a judge could sit on a case even though he was related to one of the parties.

Federal judges have always been held to a higher standard than the bare minimum required by English common law. Within three years after the Constitution’s ratification, Congress passed the first recusal statute. The Act of May 8, 1792, allowed federal district court judges to be disqualified if they had a financial interest in the litigation or had served as counsel to either party. But other than these specific grounds for disqualification for interest, the statute did not prohibit judges from hearing cases in which they might have a bias or prejudice against or in favor of one of the parties.

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26. Dr. Bonham’s Case, 77 Eng. Rep. 638 (K.B. 1608) (Lord Coke ruled that members of a board that determined physicians’ qualifications could not both impose and personally receive fines.).

27. For example, the Mayor of Hereford was imprisoned for sitting in judgment in a cause where he had leased land from the plaintiff. Putnam, supra note 20, at 4.

28. 3 WILLIAM BLACKSTONE, COMMENTARIES *361 (“the law will not suppose the possibility of bias or favor in a judge”).


30. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278–79 (1792). That statute provided: And he is further enacted, That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, in any way, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.

31. Early standards for recusal were far more lax than they are today. Interestingly, Marbury v. Madison is an example of an early case in which a Justice chose not to recuse himself despite an obvious interest and involvement in the case. 5 U.S. 137 (1803). Chief Justice John Marshall had been the Acting Secretary of State who had failed to deliver William Marbury’s commission to serve as Justice of the Peace. Thus, in sitting on the case, Marshall judged the legality of a commission that he had authorized while a cabinet official, and which he admitted responsibility for failing to deliver. Mackenzie, supra note 25, at 1.

In reviewing the multiple instances in which Justices ran for office, negotiated treaties, and committed themselves to other non-judicial tasks, one commentator wrote: “This is not a part of our history that guides us by its ethical example; it is a part that dramatizes how different we have be-
The 1792 recusal statute was construed narrowly from its inception.\(^{32}\) In defining improper judicial "interest," courts adopted the restricted English common law standard and applied it sparingly.\(^{33}\) For example, in 1872 a federal judge presided over bankruptcy proceedings despite being a creditor of the bankrupt.\(^{34}\) Although the judge admitted that the matter raised a "question of delicacy" and put him in an "embarrassing position," he nonetheless declined to recuse himself because he was "wholly unconscious of any bias" that could "warp [his] judgment."\(^{35}\) Courts also limited the 1792 Act's requirement that a judge disqualify himself when he had previously represented a party, concluding that it applied only when the judge had been counsel in the very same case.\(^{36}\)

In the first of many amendments attempting to broaden the law's scope, the statute was altered in 1821 to mandate more generally that a judge recuse himself if he is "so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action."\(^{37}\) Congress altered the statute again in 1911, adding that a judge should recuse himself if, "in his opinion," his relationship with any attorney made it improper for the judge to sit on the case.\(^{38}\) In 1948, the provision was recodified as 28 U.S.C. § 455, where it remains today. The 1948 amendments eliminated the requirement that a party

\(^{32}\) Frank, supra note 25, at 627-28; Disqualification, supra note 25, at 740 ("Courts have tended to construe narrowly the mandatory grounds of section 455.").

\(^{33}\) Frank, supra note 25, at 627.

\(^{34}\) In re Sime, 22 F. Cas. 145, 146 (C.C.D. Cal. 1872) (No. 12,861).

\(^{35}\) Id. at 146-47.

\(^{36}\) See Frank, supra note 25, at 627 (citing Carr v. Fife, 156 U.S. 494 (1895)) ("'Has been of counsel' was soon limited by addition of the phrase 'in this case' . . . .").

\(^{37}\) Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. That statute provided:

That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the state; and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognizance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed, as were cognizable in the district court from which the same was removed.

first seek a judge’s disqualification, transforming the statute from a challenge-for-cause provision to a self-enforcing disqualification provision that places the onus on the judge to determine whether he should recuse himself.39

Judges applying the amended statute to themselves once again found ways to limit its reach. “The specific mandatory grounds for disqualification were narrowly construed” by courts.40 In addition, judges created the “duty to sit” doctrine—that is, an obligation to remain in any case to which they had been assigned absent statutory grounds for recusal—that nowhere appears in the statute.41 Theoretically, the “duty to sit” does not conflict with the statutory requirement that judges recuse themselves under certain specific circumstances. But the statutory standard for disqualification is vague, leading to ambiguous situations in which reasonable people can differ about whether the judge has a disqualifying interest. Because the legal obligation to recuse is not always clear, the “duty to sit” doctrine encouraged judges to remain on cases from which they arguably should have recused themselves.42

Early dissatisfaction with the law spurred Congress to enact a second recusal statute in 1911 that for the first time provided a means for litigants to seek disqualification of a judge not just for a conflict of interest, but also for more general bias or prejudice that might prevent the judge from serving as a neutral decisionmaker.43 Although the new law—


Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Id.

In addition to eliminating the requirement that a party seek disqualification, the 1948 amendments added the word “substantial” before interest—one of the only occasions in which Congress narrowed a recusal statute.

40. Litzeneker, supra note 5, at 239.

41. Id. Laird v. Tatum, 409 U.S. 824, 837 (1972) (noting that the courts of appeals had unanimously concluded that judges have “a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified”).

42. Idaho v. Freeman, 507 F. Supp. 706, 717 (D. Idaho 1981) (noting that “duty to sit” doctrine led to judges refusing to recuse in “difficult” cases); Litzeneker, supra note 5, at 239 (same).

43. Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1087, 1090. The statute provided:

Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not
codified today as 28 U.S.C. § 144—established a more liberal standard for recusal, it applied only to district court judges and thus could not be used to disqualify judges on the courts of appeals or the Supreme Court, as § 455 can.

In addition to creating a broader standard for recusal of trial judges, the statute sought to limit judicial discretion about when to recuse. Section 144 permits either party to force the disqualification of a federal district judge by filing an affidavit alleging facts from which the judge’s bias or prejudice reasonably may be inferred. The legislative history explains that judges are to be automatically disqualified from any case in which such an affidavit is filed, even if they disagree with the claimed basis for disqualification. Specifically, the statute provides:

Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to

less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

Id.

44. Id. The affidavit must be from the party him or herself and must be accompanied by a certificate from counsel that it has been made in good faith. Parties are limited to one affidavit per case and must file it within a specified period of time. Although as originally written the law appeared to apply to all judges, early on it was construed as applying only to trial courts. See Kimney v. Plymouth Rock Squab Co., 213 Fed. 449, 449 (1914) (stating that the statute “is so framed that evidently it does not apply to an appellate tribunal”).

45. See FLAMM, supra note 9, § 25.2.1, at 721 (“On its face § 144 appears to be a peremptory disqualification provision, and there is little doubt that it was originally intended to be one.” (footnote omitted)).

During debate over the legislation, Rep. Cullop of Indiana was asked whether district courts had discretion under the statute to determine whether affidavits were sufficient to justify their disqualification.

Mr. Cullop: No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

Mr. Cox: [S]uppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

Mr. Cullop: No, it expressly provides that the judge shall proceed no further.

46 CONG. REC. 2627 (1911).
the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter.46

Despite this clear language, judges consistently adopted a narrow definition of “bias and prejudice” and then reviewed affidavits to determine whether the allegations met that standard—a practice that essentially permitted judges to pass on the sufficiency of the allegations against them.47 The Supreme Court’s decision in Berger v. United States48 affirmed this trend, thereby “effectively eviscerat[ing] [§ 144’s] peremptory intent.”49

The defendants in Berger, some of whom were of German descent, were accused of espionage. They petitioned for the trial judge’s recusal on the ground that the judge was biased against German Americans, attesting by affidavit that the judge had stated, among other things, that “[o]ne must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty.”50 The judge had refused to recuse himself and had presided at the trial at which the defendants were convicted, and then had sentenced each defendant to twenty years in prison.51 Although the Supreme Court concluded that the trial judge could not himself decide the truth of allegations of bias, it did allow that the judge had the authority to review the affidavit and application for disqualification to ensure they were legally sufficient before being required to recuse himself.52 To be legally sufficient, the Court held that the affidavit “must give fair support to the charge of a [judge’s] bent of mind that may prevent or impede im-

47. Basset, supra note 8, at 1224, 1224 n.58 (2002) (“[D]espite the clear intentions of both the bill’s sponsor and the statute’s language, a series of judicial decisions quickly eviscerated the peremptory challenge intent behind the statute.” (footnote omitted)); Bloom, supra note 21, at 666 (“[T]he courts consistently construe the statute narrowly, which makes disqualification difficult.”); Frank, supra note 25, at 629, 626 n.98 (“Frequent escape from the statute has been effected through narrow construction of the phrase ‘bias and prejudice.’ ”); Disqualification, supra note 25, at 238–39 (noting that § 144 was limited in application by judicial decisions narrowing its scope).
48. 255 U.S. 22 (1921).
49. FLAMM, supra note 9, § 23.4.1, at 675; see also Idaho v. Freeman, 507 F. Supp. 706, 715 (D. Idaho 1981) (“Although from the face of section 21 and from its legislative history it appears that the section was designed to create a fully peremptory approach to disqualification where bias or prejudice is alleged, the United States Supreme Court chose not to give the section such a broad reading.”); Ernest J. Crof, Peremptory Disqualification of the Trial Judge, 1 LITIG. 22, 23 (1975) (stating that the Supreme Court’s decision in Berger encouraged the federal courts to construe § 144 as narrowly as possible).
51. Id. at 27.
52. Id. at 36.
partiality of judgment.” Hence, Berger gave trial judges considerably more discretion in deciding whether to disqualify themselves than Congress had intended.

Courts have freely exercised that discretion. The leading treatise on judicial disqualification states that it is now “well established that the challenged judge has the prerogative, and may even have the duty, to pass on the timeliness and legal sufficiency of the §144 challenge in the first instance.” To be successful, the affidavit must contain specific facts and circumstances demonstrating bias; allegations based on hearsay, opinion, or inferences are disregarded. Moreover, only allegations of a judge’s “personal bias” are sufficient. That is, the bias must arise from an “extrajudicial source,” and not simply develop during the judge’s participation in the case. Finally, courts strictly construe the procedural requirements of form, timeliness, and legal sufficiency against the party seeking disqualification. Altogether, the judicial gloss on § 144 has meant that even though the procedural requirements for obtaining judicial disqualification under § 144 would appear to be extremely easy to satisfy in a great many instances . . . disqualification under this statute has seldom been accomplished.

53. Id. at 33–34.
54. FLAMM, supra note 9, § 25.4, at 727.
55. See, e.g., United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (“[T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient.”); United States v. Haldeman, 559 F.2d 31, 135, 135 n.317 (D.C. Cir. 1976) (en banc) (per curiam) (noting that some courts do not permit an affidavit to contain hearsay); see also, e.g., FLAMM, supra note 9, § 25.7.2, at 733.

At least one court has criticized this standard, commenting that the policy of disallowing an affiant’s conclusions and inferences undermines the requirement that courts accept the affidavit as true. United States v. Platthorn, 485 F. Supp. 1367, 1368–69 (S.D. Fla. 1980); see also Litteneker, supra note 5, at 238 n.8 (commenting that it is “difficult to reconcile” the “no-hearsay” rule with the requirement that affidavits be accepted as accurate because the “fact that the allegation is supported by hearsay should make no difference since it need not be supported by evidence at all”).

56. See Liteky v. United States, 510 U.S. 540, 550–51 (1994) (discussing the “extrajudicial source” doctrine as it applies to both §§ 144 and 455 of Title 28 and concluding that a judge will not be required to recuse himself except in rare cases of “pervasive bias”—that is, bias “so extreme as to display clear inability to render fair judgment”). United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (stating that the alleged bias “must stem from an extrajudicial source” and not from “what the judge learned from his participation in the case”).

57. For example, the Tenth Circuit has stated that “the affidavits filed in support of recusal are strictly construed against the affiant and there is a substantial burden on the moving party to demonstrate that the judge is not impartial.” United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992); see also Winslow v. Lehr, 641 F. Supp. 1237, 1241 (D. Colo. 1986) (stating that “the procedural requirements are strictly construed”); FLAMM, supra note 9, § 25.8, at 737 (stating that “courts have generally construed § 144’s procedural requirements quite strictly”).

58. FLAMM, supra note 9, § 25.8, at 737–38 (stating that “§ 144’s disqualification mechanism has proven to be essentially ineffectual”; CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3541, at 551 (2d ed. 1992) (“actual disqualifications under [§ 144] were rare”).
B. Recent Amendments to the Judicial Disqualification Laws

In the 1970s, highly publicized controversies regarding several judges’ failures to disqualify themselves in questionable cases inspired a new round of reforms to disqualification laws.59 Among these were the revelations during Judge Clement Haynsworth’s unsuccessful 1969 Supreme Court confirmation hearings that he had sat on five different cases in which he had a small financial interest. Also influential was the Senate’s rejection of Justice Abe Fortas’s nomination to the position of Chief Justice, due in part to his habit of serving as counselor to President Johnson even while serving on the Court.60 During Senate confirmation hearings, Fortas admitted attending White House conferences concerning the most sensitive and important matters facing the administration, such as the escalation of the Vietnam War and the response to the Detroit riots.61 Even after his nomination failed, Fortas’s troubles were not over. The next year, Life magazine published an article on Fortas’s dealings with convicted financier Louis Wolfson, and Fortas was forced to resign under intense media pressure.62 Finally, Justice (now Chief Justice) William Rehnquist’s refusal to recuse himself in Laird v. Tatum63 further spurred Congress to take action.

Laird v. Tatum involved a constitutional challenge to the Army’s surveillance of civilian political activity. While serving in the Department of Justice, Rehnquist had appeared as an expert witness at Senate hearings on that subject, and he had commented on the application of the law to the facts of the Laird case, which was then pending in a lower court. After losing in the Supreme Court 5-4, the respondents in Laird filed a motion asking that Rehnquist recuse himself and that the case be reheard with eight Justices.

Justice Rehnquist refused to recuse himself, and he took the unusual step of issuing a memorandum explaining why.64 He stated that in the

59. Idaho v. Freeman, 507 F. Supp. 706, 717 n.12 (D. Idaho 1981); Flamm, supra note 9, § 23.6.1, at 678–79; Leibsdorf, supra note 19, at 245 n.45.
60. Freeman, 507 F. Supp. at 717 n.12 (“Because of the problem raising from these cases a move to amend section 455 began to grow.”); Mackenzie, supra note 25, at 67–94 (citing as examples of the controversies leading to § 455’s amendment the indictment of Seventh Circuit Judge Otto Kerner, the Senate’s rejection of Justice Abe Fortas’s nomination to Chief Justice, and the Senate’s rejection of Judge Clement Haynsworth’s nomination to the Supreme Court).
62. Id. at 71–76. For a more detailed discussion of these events, see Laura Kalman, Abe Fortas: A Biography 370–73 (1990).
63. 409 U.S. 824 (1972).
64. In the first paragraph of that memorandum, Justice Rehnquist commented that he was the first Justice to issue such an explanation for a recusal decision. Id. at 824.
course of preparing his Senate testimony he was given some information about the Laird case, but he insisted that he had “no personal knowledge” of the case.65 Accordingly, Rehnquist concluded that he was not required to recuse himself under 28 U.S.C. § 455 because he had not been “of counsel” in the case or even substantially involved in it.66 Nor did he think his public statements and opinions on the law should lead him to recuse himself under § 455’s discretionary provision.67

Justice Rehnquist admitted that the question whether he should recuse is “a fairly debatable one,” and he “concede[d] that fair-minded judges might disagree about the matter.” 68 Nonetheless, he came down on the side of remaining on the case and cast the decisive vote in a decision that resolved the case in the manner consistent with his previously articulated views that the Army’s intelligence gathering was constitutional. Key to his decision was his belief that he had a “duty to sit” in any case in which he did not find clear grounds for recusal.69 Rehnquist noted that the courts of appeals had unanimously concluded that federal judges “ha[ve] a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified,” and he found this duty to be even more compelling in the Supreme Court, where there is no substitute for a recused Justice, and where recusal would lead to the possibility of affirmance by an equally divided Court.70

Reacting to these controversies, the American Bar Association appointed a special committee charged with revising the Canons of Judicial Ethics to provide more guidance for judges about when to recuse themselves. The Committee developed a new canon, Canon 3C, that fleshed out the standard for judicial disqualification.71 Most notable was the Canon’s creation of an objective “appearance of justice” standard that required a judge to recuse himself whenever “his impartiality might reasonably be questioned.” 72

In 1974, Congress followed the ABA’s lead and amended § 455 to broaden and clarify the grounds for judicial disqualification,73 using the ABA’s Canon 3C as its model.74 Congress explained that the goal of the

65. Id. at 827.
66. Id. at 828.
67. Id. at 830.
68. Id. at 836–37.
69. Id. at 837
70. Id.
71. MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1990).
72. Id.
legislation was to “promote public confidence in the impartiality of the judicial system”—confidence that had been shaken by the Haynsworth, Fortas, and Rehnquist controversies.

Like Canon 3C, the amended § 455 established an objective “appearance” standard that replaced the original § 455’s subjective standard permitting a judge to reference his own “opinion” when deciding whether to recuse himself. In the House Report, Congress stated explicitly that it intended the objective standard to eliminate the “so-called ‘duty to sit.’” In addition, the amended version of § 455 defined a financial interest as any legal or equitable interest, “however small,” thereby eliminating the vague “substantial interest” requirement that had been such a problem for Judge Haynsworth. The new § 455 also addressed the situation faced by Justice Rehnquist in *Laird v. Tatum* by requiring that a judge or Justice be disqualified if he or she had expressed an opinion concerning the merits of a case while serving as a government lawyer. Another important change was the inclusion in § 455 of the more general “bias and prejudice” standard that had previously been found only in § 144. Because § 455 applies to all Justices, judges, and magistrates, and not just to district court judges as § 144 does, these broad substantive standards for recusal suddenly had much wider application.

C. Judicial Disqualification Laws Today

Today, §§ 455 and 144 together govern disqualification in the federal courts. Although the two provisions contain different standards and procedures, they substantially overlap, and the relationship between the two is confusing.

75. *Id.* As Justice Scalia subsequently described the new standard, “what matters is not the reality of bias or prejudice but its appearance.” *Liske v. United States*, 510 U.S. 540, 548 (1994).


79. *Id.* at 1609.

80. *Id.*

81. A third recusal statute provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” 28 U.S.C. § 47 (2009). This statute is straightforward, narrow in application, and has been implemented without problem, and thus will not be discussed further.

As some courts have commented, § 455 “does not provide the procedure for its enforcement.” Judges are expected to recuse themselves under § 455 sua sponte. If they do not, parties have to invent the procedures for seeking disqualification as they go along. Judges also have no statutory guidance as to how to analyze and resolve the question of whether they are too biased or interested in the subject matter to sit on the case.

In contrast, § 144 does provide some procedures to guide litigants. That statute requires the filing of a timely motion to disqualify along with an affidavit and a certificate of good faith by counsel. But, as discussed above, § 144 did not explicitly provide the standards by which courts were to review such motions, and courts have used this procedural gap to give themselves a great deal of leeway when reviewing motions and affidavits for “legal sufficiency.”

Courts continue to narrowly interpret the amended statutes. In Liteky v. United States, the Supreme Court again read an “extrajudicial source” requirement into § 455, holding that in most cases a judge could not be disqualified based on views derived from her participation in the legal proceedings. Yet, as the concurrence pointed out, nowhere in § 455 did Congress indicate that the source of judicial bias or prejudice mattered when determining whether the judge was, or appeared to be, so biased as to create the appearance of partiality. Consistent with Liteky, courts of appeals rarely order disqualification when the basis for a claim of bias occurred during the legal proceeding itself. For example, the Tenth Circuit upheld a district court judge’s refusal to recuse himself despite his pretrial statement that “the obvious thing that’s going to hap-
pen... is that [the defendant's] going to get convicted..." 89 The Tenth Circuit first noted that the judge had not based his opinion on knowledge gained outside the courtroom and then concluded that the judge's comment "does not show that the judge could not possibly render fair judgment." 90

The duty-to-sit doctrine also remains alive despite Congress's expressed intent to abolish it. In 1993, seven Supreme Court Justices issued a "Statement of Recusal Policy" announcing their views regarding recusal when a relative was involved in a case before them. 91 In the course of describing their policy for recusal in such cases, these Justices declared more generally that they should not recuse themselves "out of an excess of caution" because "[e]ven one unnecessary recusal impairs the functioning of the Court." 92 This policy reflects the unique nature of the U.S. Supreme Court, in which a recusal would create the possibility of a tie vote that would leave a legal issue unresolved. 93 In his memorandum defending his decision to sit on the Cheney case, Justice Scalia again noted this problem and commented that a decision to recuse is "effectively the same as casting a vote against the petitioner." 94 As the Statement of Recusal Policy and Scalia's memorandum demonstrate, the duty-to-sit doctrine continues to guide recusal decisions by at least some of the Justices of the Supreme Court. 95

Although they do not face the same personnel problem, circuit courts have also made statements suggesting that they continue to adhere to the duty-to-sit doctrine. For example, the Second Circuit recently declared that "where the standards governing disqualification have not been met,

89. United States v. Young, 45 F.3d 1405, 1414 (10th Cir. 1995).
90. Id. at 1415.
91. See 1993 STATEMENT OF RECUSAL POLICY, available through the Supreme Court clerk's office. The seven Justices who signed the Statement of Recusal Policy—Justices Rehnquist, Stevens, Scalia, Thomas, O'Connor, Kennedy, and Ginsburg—all had "spouses, children, or other relatives within the degree of relationship covered by 28 U.S.C. § 455 who are or may become practicing attorneys." Id.
92. Id.
93. However, the Court was originally established with an even number of Justices (six), and it has sat for significant periods during its history with an even number of Justices—suggesting that tie votes are not of overriding concern to Congress. See Bias in the Federal Courts, supra note 8, at 1446-47. Finally, certain Justices frequently recuse themselves from cases because they own stock in one of the parties. See generally Tony Mauro, Furor Over Scalia-Cheney Trip Casts Light on Murky World of Recusals, 175 N.J. LAW J. 732 (2004). If avoiding ties was truly a priority, these Justices would have divested themselves of the stock that frequently requires their recusal.
95. Justice Ginsburg also cited the problem of tie votes in her response to a call by thirteen members of Congress for her to withdraw from all future cases concerning abortion because of her affiliation with NOW Legal Defense Fund. See GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases, L.A. TIMES, Mar. 19, 2004, at A18.
disqualification is not optional; rather, it is prohibited. As one commentator observed, "[d]espite the clarity of the congressional purpose to eliminate the duty to sit, many courts have continued to find some version of such a duty."

D. Calls for Reform of Judicial Disqualification Laws

As a result of the controversy over Justice Scalia’s refusal to recuse himself from the Cheney case, judicial disqualification laws are again under scrutiny. If history is any guide, this public attention may lead to a new round of amendments in an effort to ensure that the laws serve the intended goal of protecting the judiciary’s reputation and serving the litigants’ interests.

Calls for reform can already be heard. The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct is currently considering revisions to the Code, and several of the comments it has received refer explicitly to the Scalia-Cheney trip and suggest changes to the rules to address similar future situations.

Although Congress has not taken any specific action yet, members have called for amendments to the disqualification laws in the wake of the Scalia-Cheney controversy. On February 6, 2004, Reps. John Conyers, Jr. and Howard L. Berman, two Democrats on the House Judiciary Committee, called for hearings into “possible gaps in federal laws” that would allow Justice Scalia to sit on a case after vacationing with one of the litigants. In a letter to the Committee’s Republican leaders, the Democrats complained that “the recusal laws contain no process for potential conflicts to be reviewed by other judges.” In March 2004, Sen. John Kerry, the Democratic presidential nominee, issued a statement in response to the controversy. He asserted that “[t]here is absolutely no question that when judges accept vacations and gifts from the parties be-

96. In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001).
97. Litenecker, supra note 5, at 241 n.26 (citing cases); see also FLAMM, supra note 9, § 20.10.2, at 615–18;
fore them it erodes public trust in the courts.” Thus, it is possible that Congress will seek to amend judicial recusal laws again in the near future.

E. Lessons to Be Learned from Historical Experience

That judicial recusal laws are amended by Congress in response to periodic crises does not make them unusual; laws often arise from various public scandals, catastrophes, or other high-profile events that prod Congress into action. Reform of the recusal statutes differs, however, because those amendments are designed to limit the authority of the very institutions (and individuals) responsible for construing them. Because judges apply the statutes to themselves in cases in which they may have an improper personal interest, they have an incentive to narrowly construe them. Thus, despite Congress’s best efforts to craft disqualification laws that protect the reputation of the judiciary, the laws are inevitably narrowed through interpretation to the point where they no longer serve the intended purpose.

The recusal statutes will fail to protect the reputation of the judiciary as long as they are implemented in an ad hoc fashion, without the procedural protections that normally govern adjudication. For as long as they have existed, the recusal statutes have operated in a procedural vacuum. The laws do not provide for appropriate disclosure of relevant facts, an adversarial presentation of the issues, or a neutral decisionmaker who issues a reasoned opinion on the question of disqualification. For the reasons discussed in Part III, without these procedural protections, the judicial recusal laws will not fulfill their goal of promoting public confidence in the impartiality of the judicial system. If these protections were in place, however, the laws might finally be interpreted as Congress intended, and applied in a manner that strengthens public confidence in the judiciary.

Perhaps it should not be surprising that Congress has hesitated to dictate procedures for courts to follow in such a sensitive area as judicial disqualification. The legislative and executive branches may feel that it is inappropriate to dictate the minutiae of procedures to be followed when litigants seek to remove a judge from a case, preferring to leave it

101. See Fong v. Am. Airlines, Inc., 431 F. Supp. 1334, 1335 (N.D. Cal. 1977) (noting that although “[s]ection 455 provides a substantive test for disqualification, it does not provide the procedure for its enforcement”).
to the judiciary to clean its own house. 102 And Congress has good reason to tread lightly in this area. Whenever Congress regulates the courts, it must keep in mind the need to maintain the separation of powers and to protect the judiciary's independence. In accordance with these principles, judges should not be forced to recuse themselves simply because they have expressed opinions and preferences that are at odds with those of the public or even just the parties before them. 103

Unfortunately, the judiciary has failed to step in and fill the procedural void left by Congress. Judges applying disqualification laws to themselves have no incentive to formalize the process, just as they have no interest in broadly construing the substantive recusal standards. Judges who wish to maintain collegial relations with one another hesitate to set in stone recusal procedures that might be viewed as disrespectful of their fellow judges. This concern is particularly evident at the U.S. Supreme Court, where the nine active Justices must sit on all cases together and seek to forge coalitions from term to term. Perhaps for this reason, the Justices have established the practice of referring recusal motions to the very Justice whose impartiality is being questioned, rather than deciding the issue collectively. 104

In conclusion, the lesson learned from the troubled history of judicial disqualification is that better procedures, rather than stricter substantive standards, are needed to govern the law's application. Whether those procedures are imposed by Congress, by professional associations such as the American Bar Association, or by the judiciary itself is not significant. What matters is that procedures be developed so that disqualification laws fulfill their goal of promoting public confidence in the justice system.

III. PROCEDURE AS A SOURCE OF JUDICIAL LEGITIMACY

As described in Part II, one of Congress's main objectives in enacting judicial disqualification laws is to promote public confidence in the

102. Cf. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862 (1988) (noting that § 455 does not prescribe any particular remedy for its violation and commenting that "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation"); Mauro, supra note 93 (describing Congress's reluctance to regulate the Supreme Court).
103. See Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201, 1202 (1992) (discussing the "confusion about bias, impartiality, knowledge, and experience" in the context of selecting judges and juries).
104. See infra note 207–09 and accompanying text.
federal court system by ensuring that judges are not only impartial in fact, but also that they maintain the appearance of impartiality. The judiciary has more riding on its institutional reputation than the other two branches of government. As Alexander Hamilton observed, the judicial branch, possessing “no influence over either the sword or the purse,” must take care to foster the public trust that serves as the main source of its authority. The Supreme Court has also explicitly recognized the importance of maintaining the trust of the people, declaring the need to “preserve both the appearance and reality of fairness,” which “generates the feeling, so important to a popular government, that justice has been done.”

The recent controversy over whether Justice Scalia should have recused himself from the _Cheney_ case exemplifies how thoroughly recusal laws have failed to protect the reputation of the judiciary. Although reasonable people can differ about whether Justice Scalia should have recused himself, most would agree that the process by which the issue was raised and decided—through front page articles, outraged editorials, political cartoons, late-night talk show host humor, criticism by members of Congress, and, finally, a defensive memorandum by Scalia justifying his decision to remain on the case—has had a negative effect on the public’s perception of the judiciary. And as described in Part II, the _Cheney_ case is just one of a long series of cases in which the debate over recusal has itself impugned the reputation of the judiciary, and it is unlikely to be the last.

Some commentators have sought to put an end to the controversy by advocating an expansion of the grounds for judicial disqualification.  

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105. See discussion supra Part II.A (describing Congress’s intention to protect the reputation of the judiciary through judicial disqualification laws).
106. _The Federalist_ No. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974); _see also_ Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).
107. _See_ Bloom, _supra_ note 21, at 663 (“Public confidence is essential to effective functioning of the judiciary because, ‘possessed of neither the purse nor the sword’ the judiciary depends primarily on the willingness of members of society to follow its mandates.”).
109. See discussion _supra_ Part II.E.
110. See, e.g., Bassett, _supra_ note 8; Frank, _supra_ note 8; Leitch, _supra_ note 8; _The Standard_,}
Congress has often followed these suggestions; Congress has amended disqualification laws on five occasions, each time broadening their scope.\textsuperscript{111} As described in Part II, legislative solutions have proved ineffective because judges have interpreted the laws narrowly when applying them to themselves.\textsuperscript{112} In any case, it is not clear that the substantive standards for disqualification should be lowered so far as to force judges to withdraw from cases simply because editorial writers or late-night talk show hosts suggest that they do so. The question whether a judge can sit on a case should not be decided solely in the court of public opinion. Indeed, to require judges to remove themselves whenever they are the subject of criticism would be antithetical to the judiciary’s role as a bulwark against the vagaries of public opinion.\textsuperscript{113}

To improve the law of judicial disqualification so that it serves to protect the judiciary’s reputation, it is first necessary to identify the sources of the public’s faith in the judiciary that the laws seek to preserve. Unelected judges regularly countermand the decisions made by elected officials, and yet for the most part the public abides by, and respects, the judiciary as an institution. In other words, judicial decision-making is viewed as legitimate, despite its countermajoritarian nature. Volumes have been written seeking to locate the source of the public’s respect for, and adherence to, countermajoritarian judicial decisionmaking.\textsuperscript{114}

Political scientists and legal theorists have recognized that procedures serve an important legitimating function for institutions in which the decisionmakers are appointed and/or given life tenure rather than elected and accountable to the constituents they govern.\textsuperscript{115} Probably the

\textsuperscript{111} See discussion supra Part II.B.
\textsuperscript{112} See discussion supra Parts II.B-E.
\textsuperscript{113} See supra note 13.
\textsuperscript{115} BORK, supra note 13, at 2 (“The democratic integrity of the law . . . depends entirely on the degree to which its processes are legitimate.”); John R. Allison, Ideology, Prejudgment, and Process Values, 28 NEW ENG. L. REV. 657, 682 (1994) (describing how “[m]any procedural elements found in judicial and administrative adjudication perform a surrogate legitimating function”);
most influential of these schools of thought in law has been Legal Process theory—a procedurally oriented view of what it is courts should do that was formulated and presented by Henry Hart, Albert Sacks, and Herbert Wechsler in Hart and Wechsler's casebook The Federal Courts and the Federal System and in Hart and Sacks's equally influential book The Legal Process. Legal Process scholarship responded to attacks on the judiciary by Legal Realists by defining the "boundaries and purposes" of federal judicial power in an effort to demonstrate that judicial decisionmaking is both "legitimate and restrained."

Legal Process theorists were certainly not the first to turn to procedure as a source of judicial legitimacy, and their scholarship has spawned many second- and third-generation process theorists who have elaborated upon and developed their ideas. While much remains contested about the sources of judicial legitimacy, most participants in the discussion agree on several essential procedural components of adjudication that legitimize it as a method of decisionmaking in a democratic society. As described in detail below, I extract from this literature the following five procedural components of adjudication that are universally considered essential to the legitimacy of the final product: (1) litigants,


Some of these scholars deeply disagree with one another about the role of procedure in legitimating judicial decisionmaking. For example, Professor Peters disagrees with Professor Bork's view that the judiciary must follow certain procedures to avoid engaging in the type of "law-declaring" that only the legislature legitimately may do. Professor Peters argues instead that appropriate procedures can legitimate adjudicative lawmaking. However, for the purposes of this Article the relevant point—and one on which all these scholars agree—is that adjudicative procedures legitimate judicial decisionmaking.

116. The influence and longevity of Legal Process methodology has been frequently remarked upon. See, e.g., Amar, supra note 18 at 693–95; Fallon, supra note 18, at 970–71.


119. See supra note 18 and accompanying text.

120. Amar, supra note 18, at 694; see also Fallon, supra note 18, at 964 ("Most of us, Hart and Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions.").

121. See Amar, supra note 18, at 693 (noting that many of the ideas and perspectives enunciated in Hart's, Wechsler's, and Sacks's work "had been gestating for years"); Fallon, supra note 18, at 963 ("Taken individually, most of Hart and Wechsler's doctrinal and policy questions were not original even in 1953. Similar questions have been raised at least since Congress addressed the question of how to allocate judicial power in the first Judiciary Act.").

122. See, e.g., RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
not courts, initiate disputes; (2) the disputes are presented through an adversarial system in which two or more competing parties give their conflicting views; (3) a rationale must be given for decisions; (4) decisions must refer to, and be restricted by, an identifiable body of law; and (5) the decisionmaker must be impartial. 123 Although scholars of the federal court system may not agree on why these particular procedural elements legitimize adjudication, the list is nonetheless a generally accepted description of the attributes of judicial decisionmaking considered essential to good (i.e. legitimate) adjudication. 124

Furthermore, not only are these procedural elements generally agreed by scholars to be essential to judicial legitimacy on a theoretical level, they also are justified by reference both to the institutional competences of the courts as well as to the Constitution's articulation of the scope of judicial power. These procedures are thus legitimating not only because they provide a theoretical justification for the exercise of judicial power in a democracy, but also because they serve to further the Framers' in-

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123. See discussion infra Part III.A.
124. See, e.g., Allison, supra note 115, at 682 ("Procedures that require published rules, party participation, reasoned decisions, and communicated rationales have the intended and actual effect of enhancing public perceptions of legitimacy."); Owen M. Fiss, The Supreme Court 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 13–14 (1979):

The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: (a) Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore. (b) Judges do not have full control over whom they must listen to. They are bound by rules requiring them to listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

The judge is required to listen and to speak, and to speak in certain ways. He is also required to be independent. This means, for one thing, that he not identify with or in any way be connected to the particular contestants. He must be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision.

See also Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. Cal. L. Rev. 1307, 1341–42 (2001):

Ideally, the adversary system allows each contending party to argue his or her case to an open-minded and disinterested judge who will reach a decision only after having heard and properly weighted all the relevant evidence presented as well as after having duly considered the conflicting interpretations of relevant legal precedents advanced by each of the contenders. . . . At the very least, [s]uch a judge promotes the rule of law by reaching an unbiased (in the sense that he or she has no reason to favor any party before the court over any other), legally-grounded, and procedurally fair decision that, by and large, should make dispute resolution through law preferable to other alternatives for a vast majority of the citizenry.
tended role for the courts in our constitutional structure.

Finally, the list of procedures described below is not merely normative or aspirational, but also descriptive; most disputes are presented to and decided by judges in accordance with these procedures. One of the few exceptions is the process (or lack thereof) that governs judicial recusals. As discussed in Part IV, recusal law’s abandonment of these traditional forms of adjudication has led to its failure to perform its intended legitimating function.

A. Litigants Initiate and Frame Disputes

Federal courts do not initiate litigation. They wait for third parties to bring conflicts to them for resolution. In the U.S. model of adjudication, courts do not have agenda-setting powers and do not conduct their own investigations. Instead, they are confined to responding to the disputes initiated by injured parties.

As Professor Christopher Peters has observed, one source of adjudicative legitimacy comes from the participation of the litigants in framing and presenting disputes for courts to resolve. By participating in the judicial process, the parties—winner and loser alike—have consented to the outcome, and consent of the governed has always been viewed as essential to legitimizing forms of government decisionmaking. And solely from an instrumental perspective, participation of the bound parties improves decisionmaking by ensuring that those with the most to gain (and lose) have provided their insights and views to the decisionmaker.

That courts must wait for parties to bring disputes to them is fitting in light of the judiciary’s institutional limitations. The third branch does not have the manpower and resources needed to investigate and commence disputes. Judges are generalists, meaning that they do not have the expertise to identify and investigate specific societal problems in

125. Christopher J. Peters, Persuasion: A Model of Majoritarianism at Adjudication, 96 NW. U. L. REV. 1, 20 (2001) (observing that a “court case is initiated not by the court but by one of the parties,” and noting that it is the participation of the litigants that lends legitimacy to judicial decisionmaking).

126. Id.

need of adjudication.\textsuperscript{128} Furthermore, because federal judges are not elected and have no constituency they can plausibly claim to represent, they lack the mandate to create their own agenda. Thus, the affected parties are usually the best-situated to bring forward and frame their disputes for judicial resolution, because they have firsthand knowledge of the problem at issue and can best decide when, if, and how to frame that dispute.\textsuperscript{129}

The Framers intended to limit judges to resolving disputes raised by others, and that view is reflected in Article III of the Constitution. Judges must wait until a “case” or “controversy” is brought to them; nothing in the text of Article III empowers courts to manufacture cases for themselves.\textsuperscript{130} The Framers did not foresee the need for the legions of judges that would have been required were the judiciary to be assigned the task of investigating cases and initiating litigation. Accordingly, the Constitution did not mandate the creation of hundreds of new judicial officers, but rather vested the judicial power in “one Supreme Court” and “in such inferior courts as the Congress may from time to time ordain and establish.”\textsuperscript{131}

Although not explicitly prohibited by the Constitution’s text, it would be constitutionally suspect for judges to take over the investigation and prosecution of cases. First, such tasks would interfere with the ability to carry out the primary task of judging; second, engaging in these activities would impermissibly mix the judicial function with that of the executive;\textsuperscript{132} and third, permitting courts to choose which issues to address and when to address them would vest too much power in the hands of the government. The Framers preferred that the people retain the ability to choose which cases to bring to the courts for resolution.\textsuperscript{133}

\begin{footnotes}
\textsuperscript{128} See generally JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 31–36 (1938).
\textsuperscript{129} For discussion of the judiciary’s institutional limitations in this regard, see Malott, supra note 16, at 60.
\textsuperscript{130} Id. at 64–65.
\textsuperscript{131} U.S. CONST. art. III, § 1.
\textsuperscript{132} Alexander Hamilton explicitly discussed the danger to liberty if the judicial branch were to take on the powers of the other branches as well:
    For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’ It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . .

THE FEDERALIST NO. 78, at 497 (Robert Scigliano ed., 2000) (quoting 1 BARON DE MONTESQUIEU, SPIRIT OF LAWS 181 (1748)).
\textsuperscript{133} See Malott, supra note 16, at 66–67 (describing the Framers’ mistrust of the judiciary and relatively greater confidence in litigants and juries to play key roles in the judicial process).
\end{footnotes}
B. Adversarial Presentation of Disputes

The adversarial presentation of disputes is another basic component of the traditional adjudicatory model.\textsuperscript{134} Under an adversary system, opposing parties have an opportunity to present their conflicting arguments to a relatively passive decisionmaker. In his seminal article “The Forms and Limits of Adjudication,” Lon Fuller declared that the parties’ responsibility for presenting “reasoned arguments” in support of their respective positions was the “essence” of adjudication.\textsuperscript{135} It is the parties who conduct investigations, choose which issues to pursue in litigation, and prepare and present arguments and evidence to the factfinder.\textsuperscript{136} Although courts will occasionally raise issues or arguments on their own, these instances are rare and usually have to be justified by other limitations on judicial power, such as the court’s inability to decide questions outside of its jurisdiction or its interest in avoiding pronouncements on constitutional questions. This system is in sharp contrast to the inquisitorial systems of many other countries, in which state agents control litigation.\textsuperscript{137}

Party control over case-presentation is legitimating for much the same reasons that party control over case-initiation is legitimating. Again, it is important symbolically that the parties who will be bound to the decision have a role in persuading the decisionmaker of their point of view.\textsuperscript{138} And the fact that the litigants will be the most directly affected by the decision has instrumental value, for it improves the quality of their

\textsuperscript{134} See, e.g., Ellen E. Sward, Values, Ideology, and the Evolution of the Adversary System, 64 IND. L.J. 301, 301 (1989) (“[T]he hallmark of American adjudication is the adversary system.”).

\textsuperscript{135} Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 364-65 (1978).

\textsuperscript{136} Peters, supra note 125, at 21 (commenting that “judges in our model of adjudication typically do not rely upon evidence outside the record, or engage in their own investigative efforts, or even rely on legal arguments other than those advanced by the parties”).

\textsuperscript{137} Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 380-82 (1982). Mirjan Damaska has observed that inquisitorial legal systems tend to spring from political regimes that are less concerned with citizen participation in government decisionmaking. Mirjan R. Damaska, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 154-73 (1986). That the United States has adopted a litigant-centered rather than judge-centered model of adjudication thus speaks not only to the qualities the citizens of the United States value in adjudication, but also the qualities they value in government decisionmaking more generally. See also Peters, supra note 125, at 27 (“Adjudication in the Anglo-American common-law tradition thus draws legitimacy from the same source as majoritarian political decisionmaking in the western democratic tradition. That source is the meaningful participation of the governed in the making of decisions that will bind them.”).

\textsuperscript{138} Fuller, supra note 115, at 19 (stating that the adversary model respects the dignity of the individual by affording those “affected by the decisions which emerge . . . [a] formally guaranteed opportunity to affect those decisions”)


participation and thus the quality of the final decision. As Professor Peters has argued, the role of the parties in framing and arguing their own cases serves a legitimating function similar to that of reasoned deliberation in the legislative sphere. Participation by the interested parties ensures that “a greater diversity of interests [are] represented in the decisionmaking process” than would occur were the court to decide without litigant input, just as deliberation adds voices and perspectives to Congress’s decisionmaking. By bringing in the most interested parties to make arguments and present facts, the process of adjudication assures that the decisionmaker has as much relevant information as possible before her when making a decision.

Institutionally, American judges are not well suited to engage in factual investigations of social problems because they lack the resources and the public mandate to do so. Courts do not have large staffs to gather and sift through evidence for them and, even if they did, they do not make good representatives of a constituency because they do not engage in dialogue with their constituents or otherwise attempt to remain in tune with the wishes of the general population that they serve.

Finally, limiting the judicial role to that of decisionmaker, rather than investigator, is in keeping with the Framers’ intent that the judiciary be separate from the executive, and that the people maintain power and control over adjudication.

C. Reasoned Decisionmaking

Reasoned decisionmaking—“the explicit act of offering a justification or explanation for the result reached”—is a hallmark of the legal process. In his article “Giving Reasons,” Professor Frederick Schauer observed that the practice of providing reasons for legal decisions is “central to what makes the legal enterprise distinctive.”

140. Peters, supra note 125, at 356.
141. Id. at 358.
142. See discussion supra Part II.A.
144. HART & SACKS, supra note 118, at 143–52; Fallon, supra note 18, at 966 (“Reason and reasoned elaboration are the stuff of the judicial process.”).
145. Schauer, supra note 143, at 634.
decisions is widely viewed as a vital source of legitimacy for judicial decisionmaking. As Professor Schauer noted, the need to give reasons is a sign of the weakness of the decisionmaker. Those in positions of unquestioned authority over subordinates—such as teachers, army officers, and parents—do not need to explain their decisions before their subordinates will comply with their commands. Only those whose authority is more tenuous must justify their rulings. As Schauer puts it, "reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important."

That the judiciary ordinarily gives reasons for its conclusions is thus both a sign of its weakness as well as a means of bolstering its legitimacy. Congress, which gains its legitimacy through periodic elections, enacts statutes in the form of commands without justification. The judiciary cannot act with the same assumption that its orders will be followed without question. Rather a judge must explain and justify his

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146. Peters, supra note 125, at 20–21; Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 16 (1999); Martha J. Dragich, Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Decisions Pose a Greater Threat?, 44 AM. U. L. REV. 757, 775–76 (1995) (quoting former D.C. Circuit Judge Patricia Wald’s statement that reasoned opinions “lead decisions legitimacy, permit public evaluation, and impose a discipline on judges,” and concluding that reasoned decisions “thus promote public confidence in the integrity of the courts”); Resnik, supra note 137, at 378 n.13 (“When ruling, judges are obliged to provide reasoned explanations for their decisions . . . .”); Owen M. Fiss, The Forms of Justice, 93 HARV. L. REV. 1, 42 (1979); Fuller, supra note 135, at 367; Alexander M. Bickel, Is the Warren Court Too “Political”? N.Y. TIMES, Sept. 25, 1966, § 6, at 30 (“The Court must be able to demonstrate by reasoned argument why it thought the action right or necessary . . . . An action for which there is no intellectually coherent explanation may be tolerable . . . but it is for the political institutions to take, not for the Court.”).

147. Schauer, supra note 143, at 637.

148. Id.

149. Of course, reasons do not always accompany judicial decisions. Motions are often decided without explanation, and the Supreme Court’s denials of certiorari almost never come with reasons. However, the fact that these more marginal decisions are issued without justification only serves to illustrate that the norm for final, binding decisions on the merits of a question of law are usually accompanied by an explanation.

Appellate courts increasingly issue summary affirmances without decision. However, cases unaccompanied by a written decision are usually unanimous decisions on questions that the court has addressed and previously answered with a reasoned explanation. And yet even in such cases the practice has been criticized in part because it undermines judicial legitimacy. See, e.g., Anne Coyle, A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals, 72 FORDHAM L. REV. 2471, 2491 (2004); Dragich, supra note 146, at 787, 797–802.

150. Schauer, supra note 143, at 658 ("When decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they ema-
decisions, which serves the dual purposes of proving that the judge has heard the litigants’ arguments and demonstrating to the loser that the decision was not arbitrary or based on illegitimate preferences.  

In addition, reasons legitimize judicial decisions by committing the court to a general principle that controls a category of cases, which forces it to look beyond personal biases regarding the parties or emotional reactions to the facts in the specific case before it. “To provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.” Reason-giving thus serves as a constraint on judicial power, cabining judicial discretion through the act of articulating general principles that will serve to bind the judge in future cases. A related benefit is that explaining and justifying judicial decisions forces the decisionmaker to slow down, guarding against a gut reaction to a case or a party that cannot be justified by a general principle. Finally, because courts publicly declare reasons for their decisions, they cannot deviate too far from the mores and values of the community they serve. For example, a federal judge could not justify the outcome of a case simply by citing the race of the litigants, because race is not a legitimate ground for decisionmaking by the United States government.

Institutionally, courts are well suited to the task of reasoned decisionmaking. The act of giving a reason for a decision is best done by one or a small number of individuals, rather than a large group that might find it difficult to reach a consensus even on an outcome, and nearly impossible to articulate a single rationale for that outcome. Reasoned decisionmaking is also a valuable means of communication with the other

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151. Melvin Aron Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 HARV. L. REV. 410, 412 (1978). In describing and defending the Legal Process methodology, Professor Richard Fallon explained “[w]hat seems crucial to the notion of reasoned elaboration is that the value judgments occur within a process of legal reasoning, rather than being imposed from the outside as a judge’s personal, dictatorial preferences.” Fallon, supra note 18, at 973 n.85.
152. Schauer, supra note 143, at 652–53.
153. Id. at 641.
154. Id. at 656–57.
two branches of government about the acceptable limits of their powers. For example, Congress will know by reading a court's decision striking down a statute whether it is free to amend the law to overrule that decision or whether the Constitution itself prohibits the goal Congress wished to accomplish. By giving reasons, courts also set out a road map for litigants and judges to follow in the future. Citizens can better accord their conduct with the law when they are given reasons for a particular decision in a particular case.

Explanations are essential for courts to perform the tasks assigned to them under the Constitution. Reason-giving is necessary to "reconcile[]" "clashing" statutes, as courts must do to fulfill their role as "interpreters of the law." 135 Likewise, the Framers did not intend courts to strike down laws enacted by Congress without first explaining how they conflict with the Constitution. 136 Finally, the multi-tiered structure of the federal courts systems require reasoned decisionmaking so that appellate courts can review lower courts' pronouncements.

D. Reference to Governing Body of Law.

Yet another core principle of adjudication is that judges are not to decide cases based solely on their own personal views, but rather must constrain themselves to applying and interpreting a recognized body of law. 137 Chief Justice John Marshall first articulated that limitation on federal judicial power in Marbury v. Madison. 138 "[C]ourts may act only when there is law, based on precedent, to apply. Courts do not possess authority to assert their own will." 139 The view that judges are con-

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156. Id. at 500.
157. See Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 3 (1989) ("The notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems."); Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 Cal. L. Rev. 1457, 1465 (2003) ("Judges are supposed to decide cases according to the law, and this practice may be essential to the legitimacy of the judiciary."); Nicholas S. Zeppos, Judicial Censor and Statutory Interpretation, 78 Geo. L.J. 353, 506 (1989) ("As long as courts cultivate the perception that they are constrained and distinguishable from the political branches, their legitimacy will remain intact.").
158. 5 U.S. 137, 165 (1803).
159. Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 U.C. Davis L. Rev. 41, 55 (1995); see also Kathleen M. Sullivan, The Supreme Court,
strained by a body of law—whether that be statutory law or judge-made precedent—is by now a firmly established procedural limitation on judicial decisionmaking.

In attempting to legitimate judicial power, Legal Process theorists declared that courts must not simply read their own personal preferences into law, but should instead decide cases by referring to principles and policies that are deeply embedded in society as a whole. The Legal Process school’s primary concern was to respond to Legal Realist criticism by demonstrating that the judiciary was constrained in its choices, and was not simply deciding cases based on personal preferences, as an elected legislator might do.

In more recent academic literature, commentators have noted that the common law method of reasoning by analogy promotes judicial legitimacy by ensuring that adjudication operates as interest representation. Under the common law method, judicial decisions are binding only on those that are similarly situated to the original parties. This process ensures that litigants serve as vicarious representatives because their legal arguments will influence the outcome only for those future litigants that share their same interests.

Adherence to precedent not only cabins judicial discretion, it also promotes fairness and predictability in judicial decisionmaking. If like cases must be decided alike, then judges are less free to reach outcomes based on their personal attitudes toward the litigants or the causes they promote. Requiring all judges to follow the same precedents helps to standardize decisionmaking and minimize inconsistency in judicial decisions, which in turn strengthens the credibility of those decisions and of the judiciary as an institution.

The Framers of the Constitution also intended that the judiciary make decisions in accord with an identifiable body of law. Alexander Hamilton articulated that presumption in Federalist No. 78, explaining: “To avoid an arbitrary discretion in the courts, it is indispensable that

1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 64-65 (1992) ("Courts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others.").


161. Professor Fallon stated that a basic assumption of Legal Process Theory is that the judicial role “is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers.” Fallon, supra note 18, at 966.

162. Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193, 203 (1992); Brilmayer, supra note 139, at 817; Peters, supra note 125, at 366-68.

163. Schauer, supra note 143, at 595-98.

164. Id. at 600.
they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.\footnote{165}

\section*{E. Impartial Decisionmaker}

An impartial decisionmaker is essential to the legitimacy of any system of adjudication. The significance of an unbiased judge has been recognized in such varied and historical sources as the Old Testament,\footnote{166} the Code of Justinian,\footnote{167} and Shakespeare’s Henry VIII,\footnote{168} and has been described as the most basic requirement of due process.\footnote{169} In the Legal Process theorists’ conception of adjudication, the judge must be “thoughtful and dispassionate”\footnote{170} in reviewing the facts and arguments presented, and must bring to the case an “uncommitted mind.”\footnote{171} A decision by a judge lacking such an open mind would not be worthy of the respect ordinarily due judicial pronouncements.

An impartial decisionmaker also serves the instrumental value of improving the accuracy of judicial decisionmaking. A judge who is free from bias or prejudice is more likely to reach the correct result than one who is not.

Like all the procedural elements of adjudication discussed thus far, independent decisionmakers also serve the important non-instrumental value of protecting the reputation of the adjudicatory process by “generating the feeling, so important to a popular government, that justice has...”

\footnote{165. The Federalist No. 78, at 496 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974).
166. See, e.g., Deuteronomy 16:18–20 (“Judges and officers shall you appoint in all your cities ... and they shall judge the people with righteous judgment. You shall not pervert judgment, you shall not respect someone’s presence, and you shall not accept a bribe, for the bribe will blind the eyes of the wise and make just words crooked. Righteousness, righteousness shall you pursue...”).
167. See supra note 20.
168. William Shakespeare, King Henry the Eighth act 2, sc. 4 (Queen Katherine of Aragon refuses to permit Cardinal Wolsey to sit as judge in her case because he was her “most malicious foe” and thus would not be a “friend to truth” in her case.).
171. Fuller, supra note 135, at 386.
been done.\footnote{172} When the decisionmaker appears to have a personal interest in the outcome of the litigation, the legitimacy of the final decision is in question. "Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors."\footnote{173}

An impartial judge is also a value enshrined in the Constitution. Article III requires that federal judges be given life tenure and prohibits diminution of judicial salaries.\footnote{174} Alexander Hamilton explained that such protections were necessary to ensure judicial independence, commenting that "a power over a man's subsistence amounts to a power over his will."\footnote{175} In addition, the Constitution's allowance for federal jurisdiction in cases between parties from different states is yet another protection against actual or apparent judicial bias, because it arose from a concern that state court judges might be partial to their own citizens.\footnote{176} Finally, the Supreme Court has held that an unconflicted decisionmaker is an "essential" element of the "due process" guaranteed by the Fifth and Fourteenth Amendments.\footnote{177}

**IV. JUDICIAL DISQUALIFICATION'S DEPARTURE FROM TRADITIONAL FORMS OF ADJUDICATION AND THE RESULTING LOSS OF LEGITIMACY**

The five essential elements of adjudication described in Part III are not just normative ideals, they are descriptive of the processes followed in most American adjudication. As a general matter, the parties frame disputes that are decided by an impartial judge who issues a reasoned decision that references an established body of law. On rare occasions when courts stray from this traditional model of adjudication—as they tend to do when overseeing class actions or pre-trial practice, for exam-
ple—they are subject to criticism.\footnote{\textsuperscript{178}}

This Part describes how the process by which a judge decides whether to recuse herself is one of the few areas in which judges consistently abandon these traditional forms of adjudication. Commentators have paid little attention to the procedural void in recusal law, perhaps because the question of judicial disqualification is such a sensitive one that it appears to be sui generis, and to be appropriately outside of the traditional model of adjudication. However, as discussed in Part III, the basic procedural elements that govern most adjudication serve a vital legitimating function. Disqualification laws have failed to protect the reputation of the judiciary because judges do not follow these traditional forms of adjudication when deciding whether they must recuse themselves.

\section{The Law of Judicial Disqualification Has Deviated from the Traditional Forms of Adjudication}

\subsection{It Is Difficult for Litigants to Seek Judicial Disqualification}

Section 455 of Title 28 does not outline any procedures by which parties may seek disqualification; rather, the judge is supposed to consider whether to recuse himself on his own volition. The very absence of statutorily prescribed procedures discourages lawyers from moving for disqualification and makes recusal motions all the more ad hoc and exceptional. In contrast, § 144 does contain clear procedural requirements for seeking judicial disqualification. However, because § 144 requires recusal only upon the more difficult showing of actual bias, rather than the "appearance" standard in § 455, and because it applies only to district courts, it is far less frequently cited as the basis for a disqualification motion.\footnote{\textsuperscript{179}}

The absence of statutory procedures exacerbates the difficulties inherent in seeking a judge’s disqualification. A lawyer might reasonably hesitate to make such a motion, fearing that it will anger the judge before whom he will have to try the case if he loses. Even if the issue is clear-cut and the motion is sure to succeed—if not before the challenged

\footnotesize
\begin{itemize}
\item[\textsuperscript{178}] See, e.g., Deborah R. Hensler, \textit{Suppose It's Not True: Challenging Mediation Ideology}, 2002 J. Disp. Resol. 81, 95 (noting that litigants may be better satisfied when disputes are framed by parties and judges' decisions are based on an identifiable body of law); Molot, \textit{supra} note 16, at 59 ("[W]hen judges stray from their traditional adjudicative role, they trigger questions regarding the effectiveness and legitimacy of their actions."); Resnik, \textit{supra} note 137, at 424–31.
\item[\textsuperscript{179}] \textit{Federal Judicial Center}, \textit{supra} note 82, at 48–49.
\end{itemize}
judge, then at least on appeal—a lawyer might still be concerned that the motion would annoy a judge before whom he expects to appear regularly.\textsuperscript{180} Such fears are not unfounded. For example, a district court judge stated that he found the motion for his disqualification to be "offensive" and he asserted that it "impugned his integrity."\textsuperscript{181}

A more basic problem is that the parties often lack the factual information necessary to make such a motion.\textsuperscript{182} A party or his lawyer may hear rumors about a relationship between a judge and the opposing party, but unless that information can be corroborated, the party and his lawyer will hesitate to ask the judge to recuse himself on the basis of speculation or gossip.\textsuperscript{183} Indeed, affidavits based on hearsay are considered legally insufficient to justify recusal.\textsuperscript{184} Nor are there any procedures establishing how a party can investigate such rumors to determine whether there is any truth to them. Judges are generally not required to disclose information about relationships, bias, or conflict of interest that they do not

\textsuperscript{180} See Alan J. Chaset, \textit{Disqualification of Federal Judges by Peremptory Challenge} 58 (1981) (noting that "[j]udges, like other persons, are likely to resent charges of bias"); FLAMM, supra note 5, § 1.10.3, at 25 (commenting that "[j]ust as judges generally do not like to admit having committed legal error, they are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality"); Bassett, supra note 8, at 1244 (noting that "many judges approach recusal decisions with a presumption of participation and with a touch of defensiveness"); Leubsdorf, supra note 19, at 264 (observing that judges often take a defensive tone in their opinions denying disqualification motions); Liteneker, supra note 5, at 260 ("Counsel who would face a particular judge many times in his career would be hesitant to charge the judge with bias or to refuse a judge's request that he waive his right to disqualify.").


\textsuperscript{181} Hook v. McDade, 89 F.3d 350, 353 (7th Cir. 1996).

\textsuperscript{182} See David G. Knibb, \textit{Federal Court of Appeals Manual: A Manual on Practice in the United States Court of Appeals} § 5.2, at 27–28 (2d ed. 1990) ("The lawyer will probably have insufficient information to feel comfortable in asserting without reservation that the judge should have been disqualified.").

\textsuperscript{183} Although federal judges are required to disclose gifts and honoraria received, those forms are filed only once a year—which may come far too late for a party to determine whether the judge has accepted gifts from a party or litigant in a pending case. 5 U.S.C. app. 4 §§ 101–11 (2003). In any case, a judge may have a close relationship with a lawyer or litigant that might prejudice the judge in that individual's favor even though no gifts are exchanged.

\textsuperscript{184} See supra text accompanying note 52.
perceive as disqualifying.\textsuperscript{185} For all these good reasons, parties rarely seek disqualification, waiting instead for the court to do so on its own motion.

2. Adversarial Presentation Is Absent Under Current Disqualification Procedures

Even when one party seeks the judge’s recusal, the opposing party in litigation may remain silent on the recusal question. In many cases, the other party may not have any grounds to oppose the motion because that party has no idea whether the judge has a bias or financial interest that would justify disqualification. As one commentator noted, the challenged judge is the one “most familiar with his own conduct,”\textsuperscript{186} and thus the most appropriate party to respond to a disqualification motion. Yet the judge does not respond—at least not in a traditional adversarial manner—because she is responsible for deciding the legal question of whether her conduct merits disqualification.

3. Judges Often Do Not Give a Reasoned Explanation for Recusal

Judges who recuse themselves rarely issue a decision explaining why. When Justice Frankfurter recused himself sua sponte from Public Utilities Commission v. Pollak,\textsuperscript{187} he wrote a separate opinion discussing his reasons for doing so and declared that judges should publicly state the grounds for recusal decisions.\textsuperscript{188} However, this practice has generally not been followed. One commentator has even referred to disqualification as “typically a quiet, almost invisible, legal issue.”\textsuperscript{189}

The process is particularly mysterious when a judge recuses herself sua sponte. But even when a judge is asked to step aside by one of the parties, it is often not clear whether the judge’s decision to do so is based on bias-in-fact or simply concern that remaining on the case would create the appearance of impartiality. The lack of transparency exists even at the highest levels of the federal court system. For example, many of the sitting Justices have recused themselves from hundreds of cases, almost

\textsuperscript{185} However, the Eleventh Circuit has stated that judges have an ethical duty to “disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification.” Porter v. Singleton, 49 F.3d 1483, 1489 (11th Cir. 1995).

\textsuperscript{186} Littenecker, supra note 5, at 266.

\textsuperscript{187} 343 U.S. 451 (1952).

\textsuperscript{188} Id. at 466–67.

\textsuperscript{189} Bassett, supra note 8, at 1214.
always without explanation.\textsuperscript{190} Presumably they own stock or have some other financial position that might be affected by the litigation, but because they do not issue explanations, their reasons for withdrawal are unknown.\textsuperscript{191}

4. The Precedent on Disqualification Is One-Sided

The federal statutory standards for recusal are vague. Section 455(a) of Title 28 requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Courts have struggled with the meaning of "impartial" and have differed over whose viewpoint to adopt when deciding whether it would be "reasonable" to question a judge's impartiality. For instance, some courts have suggested that the "reasonableness" standard should be viewed from the perspective of an objective judge because a non-judicial observer is "less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be."\textsuperscript{192} In contrast, others have concluded that the standard should be based on a "reasonable person" with knowledge of all of the relevant facts.\textsuperscript{193} Moreover, even when applying the same standards, courts will differ over when the language of the statute requires recusal.

Normally, ambiguous statutory text is clarified by a body of judicial precedent developed by judges applying the language to the specific cases before them. In the area of recusals, however, the judicial precedent is noticeably lopsided. Judges are more likely to publish opinions when denying a motion to disqualify than when granting one, meaning that the majority of published judicial decisions elaborate the reasons why a judge should continue to sit, and relatively few address circumstances justifying recusal.\textsuperscript{194} Justice Scalia's recusal decisions this term alone are illustrative of the problem. When he recused himself in \textit{Elk Grove Unified School District} \textit{v.} Newdow (concerning a challenge to the recitation of the pledge of allegiance in the public schools),\textsuperscript{195} he did so

\textsuperscript{190} Mauro, supra note 93. There is a wide disparity in the rates of recusal. Justice Breyer recuses himself most often, averaging forty-two times a year, while Chief Justice Rehnquist and Justice Ginsberg recuse themselves seven times a year, the lowest average.

\textsuperscript{191} See Bloom, supra note 21, at 690 n.172 (noting that justices rarely state their reasons for disqualifying themselves).

\textsuperscript{192} \textit{In re Mason}, 916 F.2d 384, 386 (7th Cir. 1990).

\textsuperscript{193} United States \textit{v.} DeTemple, 162 F.3d 279, 287 (4th Cir. 1998).

\textsuperscript{194} Other commentators have noted this problem. See Leubsdorf, supra note 19, at 244-45 ("A judge who withdraws usually writes no opinion. Published opinions, consequently, form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

\textsuperscript{195} 540 U.S. 945 (2003). Justice Scalia did not issue a public statement or ruling announcing
without explanation, while he published a twenty-one page memorandum justifying his decision to sit on the Cheney case.

5. The Challenged Judge Is Not an Impartial Decisionmaker

The Catch-22 of the law of judicial disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case. Although precedent does exist for referral of disqualification motions to a neutral judge, it is rare. As one commentator has noted, the "policy against automatic transfer of a motion to disqualify" is firmly embedded in court practice.

Exacerbating this problem is the deferential standard of appellate review of a trial court's denial of a motion to disqualify. Circuit courts review such decisions only for abuse of discretion. One court opined that its review is deferential because a "judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion"—a view that simply ignores the possibility that a judge's refusal to recuse might be affected, consciously or unconsciously, by the very bias that is claimed as the basis for recusal. Litigants seeking recusal bear an even heavier burden if they seek to bring that he was recusing himself. Instead, the Court's order granting the petition for a writ of certiorari was accompanied by the statement that "Justice Scalia took no part in the consideration or decision of these motions and this petition." Interestingly, Justice Scalia made his first public statement about his recusal in "Nevado" in his memorandum in In re Cheney, when he stated that "recusal is the course I must take—and will take—when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term." In re Cheney, 541 U.S. 913, 916 (2004).

197. See, e.g., United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989) (holding that a motion to disqualify is usually heard by the challenged judge); In re Demjanuk, 584 F. Supp. 1321, 1322 n.1 (N.D. Ohio 1984) (stating that most federal courts resolve recusal motions themselves); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (recusal motions normally first ruled upon by the judge who is the subject of the motion); see also FLAMM, supra note 9, § 17.5.1 at 513-17 (explaining that a judge challenged by a judicial disqualification motion usually decides the motion himself or herself). However, some states have made such a transfer mandatory, either through statute or court rule. See id. § 17.5.3, at 521 (stating that in some jurisdictions "the challenged judge must either recuse himself or transfer the motion to another judge"); Edward G. Burg, Comment, Meeting the Challenge: Rethinking Judicial Disqualification, 69 CAL. L. REV. 1445, 1465 (1981) (stating that in one case "judges on a court collectively disqualif[ied] one of their benchmarks").
198. Listenecker, supra note 5, at 266. The United States Court of Appeals for the District of Columbia Circuit has discouraged transfer. United States v. Haldeman, 559 F.2d 31, 131 (D.C. Cir. 1976) (en banc) (per curiam).
the issue to the court of appeals before the merits of the case are decided,200 even though immediate appeal of the disqualification decision is the only meaningful avenue for obtaining an impartial judge’s review of a refusal to recuse.201

But at least there is review of a district court’s refusal to recuse. Litigants seeking to remove an appellate judge have a slim chance of getting an impartial decisionmaker to review the challenged judge’s decision to remain on the case. At both the circuit and Supreme Court levels, the challenged judge decides for himself whether to recuse. Theoretically, a circuit court judge’s refusal to recuse could be reviewed by the en banc court or by the Supreme Court, but such review is so rare as to have little practical effect. The Supreme Court has adopted the practice of letting an individual Justice decide a motion asking him or her to recuse, and there is no system in place for the full Court to review that decision if the Justice refuses to step down.202

B. The Cheney Case: The Consequences of Flawed Recusal Procedures

The process leading up to Justice Scalia’s decision not to recuse himself from the Cheney case illustrates how far the recusal process has deviated from the traditional model of adjudication described in Part III.

1. Background

The fact that Justice Scalia and Vice President Cheney went on vacation together after the Supreme Court had granted certiorari in the Cheney case was not disclosed to the public or the parties by either Scalia or Cheney. It only came to national attention when reported in the L.A. Times on January 17, 2004.203 The story was quickly picked up by other papers. Then, in early February, the L.A. Times reported in a front-page

200. As the Second Circuit explained:
[W]e must bear in mind not only the standards governing recusal, but we must also consider the extraordinary showing required to obtain the issuance of a writ of mandamus .... [P]etitioners must “clearly and indisputably” demonstrate that the district court abused its discretion. Absent such a showing, mandamus will not lie.
In re Aguinaga, 241 F.3d 194, 200 (2d Cir. 2001) (citing Drexel Burnham Lambert, 861 F.2d at 1312-13).

201. FLAMM, supra note 9, § 31.2, at 973 (“[F]or a court’s decision on disqualification to be meaningfully reviewed, it usually must be appealed immediately.”).

202. See generally Bassett, supra note 8.

story that Justice Scalia had traveled on Air Force Two as “an official
guest” of Vice President Cheney.204 On the heels of this story came a
wave of editorials proclaiming that Justice Scalia should recuse himself
because his vacation with Cheney created at the very least the appear-
ance that he could not be impartial when deciding the case.205 Accompa-
nying the news stories were a large number of political cartoons, and
jokes about the trip were included in the monologues of late-night come-
dians.206

During this time, Justice Scalia did not make any public statement.
He did issue a short written response to inquiries by an L.A. Times re-
porter confirming that he and Vice President Cheney had gone on a
duck-hunting trip in Louisiana together after certiorari was granted in the
Cheney case. He concluded with a two-sentence statement about why he
believed that this social contact did not obligate him to recuse himself
from the case:

I do not think my impartiality could reasonably be questioned. Social
contacts with high-level executive officials (including cabinet officers)
have never been thought improper for judges who may have before
them cases in which those people are involved in their official capacity,
as opposed to their personal capacity.207

204. David G. Savage & Richard A. Serrano, Scalia was Cheney Hunt Trip Guest, L.A. TIMES,

205. See, e.g., Editorial, Duck-Blinded Ethics; Scalia Pers Supreme Court Integrity at Risk, SAN
22, 2004, at B16; Editorial, Scalia Should Recuse Himself, SEATTLE POST-INTELLIGENCER, Feb. 9,
2004, at B5; Editorial, Scalia. Use Good Judgment; Bow Out of Cheney Case, ATL. JOURNAL-
CONSTITUTION, Jan. 29, 2004, at 14A; Editorial, Scalia’s Apparent Conflict, B. GLOBE, Feb. 7,
2004, at A14; Editorial, Scalia’s Conflict of Interest, DENY. POST, Jan. 26, 2004, at B7; Editorial,
Scalia’s Not-So-Excellent Journey; Hunting Trip with Cheney Was Highly Inappropriate, BUFFALO
NEWS, Feb. 4, 2004, at C4; Editorial, Sir This One Out, CHI. SUN-TIMES, Feb. 8, 2004, at 33; Editorial,
Too Close for Comfort, S.F. CHRON., Jan. 26, 2004, at B6; Editorial, Too Close for Comfort,
COLUMBUS DISPATCH, Jan. 23, 2004, at 10A.

03-475).

207. Letter from Justice Antonin Scalia to Reporter David Savage (Jan. 16, 2004) (on file with
author) (emphasis in original). Prior to his March 18, 2004, memorandum, Justice Scalia com-
mented publicly on the matter on just one other occasion. When asked about the controversy
while speaking at Amherst College on February 10, 2004, Justice Scalia responded that he did not
need to recuse himself, because the lawsuit involved Cheney in his official and not personal
capacity, and he repeated that it is “acceptable practice” for justices to socialize with members of the
executive branch. He finished his comment by declaring, “That’s all I’m going to say for now.
Quack, quack.” Associated Press, Scalia Says He’ll Stay on Cheney Court Case, L.A. TIMES, Feb. 12,
Scalia provided no details about travel arrangements, allocation of expenses, lodgings, other attendees, or when the joint trip had been planned.

As the press attention increased, members of Congress began to weigh in on the matter. On January 22, Senator Patrick Leahy, ranking Democrat on the Judiciary Committee, and Senator Joe Lieberman, ranking Democrat on the Governmental Affairs Committee, jointly wrote to Chief Justice Rehnquist questioning whether Justice Scalia should sit on the case: "When a sitting judge, poised to hear a case involving a particular litigant, goes on a vacation with that litigant, reasonable people will question whether that judge can be a fair and impartial adjudicator of that man’s case or his opponent’s claims." 208 The two senators asked the Chief Justice to clarify the rules Justices follow in deciding whether to remove themselves from cases and inquired as to "whether mechanisms exist . . . for review of a justice’s unilateral decision to decline to recuse himself." 209

In his reply, Rehnquist stated that "[t]here is no formal procedure for court review of the decision of a justice in an individual case. That is so because it has long been settled that each justice must decide such a question for himself." He then chastised the senators for expressing their views that Scalia should recuse himself from the Cheney case: "Anyone at all is free to criticize the action of a justice—as to recusal or as to the merits—after the case has been decided. But I think any suggestion by you or Senator Lieberman as to why a justice should recuse himself in a pending case is ill-considered." 210

The parties remained silent on the matter for several weeks. Then, on February 13, Judicial Watch, the conservative public interest law firm that is co-plaintiff on the Cheney case with the Sierra Club, publicly stated that it "does not believe the presently known facts about the hunting trip satisfy the legal standards requiring recusal." 211

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208. This letter was reported in news stories. See, e.g., David G. Savage, High Court Won’t Review Scalia’s Recusal Decision, L.A. TIMES, Jan. 27, 2004, at A12.

209. Id. Democratic Representatives Henry A. Waxman (D-Cal.) and John Conyers Jr. (D-Mich.) also wrote to Chief Justice Rehnquist urging him to establish a procedure for "formal review" of Justices’ ethical conflicts. The two argued that Justice Scalia had failed to recuse himself despite precedent in lower courts requiring recusal in such situations. They wrote: "It is no exaggeration to say that the prestige and power of the Vice President are directly at stake in the case." David G. Savage, 2 Democrats Criticize Scalia’s Refusal to Quit Cheney Case, L.A. TIMES, Jan. 31, 2004, at A26.

210. Savage, supra note 208.

The Sierra Club disagreed, and on February 23 it took the unusual step of filing a motion asking Justice Scalia to recuse himself from the case. The motion was submitted to the full Court, and the Sierra Club intended that all nine Justices address it just as they would any other question of law. David Bookbinder, the Sierra Club’s Washington legal director, stated: “Obviously, this is an issue for each of the nine justices to consider, since the integrity of the entire court is being called into question.”

Nonetheless, the full Court did not address the motion. The docket entry for the motion stated: “In accordance with its historic practice, the Court refers the motion to recuse in this case to Justice Scalia.”

As is typical when one party asks a judge to recuse himself, the opposition did not respond to the motion. Indeed, the government never commented on the issue either in legal filings or in the press.

More than three weeks passed before Justice Scalia issued a twenty-one page memorandum decision denying the motion. Before he did so, it was not clear that Justice Scalia would respond at all. The Justices normally do not issue statements about decisions to recuse. For example, when the respondent in Newdow asked Justice Scalia to recuse himself earlier the same term because he had commented on the merits of the question presented, Justice Scalia had not issued any formal response. The public and the parties learned that he had recused himself from the case only because the Court’s order granting a writ of certiorari in the case was accompanied by the statement that “Justice Scalia took no part in the consideration or decision of . . . this petition.”

Thus, the length and detail of Justice Scalia’s response was surprising. To ask a Supreme Court Justice to recuse himself is rare; for the Justice to respond at length is almost unprecedented. During the Court’s long history, the only comparable explanation for a denial of a motion to disqualify came from Justice Rehnquist in Laird v. Tatum, who began his memorandum by stating that he did not “wish to suggest” that providing such an explanation was “desirable or even appropriate” in most cases.

215. 409 U.S. 824 (1972). In his memorandum explaining his decision not to recuse, Rehnquist stated that “neither the Court nor any Justice individually appears ever to have” provided a similar justification for remaining on a case. He added, “I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.” Id. Rehnquist provided a much shorter explanation of his decision to sit on the Microsoft antitrust litigation despite the fact that Microsoft had hired the firm at which his son was a lawyer. See Mi-
Justice Scalia’s memorandum was thus a significant departure from past practice.

In the memorandum, Justice Scalia revealed facts about circumstances and logistics of the trip that previously had been unknown to the general public and to the Sierra Club, and then he made a persuasive case for why he should not be required to recuse himself. Nonetheless, his response did not settle the matter. In a second wave of editorials, the same newspapers that had called for Justice Scalia to recuse himself criticized his rationale for remaining on the case, and some also condemned a recusal process that left the final decision in the hands of the very individual whose judgment was under question.\textsuperscript{216}

2. The Handling of the Recusal Question in the \textit{Cheney} Case
Undermined the Reputation of the Judiciary

The \textit{Cheney} case well illustrates the problems created by the lack of formal procedures governing judicial disqualification. The dispute was difficult for the parties to frame. At first, the Sierra Club could not have raised the recusal issue because it was unaware of the trip. Justice Scalia was not required by law to inform the parties about his social relations with a litigant in a case before him. Thus, without the benefit of sharp-eyed journalists, the Sierra Club would never have learned that a Justice had recently vacationed with its opponent.

Even after the Sierra Club formally filed its motion, there was no adversarial presentation of the dispute. The government did not weigh in on the question whether Justice Scalia should sit on the case. The only “adversary” was Justice Scalia. Although not required to do so, Justice Scalia eventually did respond at length, revealing the facts and circumstances of the trip that had hitherto been known only to him and the others on the trip. He also attempted to frame the dispute in terms of the law governing judicial recusals, although he admitted that precedent was sparse.\textsuperscript{217} But although Scalia provided an opposing view, he did not do

\textsuperscript{216} See, e.g., Paul Campos, Editorial, \textit{Scalia Ducking the Issue}, ROCKY MTN. NEWS, Mar. 30, 2004, at 31A (criticizing Justice Scalia for turning the “reasonable observer” test “into what might be called the ‘I’m a reasonable observer, and I didn’t observe anything that makes me question my impartiality’ test’”); Editorial, \textit{New Rules Needed on When Justices Should Step Aside}, DET. NEWS, Mar. 29, 2004, at 10A (urging the Court to adopt a new rule requiring the whole Court to determine whether a justice should step aside because the current practice is “eroding public confidence in the court”).


so as part of the adversarial process but rather in his role as final decisionmaker.

As a result of this procedural vacuum, the question of whether Justice Scalia should recuse himself from the *Cheney* case entered the public discourse in a manner that undermined the public’s faith in the judiciary. Because news of the Scalia-Cheney trip was first publicly “broken” by a journalist, rather than revealed by the Justice himself, it created a perception that the Justice had something to hide—even though, as Justice Scalia later made clear, he did not perceive the trip as inappropriate in any way. Moreover, details about the trip continued to leak slowly, rather than being fully disclosed at once, which generated a series of news stories that kept the issue in the public eye and heightened the perception that the trip had been improper. For example, shortly before the story was reported, Justice Scalia confirmed by letter with an *L.A. Times* reporter that he had gone on the trip with Vice President Cheney. But Scalia did not disclose that he had traveled with the Vice President on Air Force Two, which became the subject of a second front-page story once the press learned of it from other sources.

The press is certainly capable of generating controversy where none exists, and a Justice cannot be expected to anticipate and deflate every negative news story about his or her activities. Nevertheless, that Justice Scalia and members of his family traveled with Vice President Cheney on a government plane was newsworthy; it strongly suggested that they saved themselves the price of the trip, which would not only be grounds for recusal but would also potentially violate the Ethics Reform Act of 1989.\(^{218}\) Therefore, the revelation about Justice Scalia’s travel arrangements could reasonably be expected to generate a follow-up story. Yet it was a detail that could just as easily have been revealed up front by Justice Scalia at the same time that he confirmed taking the trip.

Moreover, as Justice Scalia eventually disclosed in his memorandum, neither he nor his relatives “saved a cent” by traveling with the Vice President because they had all purchased round-trip airline tickets for the return trip home.\(^{219}\) Because this is the kind of information that only Justice Scalia could know, and because the information is directly relevant to the question whether Justice Scalia could properly sit on the case, it should have been revealed as soon as the trip itself became public. Immediate disclosure of the information might have prevented pub-

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218. 5 U.S.C. § 7353 (1996) (prohibiting gifts to, among others, federal judges from any person “seeking official action from, doing business with, . . . or whose interest may be substantially affected by the performance or nonperformance of the individual’s official duties”).

lication of some of the news stories and editorials that tarnished Justice Scalia’s reputation, and, by extension, the Court’s.

Because of the absence of formal procedures for filing recusal motions, the public debate about whether Justice Scalia should recuse himself dragged on for two months. The Sierra Club did not file a motion seeking his disqualification until five weeks after the story first broke. Section 455 contains no procedures for filing such a motion, and thus it provides no time limit that would have forced the Sierra Club to act earlier. The Sierra Club had good reason to wait. The more editorials, cartoons, and jokes on late-night talk shows, the stronger its argument that Justice Scalia’s impartiality might “reasonably be questioned.” Ironically, § 455’s lack of procedural requirements, coupled with the objective standard for recusal that takes account of public appearances, actually encourages parties to wait to seek recusal until the press has repeatedly reported on, and criticized, a Justice for sitting on a case—leading to the negative public perception of the judiciary that the law was designed to prevent.

Finally, because the process was not an adversarial one, no one gave the press or the public the other side of the story or defended the propriety of taking such a trip. Instead, for two months the public heard only one version of the story: Justice Scalia took a vacation with Vice President Cheney, at government expense, shortly after the Court agreed to hear Cheney’s case, which many thought created at least the appearance that Justice Scalia could not be impartial.

Eventually, Justice Scalia spoke up in his own defense. In his memorandum decision, Scalia asserted heretofore unknown facts about the trip to rebut the arguments of his sharpest critics. Most relevant were the following: (1) Scalia’s invitation to Cheney to join him on a duck-hunting trip, and Cheney’s acceptance, came before the petition for certiorari was filed in the Cheney case;²²⁰ (2) Scalia and his family members did not save any money as a result of traveling with the Vice President because they all bought round-trip plane tickets;²²¹ (3) the trip was attended by thirteen hunters as well as various staff and, of course, security for the Vice President, and thus was not, in Scalia’s view, an “intimate setting”;²²² (4) Scalia “never hunted in the same blind with the Vice

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²²⁰. Id. at 914.
²²¹. Id. at 912–13.
²²². Id. at 915.
President” and was never alone with him at any time during the trip; and (5) Scalia and Cheney did not discuss the case.

Justice Scalia then complained that many of the newspaper editorials calling for his recusal had their facts wrong. He pointed out that some of the editorialists exaggerated the length of the trip, misidentified who paid for the trip and who was the guest of whom, and, most importantly, suggested that he had been alone with the Vice President during the trip and had an opportunity to discuss the case with him.

Although some of these inaccuracies are indeed significant (one wonders just who was editing these editors), Justice Scalia could have prevented them from ever being put into print if he had simply disclosed the relevant facts himself. Significantly, Justice Scalia did not deny that certain details about the trip were relevant to the question whether he should have recused himself, and thus were proper topics to be shared with the public. To the contrary, in defending his decision not to recuse himself, he repeatedly asserted that he was never alone with the Vice President and never had the opportunity to discuss the case with him. Yet he, along with the Vice President, chose to remain silent about these significant details of the trip even as they were being inaccurately reported in the media.

Justice Scalia began the memorandum by stating that “[t]he decision whether a judge’s impartiality can ‘reasonably be questioned’ is to be made in light of the facts as they existed, and not as they were surmised or reported.” But that is arguable. On the one hand, the media’s ignorance of the facts should not force recusal where it is unjustified. But on the other hand, the facts as “reported” are the ones that the public first read. They shape the public’s impressions of the propriety of a Justice’s actions and ultimate decision to sit on a case. If appearances matter—and the recusal laws say they do—then the public’s perception of the facts, even an inaccurate perception, can damage the judiciary’s reputation in the very ways that the recusal laws intended to prevent. Accordingly, to protect the judiciary’s reputation from harm, judges should take some responsibility to ensure that the facts are accurately presented to the public from the beginning.

223. Id.
224. Id.
225. Id. at 923.
226. Id.
227. Id. at 913, 923 (stating that his impartiality could not “reasonably be questioned” where he “never hunted with [Cheney] in the same blind or had other opportunity for private conversation”).
228. Id. at 914.
In his memorandum decision, Justice Scalia noted that the Sierra Club was "unable to summon forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here." The absence of precedents supporting recusal can be partly explained by the fact that judges and Justices usually do not give reasons for their recusals. Supreme Court Justices have recused themselves in 500 cases during the last five years, but only very rarely have they given the public any inkling as to why. Perhaps some of those recusals were because the Justice had a personal relationship with a litigant or lawyer, and thus would have served as precedent for Scalia's recusal from the Cheney case. There is simply no way to know. And the dearth of motions to recuse may also be explained by the many procedural and psychological hurdles that discourage litigants from seeking recusal in the first place.

The memorandum did not put the matter to rest, in part because Justice Scalia was the sole judge of his own partiality. Several editorials criticized the Supreme Court's system of allowing the challenged justice to decide whether to recuse him or herself and called on the Court to change its rules so that all nine Justices will have to decide such questions in the future.

Exacerbating the problem was the defensive and sarcastic tone of the memorandum, which read more like an opposing brief than a legal decision. Justice Scalia appeared to be pained by the press coverage of the trip, noting that he had received "a good deal of embarrassing criticism and adverse publicity" about the matter. He commented somewhat bitterly that, as the Sierra Club has "cruelly but accurately" pointed out, he had become "fodder for late-night comedians." At different points throughout the memorandum he acknowledged being aware of which newspapers had criticized him, and, in what appeared to be retribution, he very specifically stated which papers reported which facts incor-

229. Id. at 924.
230. See, e.g., Mauro, supra note 93.
231. See discussion supra Part II.B.
232. See, e.g., Campos, supra note 216; Editorial, New Rules, supra note 216 (urging the Court to adopt a new rule requiring the whole Court to determine whether a Justice should step aside because the current practice is "eroding public confidence in the court").
234. Cheney, 541 U.S. at 929.
235. Id. Justice Scalia’s comment about the Sierra Club’s "cruelty" may have been a joke, if a bit of a wry one. My point here is that, whatever Justice Scalia’s actual mental state, the memorandum created the impression that he was angry and defensive.
rectly. In short, the memorandum is the product of a man who unquestionably has a personal stake in the matter and appears angry and defensive.

Justice Scalia is known for his acerbic opinion writing, and thus this decision might not be so far from the tone he would take in a dissent. But he was oblivious to the impression that such vituperative rhetoric creates when employed in defense of his ability to be detached, neutral, and impartial.

V. INCORPORATING TRADITIONAL FORMS OF ADJUDICATION INTO THE LAW OF JUDICIAL DISQUALIFICATION

A primary goal of judicial disqualification is to promote the appearance of justice and the reputation of the judiciary. Thus, it is ironic that the disqualification process has strayed so far from the traditional forms of adjudication that Legal Process theorists, among others, have concluded are essential to maintaining the public's faith in the decisions of unelected judges.

In this Part, I suggest ways in which the core characteristics of adjudication discussed in Part III can be incorporated into the law of recusal. As I do so, I try to balance the need for procedures that guarantee both the appearance and reality that each presiding judge is an impartial decisionmaker against concerns for maintaining a speedy and efficient justice system—qualities that are also necessary to maintain the judiciary's reputation. In addition, I acknowledge the potential for judge shopping, and so reject certain procedures that are likely to be abused. Finally, putting theory into practice, I describe how the suggested reforms would have changed the way in which the recusal question was disclosed and resolved in the Cheney case.

236. Id. at 923–24.
237. For example, Justice Scalia stated that he thought counsel for Sierra Club was being hypocritical. Scalia explained that two days before the brief in opposition to the petition in the case was filed, counsel for the Sierra Club wrote to Justice Scalia inviting him to come to speak to one of his Stanford Law School classes the following year. Scalia then pointed out that "[j]udges teaching classes at law schools normally have their transportation and expenses paid." Id. at 928. In describing this incident, Scalia attempted to equate the invitation to lecture at Stanford—a business trip to be paid for by Stanford in return for the benefits Stanford students would gain from his visit—with a vacation with a litigant that was paid for by that litigant.
238. I do not specify whether these reforms should come from Congress or the courts themselves because I do not think the source of the obligation is significant.
A. Proposals for Reform

1. Enable Litigants to Frame the Recusal Question

The recusal laws should be amended to provide a straightforward means by which litigants can seek judicial disqualification. Section 455 is intended to be self-enforcing, meaning that the recusal issue is supposed to be raised first by the judge and not the parties. Although it is now well established that litigants can file motions to disqualify under § 455, the absence of procedural guidelines for making such a motion compounds the awkwardness any litigant encounters in taking that step. Accordingly, § 455 should be amended to provide that the parties have a right to seek a judge’s recusal by motion filed within an appropriate amount of time after obtaining information that suggests that the judge could not be impartial or that his impartiality might “reasonably be questioned.”239 By providing an officially sanctioned method to seek judicial disqualification, the law would normalize disqualification and make it psychologically easier for lawyers and parties to contemplate asking for it.

In addition, § 455 should be amended to include a mandatory disclosure provision that would require judges to inform the parties of any financial interests in the case, personal relationships with litigants or their lawyers, or knowledge of the facts of the specific case before them that the judge might have. The disclosure should be required even when a judge does not think that the information establishes grounds for her recusal.240

The Ethics in Government Act already requires federal judges, along with members of Congress and senior executive branch officials, to file financial disclosure reports,241 but those disclosures come too infrequently to be of much use to litigants in pending cases. Disclosures are made only on an annual basis, meaning that a trip taken with a litigant...

239. Of course, § 455 should still provide that the judge is free to recuse herself on her own motion.
240. Although not required by federal statute, such disclosure is already encouraged by the commentary to the ABA Model Code of Judicial Conduct, which states that a “judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” MODEL CODE OF JUD. CONDUCT, Canon 2.12, cmt. 2J (Draft May 2004). The Model Code is not binding, however, and judges frequently have not disclosed facts that they did not think justified their recusal. Indeed, Justice Scalia did not feel obligated to disclose his duck hunting trip with Vice President Cheney, and he commented on the trip only after it was reported in newspapers.
might not be revealed for months or even a year. Moreover, anyone wishing to obtain a copy of these reports must send a written request to the Administrative Office of the Courts, which takes an average of ninety days to respond to requests. In addition, the judge who is the target of the request will be informed of the requester's identity. As a result, only seventy-six members of the public requested these disclosure reports in 2002. Lawyers and litigants explain that they hesitate to request such information knowing that their identities will be revealed to the judge whom they are investigating. The proposal discussed here takes this disclosure requirement significantly further by requiring the judge to provide directly to litigants in pending cases any information that might be considered to have an impact on the judge's partiality.

Understandably, judges might object to mandatory disclosure of the intimate details of their social lives. Loss of privacy is indeed a significant price to pay, but it is one that most political figures willingly accept in return for their positions of authority and public trust. Judges have no more right to total privacy in their personal lives than any other public servant. And it is important to remember that even under a mandatory disclosure regime, judges will not be obligated to report all details of their private lives; they will only be required to disclose to the parties in cases before them significant extrajudicial contacts with the lawyers or parties involved in pending litigation.

2. Provide for an Impartial Decisionmaker

The judge who is the subject of a disqualification motion should not be placed in the untenable position of deciding that motion. As a Federal Judicial Center report observed, a "judge wishing to remove any doubt about his or her objectivity may be tempted to have another judge decide the recusal question." Nothing in the law would prevent that. The First Circuit recently commented that "a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a dif-

243. Id. Moreover, judges may request redaction of some or all of the material from their financial disclosure forms on the ground that disclosure would endanger them or their families. Members of Congress and the executive branch do not have this option. It appears that a significant number of judges have made use of this redaction procedure, and most of their requests are granted. Id. Judges made 661 requests to redact information from financial disclosure reports between 1999 and 2002; nearly ninety percent of those requests were granted. Id.
245. FEDERAL JUDICIAL CENTER, supra note 82, at 44.
ifferent judge.\textsuperscript{246} Yet the court went on to observe that “no reported case or accepted principle of law compels [the judge] to do so . . . .”\textsuperscript{247} Currently, “the norm” is for “the challenged judge to rule on a recusal motion.”\textsuperscript{248}

That practice is unfortunate, and the laws governing judicial disqualification should require that motions to disqualify go to a disinterested judge unless the judge who is the target of the motion agrees to recuse himself.\textsuperscript{249} At the trial court level, this would mean simply referring the motion to another district court judge. At the appellate level, the motion could be decided by a motions panel made up of three other members of that circuit court. And in the United States Supreme Court, the motion should be decided by the other eight Justices.

Providing for an impartial decisionmaker on the question of recusal serves both to prevent actual injustice and the appearance of injustice. Ensuring that the decision is made by a neutral decisionmaker would protect the integrity of the challenged judge and the judiciary as a whole in those cases where disqualification is not justified.\textsuperscript{250} Even more so, referral to a neutral judge would protect the judiciary’s reputation and the parties from harm in those rare cases where a judge is so biased in favor of one party that, if the decision were his alone, he would choose to remain on the case even when he clearly cannot be impartial.

Transfer is particularly important in cases where the challenged judge needs to defend or explain her conduct. As discussed below, the

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\item \textsuperscript{246} In re United States, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted); accord United States v. Heldt, 668 F.2d 1238, 1271–72 (D.C. Cir. 1981) (same).
\item \textsuperscript{247} United States, 158 F.3d at 34.
\item \textsuperscript{248} FEDERAL JUDICIAL CENTER, supra note 82, at 44; see, e.g., Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); Chitimacha Tribe of La. v. Harry L. Laws Co., Inc., 690 F.2d 1157, 1162 (5th Cir. 1982); Heldt, 668 F.2d at 1271 (D.C. Cir. 1981); United States v. Azbicart, 581 F.2d 735, 737–38 (9th Cir. 1978).
\item \textsuperscript{249} In 1961, the Judicial Conference of the United States passed a recommendation that motions under § 144 be transferred to a different judge to rule on the sufficiency of the affidavit. Judicial Conf. of the United States Ann. Rep. 68–69 (1961). The American Law Institute recently approved Principles Governing Transnational Civil Procedure. Rule 10, which was appended to the rules though not formally adopted by the ALI, concerns the impartiality of the decisionmaker. Rule 10.3 explicitly states that a judge should not be responsible for deciding his or her impartiality: “A challenge of a judge must be heard and determined either by a judge other than the one so challenged or, if by the challenged judge, under procedures affording immediate appellate review or reconsideration by another judge.”
\item \textsuperscript{250} A few courts and commentators have expressed the view that transfer of a disqualification motion to a neutral decisionmaker would better serve the goal of the statute to promote public confidence in the judicial process. See Hawaii-Pac. Venture Capital Corp. v. Rothbard, 437 F. Supp. 230, 236 (D. Haw. 1977) (suggesting transfer when the judge thinks “that by [transferring the motion] he might better assist in the promotion of public confidence in the impartiality of the judicial process”); Litteneker, supra note 5, at 265–67 (advocating “transfer in all cases except where the danger of delay and disruption is substantial”).
\end{enumerate}
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challenged judge should be given an opportunity to refute the challenger's allegations or otherwise explain and justify her conduct. Yet once a judge is in the position of defending herself against a claim of bias, she cannot fairly serve as the ultimate decisionmaker on the question of whether her explanation is sufficient to justify remaining on the case.

Some courts have criticized the idea of transferring recusal motions to another judge on the grounds that it would be disruptive, and have expressed the fear that counsel might use such motions strategically to delay proceedings. However, transfer to an impartial judge should not cause significant delay; any judge addressing the motion would have to read the motion papers and issue a final decision on the matter. Although the challenged judge would be more familiar with the facts suggesting bias or interest than an impartial judge, this familiarity is the very reason why the challenged judge should not be permitted to issue the final ruling on the motion. Moreover, as one commentator has noted, even if the transferee judge is slower to issue a ruling, a challenger would be less likely to appeal a decision not to recuse issued by an impartial judge, resulting in an overall speeding-up of the recusal process.

A more significant problem with this proposal is that judges might not be any more willing to disqualify their colleagues than they are to recuse themselves. Judges might find it difficult to grant a motion to

251. See discussion infra Part V.A.3.
252. See Commonwealth v. Chernes, 520 A.2d 439, 446-47 (1987) (relying on previous court holdings that a trial judge should recuse if he feels it necessary to explain his conduct).
253. See In re Swift, 126 B.R. 725, 728 (Bankr. W.D. Tex. 1991) (“The law is well-settled that the judge whose recusal is sought is ordinarily the judge who rules on the motion, lest such motions be used as tools of delay . . . .”); FLAMM, supra note 9, ¶ 17.5.2, at 517-20 (discussing arguments in favor of allowing a challenged judge to rule on the motion).
254. Certainly, if the motion is granted then proceedings might be delayed while a new judge gets up to speed with the facts and background of the case. The disruption that would arise from switching judges is a reason to require that motions to recuse be filed immediately after a party learns of facts that would justify disqualification, but it is not grounds for preventing a neutral judge from making the decision in the first instance.
255. See FLAMM, supra note 9, ¶ 17.5.2, at 518 (noting that some courts have argued that the challenged judge should decide a recusal motion because that judge is most familiar with his own conduct).
256. Bloom, supra note 21, at 697.
257. In a survey of state court judges, the judges responded that they would be more likely to disqualify themselves than recommend a colleague be disqualified under similar circumstances. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1 (1995). However, the result of a survey posing a hypothetical recusal situation might not be the best proxy of whether judges are actually willing to recuse themselves when they have a potential conflict and are asked to do so by one of the litigants. In fact, the authors of the survey themselves noted that judges reported high levels of ambivalence about when to recuse themselves, and recommended that “serious consideration should be given to the
disqualify, fearing it would offend a fellow judge. 258 Although legitimate, this concern does not outweigh the benefits of transferring the recusal decision away from the interested judge. First, transfer would put an end to the worst cases, in which judges insist on presiding even when they have an obvious conflict of interest, because even the most respectful of colleagues would have to remove a fellow judge under such circumstances. Second, even if judges are just as reluctant to remove colleagues as they are to remove themselves from cases, the simple fact that a neutral judge is deciding the issue would create a better public impression than permitting the potentially conflicted judge to decide his own fate. Thus, the appearance of justice will be better served, even if the actual rate of recusal remains unchanged.

In any case, experience shows that judges are willing to risk offending one another when obligated to pass judgment in the course of fulfilling their judicial duties. Judges regularly take public positions opposing each other’s views. When judges sit on panels, one judge will often write an opinion that conflicts with the decision of the others. Appellate judges frequently reverse lower courts, and en banc courts often reverse their own colleagues. Judges have grown accustomed to these sorts of judicial disagreements, and it is reasonable to think that the same professionalism would allow judges to take on the task of deciding recusal motions without fear of offending one another. 259

Admittedly, disagreements over the merits of a case are not as personal, or as sensitive, as requiring a colleague to remove himself from a case over his objection. But these types of decisions do show that judges take opposing positions as a regular part of their job and suggest that judges would also be capable of making the hard choice to require a colleague’s recusal were that required of them. Indeed, appellate courts occasionally order the disqualification of district court judges, even under the current deferential standard of review. For example, a panel of D.C.

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258. Cf. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 n.12 (1988) (commenting that judges may find it “difficult” to “pass[ ] upon the integrity of a fellow member of the bench”).

259. Proof that judges have the stomach for such tasks can be found in their impressive record under the Judicial Conduct and Disability Act. 28 U.S.C. § 372(c) (1996). Studies conducted on behalf of the National Commission on Judicial Discipline and Removal concluded that chief judges take the complaint process seriously and reach the right result in the great majority of cases. See Richard L. Marcus, Who Should Regulate Federal Judges, and How?, 149 F.R.D. 375, 377 (1993) (stating that “[a]lthough there are individual cases that cause uneasiness, by and large the results look appropriate”); Barr & Willging, supra note 180, at 51 (stating the results of chief judges’ review of complaints).
Circuit judges required a district court judge to disqualify himself from the highly publicized Microsoft case—a decision that was undoubtedly made even harder by the fact that all the judges involved work in the same courthouse in Washington, D.C. The key is to make the question of whether to disqualify a colleague obligatory and standard—part of the normal judicial routine—rather than the unusual and ad hoc decision it is today.

Some commentators have suggested going further than transferring just the recusal motion, and have advocated instead for a system of peremptory disqualification. Under these proposals, the entire case would automatically be transferred to a new judge upon the claim that the assigned judge is not impartial, without requiring the challenger to prove these allegations. Each party would be given just one opportunity to challenge a judge for interest or bias. Advocates of peremptory disqualification argue that this system ensures that the litigant has an impartial judge and avoids the problem of judges being asked to decide their own partiality.

Peremptory disqualification is less efficient, however, and is more prone to abuse than are automatic transfers of just the recusal motion to an impartial judge. Peremptory disqualification slows down the litigation because a new judge will have to become familiar with the case. It can also serve as a method of judge-shopping, and may be used by litigants to remove judges whose judicial philosophies are hostile to the litigants’ claim. Finally, automatic transfer does not permit a judge to refute the allegations of bias, and thus may create the public impression that more judges are biased, or have conflicts of interest, than is actually the case. In short, peremptory disqualification might injure the reputation of the judiciary, thereby undermining the goals of recusal.

261. Although it would clearly be awkward for eight Justices to decide whether the ninth should be forced to step aside, it is also unseemly for the eight Justices to, in essence, recuse themselves from deciding whether their colleague is permitted to sit on a case, necessitating that this question of law be decided by the one Justice with a personal stake in the matter.
263. See, e.g., Baron, supra note 262; Kobrin, supra note 262.
264. FLamm, supra note 9, §§ 3.4–3.5, at 62–66.
3. Encourage the Challenged Judge to Respond to a Motion to Disqualify

In conjunction with the requirement that a recusal motion be transferred to an impartial judge, § 455 should be amended to provide that the challenged judge be encouraged to file evidence refuting facts asserted in the recusal motion, and perhaps also an explanation of why disqualification is not justified. As described above, most motions to disqualify are filed by one party and are not responded to by the other, depriving the judge of the benefit of an adversarial presentation of the issue. The challenged judge is the most natural party to respond to a motion to disqualify. He will be familiar with the facts cited by the moving party and is best able to put those facts in context for the decisionmaker. Indeed, the judge will likely do a far better job of responding to the motion than the other litigants, who may not have any knowledge of the circumstances that inspired the motion in the first place.

In the past, a handful of judges have responded to disqualification motions by including in the record refutation of the evidence against them. In *McGuire v. Blount*,265 for example, the plaintiffs filed a motion asking the judge to recuse himself on the ground that the judge’s wife had acquired an interest in the property that was the very subject of the litigation. The plaintiffs did not provide a sworn affidavit or any other evidence to support this claim. The judge denied the motion, stating that his wife had no interest in the property. But he noted for the record that she had been offered the deed to the property, which she had declined to accept. The judge then took the precaution of placing in the file an affidavit of a real estate agent attesting to these facts.266 The Supreme Court cited approvingly to the judge’s inclusion of an affidavit supporting his version of the events, noted there was no evidence to refute it, and refused to require that the judge recuse himself.267

More recently, in *United States v. Morrison*,268 the Second Circuit reviewed the district court judge’s refusal to recuse herself after investigating the facts underlying a recusal motion. The defendant sought to disqualify the district court judge based on an alleged adverse business relationship between the defendant, the judge’s husband, and a friend of the judge’s. The judge asked her husband and the friend to review the

265. 199 U.S. 142 (1905).
266. *Id.* at 143.
267. *Id.* at 143–44.
268. 153 F.3d 34 (2d Cir. 1998).
materials submitted with the defendant's motion. They both responded that the allegations were false and denied any relationship with the defendant. The judge then declined to recuse herself. Reviewing the procedure, the Second Circuit stated "it was not irregular for [the judge] to ascertain her husband's and friend's possible involvement with the defendant simply by asking them, in a reasonable effort to confirm that defendant's incredible claims were indeed not factual."²⁶⁹

Thus, although judges typically do not provide evidence to refute a motion to disqualify, reviewing courts have commented favorably on the practice in the rare cases when they have done so. Responses by the challenged judge might become more common if recusal motions were routinely referred to neutral judges, which would then free the challenged judge to defend her conduct with the knowledge that a neutral third party would ultimately decide the matter.

4. Require Judges to Give Reasoned Explanations for Recusal Decisions

Too often, judges recuse themselves without any explanation of why they are choosing to do so. Judges might feel that it is unnecessary to announce their reasons for voluntarily bowing out, and the parties in those cases usually have no interest, and certainly have no right, to insist that the judge explain herself. In contrast, judges who refuse to recuse themselves are much more likely to publish an opinion explaining why. Thus, the body of law supporting the decision to remain on a case in the face of a potential conflict outweighs the minimal precedent explaining when a judge should step aside.

To alleviate this problem, judges should give reasons for deciding to remove themselves (or, if the motion is transferred to a new judge, that judge should articulate the basis for his decision). The explanations need not be long or detailed, particularly in straightforward cases. These decisions will fill the void left by silent recusals, especially in cases where a judge decides to step down merely because his impartiality might "reasonably be questioned," and not because that judge thinks he is biased or incapable of acting as a neutral decisionmaker. Decisions articulating grounds for recusal will provide a body of precedent to guide judges facing such decisions in the future.²⁷⁰ If nothing else, a judge considering

²⁶⁹. Id. at 48 n.4.
²⁷⁰. Cf. Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 U.C. DAVIS L. REV. 41, 99 (1995) (suggesting that district courts should publish their review of magistrate judges' pretrial management decisions to provide further guidance for the
disqualification will get a clearer sense of how often his colleagues have made the choice to step aside (or to require a colleague to step aside), making it psychologically easier for a judge to take the same course of action.

B. Putting Theory Into Practice: The Effect of the Proposed Reforms on the Cheney Case

Applying these suggested reforms to the Cheney case demonstrates that, if the traditional elements of adjudication were incorporated into recusal law, those laws would better serve the purpose of protecting the reputation of the judiciary.

Under the proposals discussed above, Justice Scalia would have been obligated to disclose the fact that he took the trip with Cheney before the press reported it. If the information had initially come from the Justice himself, rather than the media, it might have softened the public impression of the incident. Rather than a piece of investigative journalism, the story would have been billed as a routine public disclosure by a Justice. Although still newsworthy, the information would have been less likely to convey the impression of impropriety than articles trumpeting a heretofore “secret” vacation between a litigant and a Justice.

Furthermore, immediate and full disclosure of important details of the trip—such as the timing of the invitation and its acceptance, the number of guests who attended, and the travel arrangements—would have given the public a more complete picture of the trip and might have forestalled some of the criticism. Justice Scalia could have made clear from the outset that he and his family members did not benefit financially from flying on Air Force Two—an important fact needed to counter the reasonable assumption that they saved themselves the cost of a flight by traveling with the Vice President. He could also have clarified for the parties and the press that he was never alone with Cheney during the trip, which would have prevented editorialists from speculating that he had hours of private time with the Vice President in which to discuss the case.271

This type of information is relevant to the question of whether a Justice should recuse him or herself after vacationing with a litigant, and thus is properly subject to a public disclosure requirement. Justice Scalia implicitly acknowledged as much when he discussed these details in his

exercise of pretrial authority).

defense of the propriety of the trip. The reputation of the judiciary would have been better protected had this information been disclosed up front, before the press reported on the matter and certainly before the Sierra Club sought his removal from the case. Indeed, if Justice Scalia had disclosed that information in advance, it is possible that the Sierra Club would never have sought his removal from the case.

In his memorandum decision, Justice Scalia staunchly defended what he described as the “well-known and constant practice of Justices’ enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch.” The disclosure requirement proposed in this Article may serve to discourage such social contact. A judge might think twice before socializing with a litigant if she realizes she will have to disclose the details of that event to the parties, and some judges might choose to curtail such socialization with litigants whose cases are pending before them. But those who, like Justice Scalia, feel strongly that they should be permitted to engage in such social contact would be free to do so under this Article’s proposal as long as they fully disclosed the information about any social engagements with litigants in pending cases.

The goal of promoting the appearance of justice would also have been better served if the other eight Justices had decided whether Justice Scalia should sit on the case, rather than leaving the decision to Justice Scalia himself. No matter how reasonable, well written, and persuasive his memorandum decision might be, it is tainted because the author had a personal stake in the matter. There is something odd about a Supreme Court pronouncement on a question of law that so prominently features the pronoun “I.” The memorandum decision is argumentative, personal, and a little defensive. It reads more like an opposing motion filed by a party than an opinion by a neutral decisionmaker. In short, the very authority of the decision is undermined by the fact that its author is seeking to justify his own conduct.

Had the other eight Justices addressed the question of whether Justice Scalia should recuse himself, the decision would undoubtedly have been better received because it would have reflected the views of a majority of the Court and not a single, self-interested Justice. Even if the

272. Id. at 915–22. The less extensive the social interaction, the less relevant information there would be to disclose. So, for example, a Justice who attended the Vice President’s Christmas reception at the time the case was pending would not need to describe travel arrangements or the number of other attendees.

273. Id. at 926.

274. See supra notes 233–237 and accompanying text.
whole Court had agreed with Scalia that he need not recuse himself, an opinion authored by one of the other Justices would likely have been more moderate in tone, would have taken fewer opportunities to attack Scalia’s critics, and would not have made such strident statements about the need to ensure that judges are free to socialize with other high-ranking members of government. Both symbolically and substantively, the final decision about whether Scalia should be disqualified would have been improved had it come from the full Court, and would have better served the goal of protecting the Court’s reputation. For these same reasons, all recusal decisions would benefit from the procedural reforms suggested in this Article.

VI. CONCLUSION

As is clear from the long history of controversy surrounding judicial recusal, including the recent attention given to Justice Scalia’s refusal to recuse himself from the Cheney case, the law of judicial disqualification has failed to protect the integrity of the judiciary. Almost every commentator discussing problems with the disqualification laws has recommended expanding the grounds for judicial recusals.²⁷⁵ But the history of judicial disqualification demonstrates that alterations to the substantive standard will do little good as long as members of the judiciary are responsible for construing and applying the disqualification laws to themselves. Moreover, it would be wrong to lower the substantive standards for disqualification so far as to force judges to withdraw from cases simply because the majority of editorial writers or political pundits suggest that they do so.

The solution I propose instead is to incorporate the traditional forms of adjudication into the recusal process. The basic procedural components of litigation—party presentation of disputes to an impartial decisionmaker who issues a reasoned decision based on an identifiable body of law—have long been valued as essential to ensuring accurate results of adjudication and, most important here, maintaining the legitimacy of the judiciary. Legal Process theorists cited these practices as a defense to Legal Realists’ attacks on judicial lawmaking, assuming that most of us would accept the legitimacy of decisions made in accordance with these traditional forms that cabin judicial discretion and promote the accuracy of the final result. The traditional adjudicatory model lauded by Legal

²⁷⁵ See, e.g., Basset supra note 8; Frank, supra note 8; The Standard, supra note 8, at 763–70; Bias in the Federal Courts, supra note 8, at 1446–47; Leitch, supra note 8, at 527.
Process theorists fifty years ago continues to be cited today by scholars describing the sources of legitimacy for judicial decisionmaking. Incorporating these traditional forms of adjudication into the law of judicial disqualification will do more to protect judicial integrity than any change to the substantive recusal standards can accomplish.
JUDICIAL RECUSAL PROCEDURES

A REPORT ON THE IAALS CONVENING

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*Quality Judges* is an initiative of IAALS dedicated to advancing empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Quality Judges Initiative* empowers, encourages, and enables continuous improvement in processes for choosing, evaluating, and retaining judges.
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INTRODUCTION

In November 2008, with the financial assistance of Geraldine El Pottier Foundation, IAALS hosted a Conference of 20 judges, lawyers, court administrators, and scholars from around the country to consider best practices for judicial recusal procedures. The participants (see Appendix A) were in general agreement about the goals of and principles for recusal procedures and reached consensus on eight broad recommendations, albeit with disagreements about some particular components.

This report draws substantially on the Conference’s discussions, and IAALS thanks the Conference participants for their contributions to this report. To be clear, all participants may not be in agreement as to all points. This report represents IAALS views, as well as having the full endorsement of both the Brennan Center for Justice and Pennsylvanians for Modern Courts. We also thank them for their support.

“Recusal” or “disqualification”) is the removal of a judge (voluntarily or otherwise) from a case because the judge has—or may appear to have—an interest or involvement in, or special knowledge, beliefs, or opinions about the case that conflict with or could otherwise frustrate the judge’s unbiased fact finding and legal conclusions.

Recusal in the state courts is governed by the Fourteenth Amendment’s due process clause, and, state by state, by constitutional provisions, statutes, rules, codes of conduct, case law, and tradition. This report identifies the main areas of debate about proposed changes in recusal procedures and points to “best practice” provisions in place in particular states. In addition to the Conference’s discussions, this report draws on proposals of several national organizations and specific provisions adopted in various states.

Recusal has received increased attention in recent years because of three closely divided U.S. Supreme Court decisions. The first decision invalidated state provisions prohibiting judicial candidates from announcing their views on disputed legal or political issues, and a concurring opinion advised states to deal with potential conflicts created by campaign commitments in part by “adopting less stringent standards than due process requires.”

Another decision held that a state supreme court justice, whether or not he exhibited actual bias, should have recused himself in a case involving a party who spent substantial funds to secure the justice’s election. The third decision held a state supreme court justice’s recusal was necessary to ensure where the justice had been involved in the capital case some years before in a prosecutorial role.

1 “Recusal” traditionally refers to a judge removing himself or herself on a peremptory basis; “disqualification” traditionally refers to removal at the request or direction of a party to the case. This report uses “recusal” for both processes, although others use the terms interchangeably.
3 Id. at 386 (Kennedy, concurring).
Despite these high-visibility cases, we have not seen evidence—and do not suggest—that failure to recuse in a
sensitive or system-wide problem (such evidence might be widespread reports of controversial recusal motions or
stream of recusal motions).] There is, however, clear evidence that judicial recusals and money spent
by and on behalf of candidates are creating recusal quandaries and worries that have spreading by outside
elements in support of particular judicial candidates can threaten judges' impartiality or the appearance of
impartiality. This report does not take aim at judicial elections or how they are financed but simply recognizes
that these developments are drawing increased attention to recusal procedures. Even without this increased
attention, however, rewriting and strengthening recusal procedures—to ensure that they are fair, transparent,
effective—serves the interests of litigants, judges, and the courts as a whole. In this same vein, while failure to
recuse may not be a systemic problem—and substantial numbers of recusal motions may be unnecessary—
even a handful of cases that required recusal but in which judges denied recusal motions or failed to recuse
promptly can cast a cloud over all judges.

Over the years, states have developed fairly consistent substantive legal requirements for recusal. Most states
apply the American Bar Association's Model Code of Judicial Conduct requirement that "[a] judge
shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be
guestioned." Most states have also adopted the Model Code's provisions for mandatory recusal, including
when a judge is biased against one of the parties, previously served as a lawyer in the matter, has more than a
de minimis economic interest in the subject matter, is related to a proceeding party or lawyer within the third
degree of kinship, has personal knowledge of disputed extrinsic facts, or has engaged in improper ex parte
communications during the course of the proceedings.7

While grounds for recusal are not consistently across states, recusal procedures vary greatly in their:

- Transparency—recusal procedures and specific recusal decisions are not always accessible and understandable, and few states provide aggregate information about recusal behavior;
- Coverage—for example, recusal procedures for trial judges are more prevalent than for appellate judges;
- Conscioius—requests for recusal about their recusal obligations vary widely; and
- Requirements—procedures vary, among such aspects as a) who decides whether a judge

should step aside, under what time limits, and with what opportunities to seek some type
of a hearing, review of recusal decision; b) whether appellate courts should consider appeals
from denied recusal motions in situ or with a more deferential standard; and c) who fills
the temporary vacancy that results from recusal and, so to appellate courts, even whether to fill
the vacancy.

Variations in recusal procedures reflect, and for some aspects should reflect, local cultures, traditions, and the
difficulty of changing rules embedded in constitutions and statutes. Furthermore, because only a handful of
states keep aggregate data on recusal activity, it is hard to determine actual recusal behavior, including whether
states' written recusal procedures describe what actually happens. Precise numbers are elusive as to some recusal
provisions and practices.

6 ABA, Model Code of Judicial Conduct, R 1.1 (Ed. 2005).
7 Id.
Recital procedures that are understandable, transparent, accessible, and procedurally fair in fact and appearance, and compliance with which can be monitored, can enhance litigants’ (and, for cases that receive media attention, the public’s) trust in the judiciary when concerns over conflicts arise. At the same time, those responsible for establishing recusal procedures must accommodate sometimes competing values. Those responsible for establishing recusal procedures must:

- Balance fairness to both litigants and judges;
- Provide procedures that are fair but that do not consume undue amounts of scarce judicial and administrative staff time;
- Achieve efficiency and economy in reaching and reviewing recusal decisions while avoiding rushed judgments and impressions of self-serving behavior when the subject judge decides the motion;
- Provide transparency of process consistent with the privacy needs of judges, their families, and associates;
- Protect eligibility on both trial and appellate courts while guarding against the appearance that the judiciary is overly protective of its own;
- Establish clear and unambiguous recusal procedures that nonetheless accommodate variations within the state as to the number of judges and the comparative ease or difficulty in assigning replacement judges;
- Seek ways to protect the integrity of the state high court’s law-declaring function while recognizing the value of ensuring one or more recused justices and
- Communicate information about recusal procedures without creating an unwarranted inference of widespread judicial bias.

This report offers basic recommendations and a range of options in eight areas:

- Written, clearly articulated, and accessible recusal procedures;
- Who decides recusal motions, and with what opportunities for review;
- Time limits for deciding recusal motions and freezing the litigation;
- Recusal motion decisions in writing or orally on the record;
- Effective appellate review of recusal decisions and standards of review;
- Replacing recused judges;
- Making advice about recusal available to judges, and
- Collecting aggregate data on recusal activity.

Adapting and implementing these recommendations may, in some states, require changes in court rules, statutes, or even constitutional provisions, and may conflict with existing state law. For example, a legislative requirement that a chief judge assigns a recused judge to decide a recusal motion may violate a state separation-of-powers principle. A supreme court rule that allows retired justices to replace justices who have recused themselves or been disqualified from hearing a case may violate the state constitution. Governing authorities in each state should be aware of such potential limitations and take them into account in proposing improvements in recusal procedures.

The report also cites examples of policies in place in various states, with commentary on why some procedures appear preferable. Appendix B contains additional examples.
SECTION I

WRITTEN, CLEARLY ARTICULATED JUDICIAL RECUSAL PROCEDURES

A. BASIC REQUIREMENTS

All states should have written rules of procedure that explain how to file a recusal motion and how the courts will process the motion. According to the Conference of Chief Justices, however, as of 2016, 36 states had specific recusal procedures for trial judges, 15 had them for intermediate appellate courts, and 14 had them for state courts of last resort. Clear procedural rules benefit not only litigants who believe the judge may have a conflict of interest but also judges and court staff by ensuring efficiency and consistency.

B. TRANSPARENT AND READILY AVAILABLE INFORMATION

Having written procedures, however, is the minimum requirement. The Conference of Chief Justices notes that posting draft procedural rules for comment by the public, bench, and bar might enhance transparency and confidence in the final product. The procedures should be understandable to non-lawyers.

A Commenting participant commented that “a key component of procedural fairness is communicating that recusal procedures are in place.” State judiciaries should post recusal standards and procedures on their websites and direct each court with a website to do so as well. Recusal standards and procedures should include a layperson-oriented statement of the permissible bases for making a judge’s recusal. In particular, potential litigants should know that a recusal motion based on disagreement with a judge’s ruling will be denied absent an explanation of how the ruling meets one of the recusal standards for recusal. States should also post a standard-form recusal motion, especially to assist self-represented litigants (see Appendix C for template for a layperson-oriented statement of recusal grounds and procedures and for a standard-form recusal motion).

SECTION II

RECUINAL MOTIONS DECIDED BY ANOTHER JUDGE, OR PROMPT REVIEW BY OTHER JUDGE(S) OF THE SUBJECT JUDGE’S MOTION DENIAL

A. GENERAL CONCERNS

Allowing the judge who is the subject of the recusal motion to make a dispositive decision denying that motion flies in the face of the oft-invoked, age-old proposition that no person should be a judge in his or her own case. It is also likely that biased opinions among the parties and potentially among segments of the public should the matter receive media attention. A judge’s denial of his own recusal motion has built-in hazards beyond stoking public cynicism. Substantial social science research on unconscious judicial bias establishes that judges, like most people, are overly confident in their ability to be impartial in potential conflict situations. Furthermore, when a judge is faced with a recusal motion that presents information already to the judge’s knowledge, but about which the judge did not recuse ex parte, “[t]he judge is being asked to admit that he has already failed in his ethical obligation to excuse himself.” Removing the judge from the motion denial process avoids that tension.

Nevertheless, according to a recent Brennan Center report, 20 states generally allow trial judges to deny motions seeking their recusal, and 35 states allow supreme court justices to do so. Federal judges also decide whether to deny their own recusal motions, subject to review through the normal appellate process. Proponents of allowing a judge to deny a motion seeking their recusal say the practice is more efficient than referring the matter to another judge or judges, especially trial judges in small or single-judge jurisdictions where a different judge may not be readily available to decide the motion. We explain below why this is less problematic than it may seem. In addition, in any court the different judge who would decide the motion must spend time to become familiar with the case and motion. Proponents also argue that procedures that suggest the subject judge cannot be trusted to rule impartially cast judicial integrity into doubt.


31 Brennan Center Report, supra note 26, at 5.

32 Brennan Center Report, supra note 26, at 4–5.

The 2014 ABA Resolution that "argued states to establish clearly articulated procedures for ... Judicial disqualification" did not recommend that judges be barred from denying requests to recuse themselves or otherwise provide relief for perceived or actual improprieties. The underlying purpose was to avoid the perception of undue influence or partiality, as well as to ensure that the judge making the recusal decision was not subject to the same concerns as the recused judge. However, the resolution does not address situations where a judge is in a position to benefit from the recusal decision, such as where the judge benefits financially or professionally from the outcome of the case. In such cases, the recusal decision may be considered a conflict of interest and may be challenged by parties to the case.

All in all, we agree with a Commenter participant who said that "judges should not judge their own wanderings." We recommend that a general rule, that states not grant judges the authority to deny motions seeking their recusal, even if the motions are based on perceived or actual improprieties. Within that general rule, however, we recognize that some judges need flexibility based on resource and jurisdictional considerations. In any event, unless a judge grants a motion, there should be a prompt ruling on the motion by another judge, and not one designated by the subject judge. Implementing such a procedure will necessarily be different for trial judges and appellate judges.

B. TRIAL COURTS

We recommend that states direct a subject judge who does not grant a recusal motion to refer it to a previously designated judge to decide the motion, and issue the order granting or denying the motion. The subject judge should take no further action in the case until the replacement judge decides the motion.

States may seek to balance the desirability of excluding the subject judge from any role in deciding the motion with the need to contain the administrative demands facing courts with few judges. They might allow the subject judge to serve in a non-adverse role or as factfinder in cases where the subject judge was not consulted or heard the motion. In any event, unless a judge grants a motion, there should be a prompt ruling on the motion by another judge.

Moreover, if another judge or panel of judges is readily available to review the subject judge's initial decision, the court may order the subject judge to recuse from any role in deciding the motion or in any other way that may be necessary to ensure a fair and impartial decision.

States that take the recent denial decision from the subject judge need to decide whether and how the subject judge may dispute claims in the motion. The Brennan Center report says some states do not provide for the subject judge's participation, while others allow or require it, citing a California procedure in which a judge who does not grant a motion must provide the replacement judge with a concurrence that includes all the allegations in the moving party's claim and any additional relevant facts.

15 Id. at 8.
Finally, states should consider subjecting lawyers to sanctions for filing malicious motions for improper purposes. Rule 3.01 of the Texas Rules of Civil Procedure offers one example: "After notice and hearing, the judge who hears the motion may order the party or attorney who filed the motion, or both, to pay the reasonable attorney fees and expenses incurred by other parties if the judge determines that the motion was (1) frivolous and filed in bad faith or for the purpose of harassment, or (2) clearly brought for unnecessary delay and without sufficient cause."

The Court, having discussed, but reached no consensus, on allowing parties, in limited circumstances, to remove trial judges as a matter of right, rather than at the discretion of the challenged judge or another judge, and without any showing or even allegation of cause. Eighteen states apparently permit some form of these pre-judgment challenges. Proponents argue that such challenges may be the only option for avoiding a biased judge because parties are reluctant to allege a lack of impartiality. They also cite their simplicity and efficiency but acknowledge that their effective use depends on allegiance to shared social norms, or the threat of sanctions, to protect against abuse.

Opponents of pre-judgment challenges argue that such challenges undermine the traditional presumption of judicial impartiality, risk harming the system, and may (on some) judicial resources particularly in smaller jurisdictions where a replacement judge may not be readily available. And of the U.S. Supreme Court rules pre-judgment challenges of jurors unconstitutionally because of the possibility of holding their absent others inadmissible to protect against abuse. Maintaining the practice as to judges will seem anomalous.

To reiterate, however, there was no consensus on this matter. Some participants favor pre-judgment challenges, others do not. IAFLA does not take a broad position on pre-judgment challenges, given the various conditions and restrictions on their use imposed by the states that allow them in one form or another. At minimum, though, we recommend that they not be allowed in appellate courts where they would provide an opportunity to tinker with courts’ law declaring functions. And we recommend that states that permit pre-judgment challenges not require the movant to allege that the challenged judge is biased. Not imposing such a requirement avoids the negative implications of an unverified claim of bias, and allows an assumption that the movant may have sought reconsideration for reasons particular to the movant rather than any concerns about the judge.

C. APPELLATE COURTS

We believe the problems with judges depowering their own recusal motions described above are compelling for intermediate appellate and supreme court judges as trial courts.

1. Courts of Last Resort

As already noted, most states (35) permit individual supreme court justices to deny motions seeking their recusal. This permission may reflect the absence of a higher court to which to refer the motion and perhaps concern that allowing justices to review a colleague’s denial could impair collegiality or, alternatively, encourage strategic justiciation to use a motion requesting recusal of a colleague in an important case to effect a temporary change in the composition of the court and thus manipulate the court’s law-deciding function.

Nevertheless, we endorse a Texas rule that directs supreme court justices either to grant a recusal motion or refer it to the entire court to decide on its own, without participation by the challenged justice (see Appendix B, Section 5A).8 That latter provision is consistent with the U.S. Supreme Court’s observation that an appellate judge should not join colleagues in deciding a case involving the judge’s potential conflict of interest even if that judge’s vote did not determine the outcome.10 The fact that the interested judge’s vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position.11

That said, however, we also encourage states to consider establishing an independent panel of retired justices and judges, and perhaps non-judges and non-attorneys, to decide or to review the denial of supreme court justices’ recusal motions. The ABA Standing Committee on Judicial Independence also suggested referring the “review of the denial” (or perhaps even assigning the motion itself to the first instance) “to a special panel of retired justices.” According to the Brennan Center report, no state has created such a panel, but states have created commissions that include judges and non-judges to decide matters relevant to the judiciary, including judicial performance evaluation commissions to provide input to judicial performance evaluations, judicial nominating commissions to screen and recommend well-qualified judicial applicants for appointment, and judicial misconduct-discipline commissions to investigate complaints of judicial misconduct and disability. As with the have review of a collegial recusal motion, recusal commissions also may provide opportunities for ill-conceived strategic voting, but we think the risk is minimal.

2. Intermediate Appellate Courts

Generally, intermediate appellate courts should have rules similar to those of a court of last resort. Review of the denial of a motion to recuse may be conducted by the chief judge or his designee, by an en banc court without the challenged judge, or by the court of last resort. As a practical matter, unlike courts of last resort, most intermediate appellate courts sit in panels, and thus a challenged judge can be replaced fairly easily by assigning a different judge to the panel.

28 See, e.g., Pa. State, 682 A.2d at 1167.
29 Williams, 185 S. Ct. at 999.
31 Nebraska v. State, 153 P.3d 1164 (Nebr. 2007).
SECTION III

SPECIFIED AND EXPEDITIOUS TIME LIMITS
FOR DECIDING RECUSAL MOTIONS;
FREEZING THE LITIGATION

A. TIME LIMITS

Recusal procedures should specify the number of days for ruling on a recusal motion before the motion is deemed granted and the case is transferred to another judge. This timeframe could include time for review by another judge if the subject judge does not grant the motion. Such a rule can limit uncertainty and delay for both the litigants and the court because until a recusal motion is dispositive, the underlying litigation is typically frozen. Except in emergencies, the judge should not rule on other aspects of the underlying litigation. The Conference of Chief Justices cited a Florida rule requiring a decision no later than 30 days after service of the motion; after 30 days, the motion is considered as granted. A corollary of having a deadline on a pending recusal motion is requiring a party to notify the subject judge when it files a recusal motion.

B. FREEZING THE LITIGATION

Most jurisdictions with rules on the subject provide that, once filed, a recusal motion freezes the litigation until the motion’s disposition, thereby forbidding the subject judge to rule on any other motions in the case until the recusal motion is decided. While such a rule makes sense in general and can serve to encourage prompt decisions, there should be exceptions for emergency situations. One Court’s participant cited as an example the need for action in a family law dispute when one parent is preparing to board a plane to take a child out of the country. Arizona Rules of Civil Procedure include such an allowance, providing that, until the motion is decided or the case transferred, the subject judge should not take any further action in the case “except to make such temporary orders as are absolutely necessary to prevent immediate and irreparable harm.”

28  COJ Resolution 3, supra note 3, at 3.
SECTION IV

RECUSAL MOTION DENIALS EXPLAINED IN WRITING OR ORALLY ON THE RECORD

Judges should explain denial recusal motions in writing or orally on the record, even when the denial is because the motion is extremely or clearly frivolous or insufficient. Written explanations can be as brief as a few sentences—whatever is necessary to state the applicable standard and explain why the motion does not meet it—or in appropriate cases, why the standard requires a more specific recusal. Even a granted motion might include a one- or two-sentence clarification of the reason for the grant. While the explanation can be brief, it is not enough simply to invoke a technical legal term that a layperson would likely not understand.

Some jurisdictions have prepared forms or checklists with common reasons for the motion denial. The judge may complete, annotate as necessary, and file as an explanation. A Commenting participant suggested preparing a template for recusal motions (see Appendix D).

There are several reasons why the rules should not require written explanations. They can help ensure individual judges’ accountability to their oath of impartiality by requiring a judge to write an opinion explaining the denial. The denial may cause the question whether the judge’s reasons are simply not obvious when the judge cannot explain it in a reasoned opinion. In the latter view, formal explanations promote due process by demonstrating that judicial decisions are well-reasoned rather than arbitrary. They promote transparency in the recusal process as a whole, and they provide guidance to other judges by establishing common law interpretations of vague or ambiguous recusal requirements. Such provisions might allow for a written explanation even of a sua sponte denial, although several participants worried that requiring such explanations might encourage judges to avoid recusal on their own initiative if the reasons for the recusal could be embarrassing. If such information is in a motion, however, it is already in the open. The best way for judges to avoid having potentially dirty laundry exposed publicly is to recuse sua sponte, putting reasons on the record to be “read” by future judges, rather than keeping the reasons entirely private.

Requiring explanations in writing facilitates appellate review of denial recusal motions. Written explanations also facilitate aggregate data collection on recusal activity. Finally, if a party (or anyone) files a disciplinary complaint regarding a failure to recuse (even if, for example, the denial stemmed from an improper motion), the subject judge’s explanation for the denial and/or at the time can facilitate resolution of the complaint.

The ABA Judicial Disqualification Project’s draft report notes the concern that such a requirement could cause judges to recuse unnecessarily out of an abundance of caution, leading to recusals based on the “sweat equity atmosphere” and “setting precedent” that other judges will be prompted to follow. The report called for the concern “unattainable” but “overzealous” and argued that “not one court has ever exercises a sua sponte motion to explain their ruling.” States may favor to encourage—rather than require—such explanations. If so, the encouragement should be strong and forthright.

One consideration offering written explanations is that recusal motions are lengthy and often full of factual and previous allegations may be impossible to summarize and relate to a denial in a denial order without involving substantially more judicial time than the motion merits and that will not satisfy the merit in any case.

SECTION V

EFFECTIVE APPELATE REVIEW OF RECUSAL DENIALS; STANDARDS OF REVIEW

Section II.B recommends that whenever a trial judge does not grant a recusal motion, the motion should be referred, by an established mechanism (not by the challenged judge), to a referral judge to decide the motion. The referral judge’s decision as to the motion’s procedural sufficiency and/or its merits is subject to normal appellate review, as is a subject judge’s denial of his or her own motion (to repeat, a practice that we do not endorse).

A. METHODS OF REVIEW

The standard mechanisms for appealing a rejected motion include motions for reconsideration, post trial petitions, and interlocutory appeals. The denial of a motion to recuse may also provide the basis for a judicial discipline complaint, as when a judge denies a recusal motion for illicit reasons. We agree with the Conference of Chief Justices and others, however, that states should not rely on the discipline process as a deterrent to, or an appellate forum for, improper handling of recusal motions.

Although interlocutory appeals offer the earliest opportunity for relief, they disrupt appellate courts’ operations—and we recommend that appellate courts not encourage them except in extraordinary cases. Interlocutory appeals seem especially questionable when a separate referral judge has decided the original motion. A Concurring participant reasoned that in “true cases out of her, with a prompt review by a separate judge, the motion has almost everything he can reasonably expect, especially because he can still raise the recusal question as part of the regular appeal.” A stronger case for interlocutory appeals may be when the subject judge denies his or her own motion and thus creates in him the appearance of self-protection. The way to avoid interlocutory appeals’ disruptions in such circumstances is to eliminate the circumstances—by the subject judge from deciding the motion and having a referral judge do so.

B. STANDARD OF REVIEW

Courts have differed on the degree of deference with which they should decide appeals of denied recusal motions, whether denied by the subject judge or by another judge to whom the motion was referred. As far as the proper standard has been apparently a matter for case law rather than recusal rules, with most appellate courts adopting the more deferential abuse of discretion standard rather than reviewing the recusal denial based on a fresh examination of the motion, see, e.g., Section V of Appendix A, however, for examples of court rules in two states that require de novo review.

Abuse of discretion review seems an appropriate way to balance fairness with conservation of resources. It clearly is appropriate in denials based on timeliness or non-conformity with procedural rules. We think it is also appropriate when hearing an appeal from the decision of a separate judge to which the motion has been referred, the practice that we recommend strongly. Because de novo review calls for a anew searching, start-from-scratch review in order to become familiar with the facts of the case, it may seem necessary when the subject judge has decided his or her own motion. However, just as we argued that a separate review at the trial court level obviates the need for disruptive interlocutory appeals, a separate review also obviates the need for unnecessary intensive de novo review on appeal.

SECTION VI

EFFICIENT PROCEDURES FOR REPLACING RECUSED JUDGES

A. TRIAL AND INTERMEDIATE APPELLATE COURTS

Trial courts that assign all cases to judges by any one of several random procedures should be able to use that process to identify replacement judges in neutral situations. As noted above in section B.C.2, most intermediate appellate courts sit in panels of judges, and thus a challenged judge can be replaced fairly easily by assigning a different judge to the panel.

B. APPELLATE COURTS

1. Methods for Identifying Replacement Justices

The purpose for which litigants seek recusal of a judge on a multi-judge appellate court is primarily to prevent the allegedly conflicted judge from participating in the case. If successful, there will usually still be a quorum of appellate judges to hear the case or, in a rare, an evenly constituted panel on an intermediate appellate court.

Not designating a temporary replacement or replacements, especially on a court of last resort, however, does not lose a court if several judges are removed; its courts with an odd number of judges, it takes a for vote. Either situation renders the underlying appeal infeasible (which may be the strategic goal of those seeking recusal).

States vary in policies as to whether and how to designate a temporary replacement for a recused high court justice. According to the Brennan Center report, 33 states allow the chief justice to designate the replacement, one or more state judges, or other judges in the state to select the replacement. Not all states have this option. Eighteen states have designated the replacement to the legislature, the chief justice, or the governor.44 Providing for a temporary replacement through these methods misses the possibility that the designation will select a judge who strategically affects the outcome of the underlying litigation. Even if that is not a goal, any selection made through these methods may carry the appearance of such a strategy. As to gubernatorial selection, one Connecticut participant noted that “governors’ appointment is good enough for mid-term judicial vacancies,” while others noted that these appointments “hear all kinds of cases, rather than a single case.”

A way to avoid these potential problems is an automatic, neutral process that codes the choice to an individual or group of individuals. The Internal Operating Procedures of the Ninth Circuit, for example, allow the chief judge to designate a judge to sit on the panel in advance of oral argument or the conference in which the case is scheduled. If the remaining judges agree ultimately to agree to a disposition, the chief justice may designate a “temporary associate justice.” The designation is based on a system of rotation among the chief judge and the district court judges, according to the number of judges on the district, excerpting from the rotation the chief judge in the district from

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which the underlying litigation arose. If such a record occurs in a “discretionary jurisdiction case,” normally
the court will “discharge jurisdiction” rather than use a temporary associate justice, unless four of the
remaining justices agree that “extraordinary circumstances” justify deciding the case with a temporary
justice. If the record occurs in a mandatory jurisdiction case in which the remaining justices are evenly
divided, the chief justice invokes the designation procedure as a matter of course. According to the Clerk
of the Court for the Florida Supreme Court, the designation procedure is effective albeit seldom used
because records usually would affect cases where the court has mandatory jurisdiction, such as death
penalty cases. In other cases, if the court is evenly divided and the case is within the court’s discretionary
jurisdiction, the general practice would be to let the lower court decision stand. 34

Of course, even neutral replacement procedures have the potential for strategic recusal. A justice deciding
whether he has a conflict sufficient to merit a recusal request, for example, may be influenced by that decision
by knowing which lower court judge or special judge or justice sits to serve as a replacement justice.

2. Protecting the High Court’s Law Declaring Function

Any system for using temporary replacement justices creates the risk that a temporarily constituted
supreme court will decide an important legal question by a closely divided vote, ensuring a precedent that the
full court (with the previously recused judge now sitting) may reverse if and when a separate case involving
the same issue comes before it. A Concurring participant described the tension as “between absolute justice
for the individual parties to every case on the one hand and avoiding dilution of a state high court’s law-
declaring function on the other.” The participant cited two unusual cases in which the state high court
announced conflicting decisions on the same day, but the participant added, “the same result can occur any
time temporary replacements are used to a high court.” The alternative is a non-presidential ruling or no
ruling, due to a divided or quango-less court, but its status with intermediate appellate courts, “the party will
still have had at least one chance at an appeal.”

These tensions merely reinforce our earlier observation that setting recusal policy, like setting most any
public policy, involves balancing competing risks and interests.

34 John T. Grbic, Clerk of the Court for the Florida Supreme Court: Memo to Justice Barbara Pariente (March
14, 2019). On file with RAILS.
SECTION VII

RESOURCES FOR SPECIFIC CONFIDENTIAL ADVICE FOR JUDGES FACING RECUSAL MOTIONS OR CONSIDERING SELF-RECUSAL, AND FOR GENERAL AND CONTINUING EDUCATION ABOUT JUDICIAL ETHICS

Fairness demands that courts deal efficiently with recusal motions according to prescribed procedures. It also demands that judges recuse themselves, in the absence of recusal motions, where they think they have a conflict of interest or there is a risk of the appearance of a conflict sufficient to undermine the appearance of impartiality.

A. PROVIDING CONFIDENTIAL ADVICE WHEN JUDGES REQUEST IT

Especially in cases where the judge has no recusal motion to weigh, the judge should be able to seek confidential advice from a source sanctioned by the state judiciary that can walk the judge through the applicable rules while not offering a binding decision.

Different states take different approaches. More than 40 states have “judicial ethics advisory committees to which judges may submit inquiries regarding the propriety of contemplated future action under the code of judicial conduct,” and according to the National Center for State Courts, a “disproportionate number” of inquiries involve disqualification. Ohio has such a body, the Board of Professional Conduct, which provides advice to lawyers and judges and publishes a small number of individual opinions, most concerning lawyers.” Judges may also seek advice from private counsel through the Ohio Supreme Court’s “Judicial Hotline.” The Hotline is administered by a division of the Ohio Department of Administrative Services in connection with its contractual program to provide liability coverage to Ohio judges. Through the Judicial Hotline, courts and judges may receive free, confidential advice apportioned on an hourly basis limited to two hours per year per judge, from three law firms serving matters that have not yet become the subjects of lawsuits or formal complaints. “The Court reports that the majority of Hotline time to date has been devoted to judicial ethics issues, including issues related to recusal.” (The United States Judicial Conference Committee on Codes of Conduct also provides advisory opinions to federal judges on the model code’s applicability to contemplated actions, and it refreshes and publishes opinions likely to be of general interest. Of the 88 opinions published on the federal court website, 37 dealt directly with disqualification.)

B. CONTINUING JUDICIAL EDUCATION

In addition to providing a source for individual advice, state judiciaries should make available orientation and continuing judicial education about ethical requirements including substantive and procedural rules governing recusal. The ABA resolution called on “states in which judges are subject to elections of any kind to adopt … guidelines for judges concerning disclosure and disqualification obligations regarding campaign contributions.”

We agree, but would not confine this assistance to the narrow area of campaign financing.

SECTION VIII

COLLECTION OF AGGREGATE DATA ON RECUSAL ACTIVITY

According to the 2006 Draft Report of the Judicial Disqualification Project, four states—Alaska, Minnesota, North Dakota, and Vermont—collect some type of statistical data on recusal and disqualification (the data does not include the reasons for disqualification). Our research for this report revealed that a fifth state, Indiana, collects statistics on how many “Special judges” are appointed each quarter by court and case type. A special judge may be appointed in a case when a motion for change of judge is granted or the sitting judge is disqualified or recuses him or herself (our research also indicated that such data is no longer collected in North Dakota).

Alaska has the most comprehensive system—a computerized case management system that tracks the number of cases reassigned because of recusal, including by peremptory challenge. Aggregate, website posted data on recusal activity—including filed, asserted bases, dispositions and reasons given, and case specific records—can enhance transparency and facilitate comparative assessment of the impact of, and compliance with, procedural rules. One Concerning participant warned that “many courts have written procedures and procedures that are not followed” authorities should make clear that the data in question are aggregate data without judge names or other identifiers, lest courts resist compliance with data collection out of fear of freedom of information act type requests for sensitive information.

Because such data gathering programs will have major implications for statewide and local information systems, establishing them initially on a pilot basis in a few diverse jurisdictions makes sense.

81 Resolution 587, supra note 14.
82 ABA Draft Report, supra note 30, at 15.
CONCLUSION

The increase in judicial campaign contributions, independent expenditures in support of judicial candidates, and relaxed rules governing judicial campaign speech have directed attention to the need for more rigorous recusal procedures to deal with conflicts of interest claims based on campaign financing and campaign speech.

The attention to campaign-related issues, however, has had a more general effect, revealing potential weaknesses in some recusal procedures apart from any judicial election context. Do current recusal procedures serve the well-established rule that no person should be a judge in his or her own case, and do they do so transparently and efficiently?

We recommend that state judicial authorities take the opportunity to review their state’s recusal procedures, asking:

- Which procedures are mandated by state constitutions, by statute, by court rules, or simply reflect tradition?
- Which values are important to elevate in the state’s recusal procedures—transparency, efficiency, expeditious resolution, and/or freedom from the appearance of bias?
- Which procedures can the judiciary change on its own, which require legislative intervention, and which require constitutional change?
- How can and how should the judiciary assure all litigants that legitimate concerns about conflicts of interest will be effectively explored?
- How can and how should the judiciary assure judges that their legitimate interests in privacy and insulation from unwarranted attacks will be protected?

We offer this report not as a manual for recusal procedures revision, but rather as a checklist of the important considerations that state judiciaries on their own and in cooperation with legislators, executive branches, the bar, and citizens can take into account in answering these questions.

And, as stated at the outset, JAASS expresses its deep appreciation to the participants in the 2016 Recusal Procedures Convening for their thoughtful illumination and consideration of recusal issues and challenges, and to EL Porat Foundation for making the Convening possible.
APPENDIX A

CONVENING PARTICIPANTS

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\[\text{Participants' affiliations are provided for informational purposes and do not denote the affiliated organization's support for this project.}\]
ILLUSTRATIVE PROVISIONS

Appendix B contains excerpts from constitutional provisions, statutes, rules of court, procedural rules, and formal statements of operating procedures that prescribe practices that are consistent with the recommendations in the text of the report.

The organizational sequence of the Appendix tracks that of the report.

A provision's inclusion in this Appendix does not signal IAALS' endorsement of it or a recommendation that states adopt it as written or with modifications. Nor does inclusion reflect any independent confirmation by IAALS that practice in the particular jurisdiction is necessarily consistent with the provisions prescribed behavior.

Inclusion only reflects IAALS' view that jurisdictions consider implementing any of the report's recommendations, they look to the efforts of other jurisdictions.

This Appendix reflects observations of Concerning participants, IAALS staff's non-exhaustive review of procedural provisions, and background research undertaken by staff of the National Center for State Courts in support of the Conference of Chief Justices' Collaboration in Developing State Recusal Rules and by the staff of the Brennan Center for Justice in support of the Center's report, Judicial Recusal Reform: Toward More Effective and Fairer Disqualification.4 We are grateful to both the National Center and the Brennan Center for providing access to their research.

I. WRITTEN, CLEARLY ARTICULATED JUDICIAL RECUSAL PROCEDURES

As of 2016, 36 states had specific recusal procedures for trial judges, 12 had them for intermediate appellate courts, and 10 had them for state courts of last resort.

II.A. RECUSAL MOTIONS DECIDED BY ANOTHER JUDGE

Alaska Statutes, 22.20.020:

(4) ... If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of court, or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge.

California Code of Civil Procedure 170.3(c)

(5) A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency of the facts, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's refusal, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson. The Clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as expeditiously as possible. No challenge pursuant to this subdivision or Section 170.6 may be made against a judge selected to decide the question of disqualification.

Louisiana Code of Civil Procedure, Article 160

Reinstatement of judge of court of appeal. When a written motion is filed to enjoin a judge of a court of appeal, he may enjoin himself or the motion shall be heard by the other judges or the panel to which the case is assigned, or by all judges of the court, except the judge sought to be enjoined, sitting en banc.

Nevada Revised Statutes, 1.225(4)

Any party to an action or proceeding seeking to disqualify a justice of the Supreme Court or a judge of the Court of Appeals for actual or implied bias shall file a petition in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be held before the other justices of the Supreme Court or, if the charge concerns a judge of the Court of Appeals, the justices of the Supreme Court.

Texas Rules of Civil Procedure, Rule 180

(1) Responding to the Motion. Regardless of whether the motion complies with this rule, the respondent judge, within three business days after the motion is filed, must either:

(A) sign and file with the clerk an order of recusal or disqualification; or

(B) sign and file with the clerk an order referring the motion to the regional presiding judge.

(2) Motion. The regional presiding judge must rule on a referred motion or assign a judge to rule. If a party files a motion to remove or disqualify the regional presiding judge, the regional presiding judge may still assign a judge to rule on the original, referred motion. Alternatively, the regional presiding judge may sign and file with the clerk an order referring the second motion to the Chief Justice for consideration.

Texas Rules of Appellate Procedure, Rule 16.3

(b) Decision. Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

Utah Rules of Civil Procedure, Rule 63

(6)13) The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge. The judge must take no further action in the case until the motion is decided. If the judge grants the motion, this order will direct the presiding judge of the court to, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of limited jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(6)12) If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing to consider and render a decision of the reviewing judge.

(6)12) If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing to consider and render a decision of the reviewing judge.

(6)12) If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing to consider and render a decision of the reviewing judge.
III. PROMPT REVIEW BY OTHER JUDGE(S) OF THE
SUBJECT JUDGE’S MOTION DENIAL

Mississippi Rules of Appellate Procedure, Rule 488
If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge’s recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, the filing party may within 14 days following the judge’s ruling, or 14 days following the expiration of the 30 days allowed for ruling, seek review of the judge’s action by the Supreme Court...

Michigan Court Rules, 2.003(D)(3)
(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

(ii) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion at once;

(b) In a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion at once.

(c) In the Supreme Court, if a justice’s participation in a case is challenged by a written motion, or if the issue of participation is raised by the justice himself/herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification at once.

The Court’s decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for granting or denial of the motion for disqualification. Any concurrence or dissenting statements shall be in writing.

III.A. SPECIFIED AND EXPEDITIOUS TIME LIMITS FOR
DECIDING RECUSAL MOTIONS

Florida Rules of Judicial Administration, Rule 2.330
(b) Time for Determination. The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (a). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to dismiss the case.

Tennessee Supreme Court Rules, Rule 108
1.03(b) Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.

3.02(a) Upon the filing of a motion seeking disqualification, recusal, or determination of constitutional or statutory incapacity of an intermediate appellate judge, the judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion...
III. FREEZING THE LITIGATION

Rules of Civil Procedure for the Superior Courts of Arizona, Rule 42.2

(b) Hearing and Assignment.

(3) On filing of the affidavit for cause, the named judge shall proceed no further in the action except to make such temporary orders as are absolutely necessary to prevent immediate and irreparable harm from occurring before the request is decided and the action transferred. However, if the named judge is the only judge in the county, that judge may also perform the functions of the presiding judge.

Texas Rules of Civil Procedure, Rule 182

(4)(2) Restrictions on Further Action.

(A) Motion Filed Before Evidence Offered at Trial. If a motion is filed before evidence has been offered at trial, the respondent judge need take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record.

Utah Rules of Civil Procedure, Rule 63(c) – see II A

IV. RECUSAL MOTION DENIALS EXPLAINED IN WRITING OR ORALLY ON THE RECORD

Uniform Rules, Superior Courts of the State of Georgia, Rule 25.6

The judge assigned may consider the motion solely upon the affidavits, but may, in the exercise of discretion, convene an evidentiary hearing. After consideration of the evidence, the judge assigned shall rule on the merits of the motion and shall make written findings and conclusions.

Maine Rules of Civil Procedure, Rule 63

(3) Determination of Reversal by the Court. With or without a hearing, a judge may determine herself or himself to be recused if the judge recuses in the matter, the judge may, but is not required to, set forth the reasons for recusal.

(5) Denial of Motion to Recuse. If a judge denies a motion to recuse, the judge shall briefly state the reasons for the denial in a written order, or orally on the record if the motion is made during the course of a proceeding that is being recorded, provided, however, that if a motion to recuse is made during or shortly before the start of an on-the-record proceeding, and the judge denies the motion, the judge need not state the reasons for denial of the motion unless after the proceeding has been completed, and the judge, or a jury, has issued any order or other ruling to conclude the proceeding.

Michigan Court Rules, Rule 2.003(D)(3)(b) – see II B

Tennessee Supreme Court Rules, Rule 108 – see III A
V. EFFECTIVE APPELLATE REVIEW OF RECUSAL DENIALS: STANDARDS OF REVIEW

Michigan Court Rules, Rule 2.003(D)(3) – see 18

Oklahoma Supreme Court Rules, Rule 1.175

... Motion to disqualify a judge of the Court of Civil Appeals shall be filed with the clerk of the Supreme Court within ten (10) days after the date notice of assignment is mailed to counsel. The motion shall be decided by the divisions. If the division should refuse to disqualify the judge, the aggrieved party may seek review in the Supreme Court by filing a petition within ten (10) days from the date of the division's order...

Tennessee Supreme Court Rules, Rule 10B

201... In both types of appeals authorized in this section, the trial court's ruling on the motion for disqualification or recusal shall be reviewed by the appellate court under a de novo standard of review, and any order or opinion issued by the appellate court shall state with particularity the basis for its ruling on the recusal issue.

VIA. EFFICIENT PROCEDURES FOR REPLACING RECUSED JUDGES – TRIAL COURTS

Rules of Civil Procedure for the Superior Courts of Arizona, Rule 42.1(j)

(i) Reassignment.

(a) On Stipulation. If a notice of change of judge is filed, the parties should inform the court in writing if they have agreed on an available judge who is willing to hear the action. An agreement of all parties may be honored and, if so, bar further changes of judge via contrary order of right unless the agreed-on judge becomes unavailable. If a judge to whom an action is assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other incapacity, the parties may consent to any judge under the rules that existed immediately before the assignment to that judge.

(b) Absent Stipulation, if no judge is agreed on, the prevailing judge must promptly realign the action.

Utah Rules of Civil Procedure, Rule 63(c) – see 11A

VII. EFFICIENT PROCEDURES FOR REPLACING RECUSED JUDGES – APPELLATE COURTS

Supreme Court of Florida Manual of Internal Operating Procedures (K)

D. Method of Selection. Associate justices shall be the chief judges of the district courts of appeal selected on a rotating basis from the lowest numbered court to the highest and repeating continuously. A district court shall be temporarily removed from the rotation if the case cannot be assigned to another district court. If more than one associate justice is needed, they shall be selected from separate district courts according to the numerical rotation. If the chief justice of a district court whose term would be vacated under this procedure is recused from the case or otherwise unavailable, the next most senior justice on that court (including senior judges) who is not recused shall replace the chief justice or associate justice.
Rules of the Supreme Court of Georgia, Rule 57

A disqualified or nonparticipating Justice shall be replaced by a senior appellate judge or judge, a judge of the Court of Appeals or a judge of a superior court where deemed necessary. A disqualified or nonparticipating Justice does not participate in any motion or decision or the opinion on the merits and is not present when discussions regarding the case take place. Neither briefs and motions nor copies of bench briefs, draft opinions or other memoranda are circulated to the disqualified or nonparticipating Justice.

Nevada Statutes 1.225

(5) Upon the disqualification of:

(a) A justice of the Supreme Court pursuant to this section, a judge of the Court of Appeals or a district judge shall be designated in place of the justice as provided in Section 4 of Article 6 of the Constitution of the State of Nevada.

(b) A judge of the Court of Appeals pursuant to this section, a district judge shall be designated in place of the judge as provided in Section 4 of Article 6 of the Nevada Constitution.

Ohio Constitution, IV.02

(A) … if any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a case or cases, the chief justice or the acting chief justice may direct any judge of any court of appeals in the place and stead of the absent judge.

South Dakota Codified Laws, 16-1-5

Retired justices and judges, with their consent, and active judges may be authorized by the chief justice to sit in the place of disqualified justices, or in the event of vacancies or other necessities as determined by the chief justice. The court shall provide for the reimbursement of their expenses.

VII. RESOURCES FOR SPECIFIC CONFIDENTIAL ADVICE FOR JUDGES FACING RECUSAL MOTIONS OR CONSIDERING SELF-RECUAL, AND FOR GENERAL AND CONTINUING EDUCATION ABOUT JUDICIAL ETHICS

This recommendation likely will not require the adoption of a statute or court rule to implement. The Ohio Supreme Court’s Judicial Institute discussed in the body of the report is one potential model.

VIII. COLLECTION OF AGGREGATE DATA ON RECUSAL ACTIVITY

Indiana Code 33-21-5-1(2) requires the Division of State Court Administration to conduct and compile statistical data on the judicial work of the courts. This data includes statistics on the number of special judges appointed each quarter by court and case type. "Special judge" may be approved when a motion for change of judge is granted or the sitting judge is disqualified or recuses himself.

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TEMPLATE FOR POSTING RECUSAL STANDARDS AND PROCEDURES: TEMPLATE FOR FORM MOTION SEEKING RECUSAL AND ACCOMPANYING DECLARATION

Section III of the report recommends that state jurisdictions “post recusal standards and procedures on their website” and that the recusal standards and procedures include a layperson-oriented statement of impermissible bases for recusal motions. It also recommends that states “post a standard-form recusal motion, particularly to assist pro se parties.”

The single document includes two separate but related templates. States may use one or the other or both, adapted to reflect their own standards and procedures. Parts I and II are sample plain-language statements of recusal standards and procedures. Parts III and IV contain a standard-form recusal motion and accompanying declaration of factual support. (Part V suggests states that post a plain-language version of standards and rules also post the actual standards and statutory rules or rule-based language.)

The sample statement of procedure reflects the report’s recommendations for mechanisms to identify relevant judges and recuse deciding non-granted recusal motions.

States that decide to adopt either or both parts of the document should post their adaptation on the state judicial website and direct its placement on any individual court website. Courts may also wish to have hard copy versions available for distribution to clerks’ or court administrative offices.
JUDICIALLY RECUSED:
SEEKING A JUDGE'S REMOVAL FROM A CASE

Recusal: An Introduction

Parties in civil, criminal, and appellate proceedings may request that the judge or justice assigned to the case no longer participate in it. Parties may do so by filing a recusal motion (sometimes called a "disqualification motion"). This document can help you formulate a recusal motion and supporting documentation by summarizing the governing rules in everyday language and by providing a form motion to use in preparing your own motion.

Part I describes judical recusal procedure. Part II summarizes the rules and requirements established by state law. Part III is a blank recusal MOTION and Part IV is a blank STATEMENT OF FACTS; you may use them in preparing your own documents. Part V contains the relevant legal provisions to which your motion and statement should refer.

Recusal protects judicial impartiality. A judge should not preside over a case if that judge has, or may reasonably appear to have, a conflict of interest in the case or procedure. A conflict of interest is an interest or involvement in, or special knowledge, belief, or opinions about, the matters involved that could create a conflict between the judge's interest in an impartial decision on the one hand and his or her interest in a specific outcome on the other.

Recusal, however, is not efficient court operations by delaying proceedings while the motion is under consideration; and, if granted, while a replacement judge is identified for assignment and becomes familiar with the case. Thus judges will not grant recusal motions that do not clearly establish an actual or apparent conflict of interest.

1. Recusal Procedures

   1. For judges of trial court and intermediate appellate court,

      a. Parties may move that the judge assigned to the case recuse himself or herself from the case. ("Judge" as used here includes other judicial officers, but does not include clerks or other administrative personnel.)

      b. The recusal motion and statement of facts must be filed according to the rules and time limits summarized in Part II.

      c. If the judge grants your request, he or she will refer the motion to a court or other designated person or agency, which will assign another judge to the case.

      d. A judge who does not grant the motion (i.e., recuse himself or herself) will send the motion to a designated court or judge, which will assign it to another judge to decide whether or not to grant it. The judge in your case will not make the assignment.

         (1) The referred judge will first review the motion to determine whether it meets the basic requirements described in Part II; for example, whether you filed it according to the time limits and it contains actual factual allegations, not just unsupported assertions. If the judge determines that the motion does not meet these basic requirements, he or she will either dismiss it or return it to you to try and correct it.

         (2) If the motion meets the basic requirements, the referred judge will decide whether the judge in your case should be recused or continue to sit on the case.

         (3) If the judge grants the motion, he or she will return a court or other designated person or agency, which will assign another judge to proceed in the case.
e. In some small courts, where another judge may not be present at the courthouse to decide the motion, the trial judge may decide from a remote location using telephone hearings and electronic submission of documents.

f. If the judge assigned to decide your removal motion denies it, you may file an appeal to the appellate court seeking review of that denial.

g. Even if you establish that the judge's impartiality might reasonably be questioned, in some circumstances the judge may continue to decide cases. For example, the judge might be the only judge available to sit in a case involving a. Due to the complexities of the issues involved, the judge might be unable to continue to decide cases if the facts that lead to the removal motion are clear and the judge has decided substantial attention to the matter and was previously unaware of the facts. The judge might be able to continue to decide if the case is not clearly barred or if the judge is not clearly barred or if the judge is not clearly barred.

2. For justices of the supreme court:

a. Appellate and appellate courts may request (e.g., make, or file a motion) that one or more justices recuse themselves from the case.

b. The recusal motion and statement of facts must be filed according to the rules and time limits summarized in Part II.

c. The justice(s) may grant your request and step aside in the case.

d. If a justice does not step aside, she or he will refer the motion to the other justices, who will, without the challenged justice's participation, decide whether to grant the motion.

e. When justices are recused, either by themselves or by other justices, a judge of a lower court, through an established procedure, may be temporarily assigned as a replacement justice to participate in your case.

II. Summary of Rules and Requirements

This is a summary of the rules and requirements for judicial removal motions as set forth in STATUTES/RULES. Read these statutes/rules in Part V of this document. To receive consideration, your motion must conform to the requirements in these statutes/rules.

1. You may not request a judge's removal for reasons other than those summarized in section 3, above. Among other things, do not file a removal motion because you disagree with a ruling the judge made unless you explain how the ruling meets one of the recusal reasons summarized in section 3.

2. You may file a removal motion only if you are a party in the case.

3. Removal is necessary only for one or more the reasons stated in STATUTES/RULES in Part V and summarized here. In your Statement of Facts, copy the provision(s) of STATUTES/RULES that you believe require removal and provide specific factual support in order to show the provision(s) support the judge's removal. Even with concrete facts, your motion will be unsuccessful if the judge who decides your motion concludes that there is no real or apparent conflict of interest.
Recusal is warranted when specific facts establish that:

a. The judge is a party in the case, or has a financial or other interest that could benefit from the decision in the case (refer to section X, Part V for the actual provision).

b. The judge, the judge’s spouse or domestic partner, individually or in association, or a child of the judicial officer has a direct financial interest in the matter. A “financial interest” is ownership of something of more than nominal or trivial value (refer to section X, Part V for the actual provision).

c. An attorney or party in the case is, or was, a judge or the judge’s spouse or domestic partner—–a spouse, domestic partner, parent, parent-in-law, grandparent, grandparent-in-law, or great grandchild of the judge, child, daughter-in-law or son-in-law, grandchild, grandchild-in-law, or great grandchild of the judge, or great grandchild, sibling, or sibling-in-law, or an aunt, uncle, niece, or nephew (refer to section X, Part V for the actual provision).

d. The judge has been attorney for either of the parties in the present case (refer to section X, Part V for the actual provision).

e. The judge knows or learns from your or another motion that a party, a party’s lawyer, or the lawyer of a party’s lawyer has within the previous _______ years made aggregate contributions to the judicial campaign fund or election or reelection as a judge in an amount that is greater than X_______ for an individual or _______ for an organization or other non-individual (refer to section X, Part V for the actual provision).

f. The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to a particular result or rule in a particular way in your case (refer to section X, Part V for the actual provision).

g. The judge’s impartiality might reasonably be questioned even if none of the specific conditions described above applies in this case. The need for specific and relevant facts, while essential to support any motion, is especially strong in this provision (refer to section X, Part V for the actual provision).

1. File the motion (time limits specified by statute or rule) (refer to section X, Part V for the actual provision).

5. File the motion and statement with the clerk of court, who will send it to the judge, and provide a copy of the judge by delivering it to the judge chambers (refer to section X, Part V for the actual provision).

6. Give copies of your motion to other parties in your case. Those parties may file their own motions agreeing or opposing your motion (refer to section X, Part V for the actual provision).

7. File no more than one recusal motion in the case, unless after you file a motion, you learn of separate, additional reasons that you believe require the judge’s recusal (refer to section X, Part V for the actual provision).

8. Signing the motion signifies that, to the best of your knowledge (do you not file the motion for any improper purpose such as a motion filed simply to delay proceedings) and if you believe your reasons for seeking recusal have factual support, if the judge who decides the motion determines that you did not sign the motion in good faith, he or she may impose monetary or other sanctions (penalize) on you (refer to section X, Part V for the actual provision).
III. Motion Form

MOTION FOR JUDICIAL RECUSAL

I, ______________________, respectfully request that Judge __________________ recuse himself/herself in the case of _____________________________, # __________, for reasons given in the accompanying STATEMENT OF FACTS.

By signing this motion, I certify that I am not filing this motion in order to delay the proceedings or for any purpose other than to request Judge __________________ recusal, and that the statements in the accompanying STATEMENT OF FACTS are true to the best of my knowledge.

______________________________
(signature and date)
IV. Form Statement of Facts

STATEMENT OF FACTS ABOUT JUDGE
AS TO THE CASE OF

Identify the specific provision(s) listed in Part V on which you base your request for recusal. Then provide specific facts and reasons why you believe the judge may have a conflict of interest that would make it difficult for the judge to make impartial decisions in your case.

Judge__________________________________ should recuse himself/herself in this case because:

Provision from Part V:

This provision describes judge__________________________________ because (state applicable facts):

________________________________________________________
________________________________________________________
________________________________________________________
________________________________________________________
________________________________________________________
________________________________________________________

(signature* and date)

* My signature certifies that I am not filing this STATEMENT OF FACTS in order to delay the proceedings or for any purpose other than to request Judge__________________________ recusal.

V. Statutes/Rules

________________________________________________________
________________________________________________________
________________________________________________________
________________________________________________________
TEMPLATE FOR ORDER GRANTING OR DENYING A RECUSAL MOTION

Some course provide judges with forms or checklists containing common reasons for action on a recusal motion. Judges can complete, customize as necessary, and file the form in support of the dispositive order. A CoA member suggested we prepare a template that states easily where to insert a checklist appropriate for their standards and procedures.

Although such a form might usually be considered for denied motions, the template provides for a granted motion as well, consistent with the report's recommendation that "[w]hen a granted motion might include a one-or-two-sentence description of the reason for the grant."

The template contemplates use, consistent with the report's recommendations, by a separate judge to whom the second motion has been referred for decision.

We caution against any suggestion that a checklist is an appropriate substitute for judges' careful consideration of recusal motions. It should be, rather, a form of convenience to help guide that consideration and effect a more efficient explanation of it.

(Although the template includes space for the judge to summarize the motion and its allegations as an indication that the judge indeed read and considered the motion, there are countervailing reasons for not adopting this aspect of the template. At the least, if adopted the form should alert judges to the problems of summarizing lengthy, rambling allegations, including those that do not even purport to claim that the judge's impartiality might reasonably be questioned. Summaries of such allegations may simply prompt charges that the judge failed to appreciate the nuances and intricacies of the motion at issue.)
ORDER

Date: 

Filed a motion seeking the recall of Judge 

[Date]. The motion was referred to me for decision. I received the motion on

[Date].

☐ The motion is GRANTED because:
  ☐ A reasonable person might conclude that Judge’s impartiality might reasonably be questioned.
  ☐ Granting the motion does not indicate a finding that the allegations asserted are true.

☐ The motion is DENIED because:
  ☐ Motion is not a party to the case.
  ☐ Motion did not file the motion within the time limits set out in STATUTE/RULE and offers no adequate explanation for failure to file in a timely manner.
  ☐ Motion disputes a legal or procedural ruling that Judge made in this case, but recall normally is not required merely because a judge has ruled on an issue in the proceeding. [Optional: Motion did not show how the ruling indicates that the judge’s impartiality might reasonably be questioned.]
  ☐ Motion is not the first such motion filed in this case and states no separate, additional reasons that require reconsideration that were unknown to motion at the time of the previous motion.
  ☐ Motion alleges facts that are sufficient to establish that Judge’s impartiality might reasonably be questioned. [Optional: Facts alleged: ]
  ☐ Motion alleges facts are not sufficient because [Optional: Facts alleged are not sufficient because: ]
  ☐ Motion seeks recall on grounds other than those provided in STATUTE/RULE. [Optional: Grounds asserted: ]
  ☐ Motion seeks recall on grounds other than those provided in STATUTE/RULE. [Optional: Grounds asserted: ]
  ☐ Motion’s evidence does not establish the allegations that Judge’s impartiality might reasonably be questioned.

Judge Presiding

Date
SUPREME COURT OF THE UNITED STATES

WILLIAMS v. PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA


Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor’s request to seek the death penalty against Williams. Over the next 26 years, Williams’s conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania’s Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83. Finding that the trial prosecutor had committed Brady violations, the PCRA court stayed Williams’s execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams’s motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court’s grant of penalty-phase relief and reinstating Williams’s death sentence. Two weeks later, Chief Justice Castille retired from the bench.

Held:

1. Chief Justice Castille’s denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. Pp. 5–12.

   (a) The Court’s due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which those precedents rest dic-
Syllabus

tate the rule that must control in the circumstances here: Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge “is too high to be constitutionally tolerable.” Caperton v. A. T. Massey Coal Co., 556 U. S. 868, 872. A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. See In re Murchison, 349 U. S. 133, 136–137. No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion. Pp. 5–8.

(b) Because Chief Justice Castille’s authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams’s case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today’s decision will not occasion a significant change in recusal practice. Pp. 9–12.

2. An unconstitutional failure to recuse constitutes structural error that is “not amenable” to harmless-error review, regardless of whether the judge’s vote was dispositive, Puckett v. United States, 556 U. S. 129, 141. Because an appellate panel’s deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to ensure that jurists can reexamine old
ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. It does not matter whether the disqualified judge’s vote was necessary to the disposition of the case. The fact that the interested judge’s vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position—an outcome that does not lessen the unfairness to the affected party. A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. Because Chief Justice Castille’s participation in Williams’s case was an error that affected the State Supreme Court’s whole adjudicatory framework below, Williams must be granted an opportunity to present his claims to a court unburdened by any “possible temptation . . . not to hold the balance nice, clear and true between the State and the accused,” Tumey v. Ohio, 273 U. S. 510, 532. Pp. 12-14.

KAGAN, J., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined. THOMAS, J., filed a dissenting opinion.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–5040

TERRANCE WILLIAMS, PETITIONER v.

PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

[June 9, 2016]

JUSTICE KENNEDY delivered the opinion of the Court.

In this case, the Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner’s case. The justice in question denied the prisoner’s motion for recusal and participated in the decision to deny relief. The question presented is whether the justice’s denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

This Court’s precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge “‘is too high to be constitutionally tolerable.’” Caperton v. A. T. Massey Coal Co., 556 U. S. 868, 872 (2009) (quoting Withrow v. Larkin, 421 U. S. 35, 47 (1975)). Applying this standard, the Court concludes that due process compelled the justice’s recusal.
Opinion of the Court

I

Petitioner is Terrance Williams. In 1984, soon after Williams turned 18, he murdered 56-year-old Amos Norwood in Philadelphia. At trial, the Commonwealth presented evidence that Williams and a friend, Marc Draper, had been standing on a street corner when Norwood drove by. Williams and Draper requested a ride home from Norwood, who agreed. Draper then gave Norwood false directions that led him to drive toward a cemetery. Williams and Draper ordered Norwood out of the car and into the cemetery. There, the two men tied Norwood in his own clothes and beat him to death. Testifying for the Commonwealth, Draper suggested that robbery was the motive for the crime. Williams took the stand in his own defense, stating that he was not involved in the crime and did not know the victim.

During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the memorandum, the then-district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

During the penalty phase of the trial, the prosecutor argued that Williams deserved a death sentence because he killed Norwood "for no other reason but that a kind man offered him a ride home." Brief for Petitioner 7. The jurors found two aggravating circumstances: that the murder was committed during the course of a robbery and that Williams had a significant history of violent felony convictions. That criminal history included a previous conviction for a murder he had committed at age 17. The jury found no mitigating circumstances and sentenced
Opinion of the Court

Williams to death. Over a period of 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review.

In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §9541 et seq. (2007). The petition was based on new information from Draper, who until then had refused to speak with Williams's attorneys. Draper told Williams's counsel that he had informed the Commonwealth before trial that Williams had been in a sexual relationship with Norwood and that the relationship was the real motive for Norwood's murder. According to Draper, the Commonwealth had instructed him to give false testimony that Williams killed Norwood to rob him. Draper also admitted he had received an undisclosed benefit in exchange for his testimony: the trial prosecutor had promised to write a letter to the state parole board on his behalf. At trial, the prosecutor had elicited testimony from Draper indicating that his only agreement with the prosecution was to plead guilty in exchange for truthful testimony. No mention was made of the additional promise to write the parole board.

The Philadelphia Court of Common Pleas, identified in the proceedings below as the PCRA court, held an evidentiary hearing on Williams's claims. Williams alleged in his petition that the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams. At the hearing, both Draper and the trial prosecutor testified regarding these allegations. The PCRA court ordered the district attorney's office to produce the previously undisclosed files of the prosecutor and police. These documents included the trial prosecutor's sentencing memorandum, bearing then-District Attorney Castille's authorization to pursue the death penalty. Based on the Commonwealth's files and the evidentiary hearing, the PCRA court found
that the trial prosecutor had suppressed material, exculpatory evidence in violation of Brady v. Maryland, 373 U. S. 83 (1963), and engaged in “prosecutorial gamesmanship.” App. 168a. The court stayed Williams’s execution and ordered a new sentencing hearing.

Seeking to vacate the stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court. By this time, almost three decades had passed since Williams’s prosecution. Castille had been elected to a seat on the State Supreme Court and was serving as its chief justice. Williams filed a response to the Commonwealth’s application. The disclosure of the trial prosecutor’s sentencing memorandum in the PCRA proceedings had alerted Williams to Chief Justice Castille’s involvement in the decision to seek a death sentence in his case. For this reason, Williams also filed a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the recusal motion to the full court for decision. The Commonwealth opposed Williams’s recusal motion. Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral. Two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered full briefing on the issues raised in the appeal. The State Supreme Court then vacated the PCRA court’s order granting penalty-phase relief and reinstated Williams’s death sentence. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred in the result without issuing a separate opinion. See ___ Pa. ___, ___. 105 A. 3d 1234, 1245 (2014).

Chief Justice Castille authored a concurrence. He lamented that the PCRA court had “lost sight of its role as a neutral judicial officer” and had stayed Williams’s execution “for no valid reason.” Id., at ___, 105 A. 3d, at 1245. “[B]efore condemning officers of the court,” the chief jus-
tice stated, “the tribunal should be aware of the substantive status of Brady law,” which he believed the PCRA court had misapplied. Id., at __, 105 A. 3d, at 1246. In addition, Chief Justice Castille denounced what he perceived as the “obstructionist anti-death penalty agenda” of Williams’s attorneys from the Federal Community Defender Office. Ibid. PCRA courts “throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group,” he wrote, lest Defender Office lawyers turn postconviction proceedings “into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow.” Id., at __, 105 A. 3d, at 1247.

Two weeks after the Pennsylvania Supreme Court decided Williams’s case, Chief Justice Castille retired from the bench. This Court granted Williams’s petition for certiorari. 576 U. S. __ (2015).

II

A

Williams contends that Chief Justice Castille’s decision as district attorney to seek a death sentence against him barred the chief justice from later adjudicating Williams’s petition to overturn that sentence. Chief Justice Castille, Williams argues, violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.

The Court’s due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor. For the reasons explained below, however, the principles on which these precedents rest dictate the rule that must control in the circumstances here. The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regard-
ing the defendant’s case.

Due process guarantees “an absence of actual bias” on the part of a judge. In re Murchison, 349 U.S. 133, 136 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court’s precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, “the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.” Copper, 556 U.S., at 881. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See Murchison, 349 U.S., at 136–137. This objective risk of bias is reflected in the due process maxim that “no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” Id., at 136.

The due process guarantee that “no man can be a judge in his own case” would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. This conclusion follows from the Court’s analysis in In re Murchison. That case involved a “one-man judge-grand jury” proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes. Id., at 134. During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding. He charged one witness with perjury and then, a few weeks later, tried and convicted him in open court. The judge charged the other witness with contempt and, a few days later, tried and convicted him as well. This Court overturned the convic-
tions on the ground that the judge’s dual position as accuser and decisionmaker in the contempt trials violated due process: “Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.”  *Id.*, at 137.

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge “would be so psychologically wedded” to his or her previous position as a prosecutor that the judge “would consciously or unconsciously avoid the appearance of having erred or changed position.”  *Withrow*, 421 U.S., at 57. In addition, the judge’s “own personal knowledge and impression” of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties’ arguments to the court.  *Murchison, supra*, at 138; see also  *Caperton, supra*, at 881.

Pennsylvania argues that  *Murchison* does not lead to the rule that due process requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision in the case. The facts of  *Murchison*, it should be acknowledged, differ in many respects from a case like this one. In  *Murchison*, over the course of several weeks, a single official (the so-called judge-grand jury) conducted an investigation into suspected crimes; made the decision to charge witnesses for obstruction of that investigation; heard evidence on the charges he had lodged; issued judgments of conviction; and imposed sentence. See 349 U.S., at 135 (petitioners objected to “trial before the judge who was at the same time the complainant, indictor and prosecutor”). By contrast, a
judge who had an earlier involvement in a prosecution might have been just one of several prosecutors working on the case at each stage of the proceedings; the prosecutor's immediate role might have been limited to a particular aspect of the prosecution; and decades might have passed before the former prosecutor, now a judge, is called upon to adjudicate a claim in the case.

These factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution. The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchison*, is nevertheless significant. A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.
This leads to the question whether Chief Justice Castille’s authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision. The Court now concludes that it was a significant, personal involvement; and, as a result, Chief Justice Castille’s failure to recuse from Williams’s case presented an unconstitutional risk of bias.

As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant’s life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

Pennsylvania nonetheless contends that Chief Justice Castille in fact did not have significant involvement in the decision to seek a death sentence against Williams. The chief justice, the Commonwealth points out, was the head of a large district attorney’s office in a city that saw many capital murder trials. Tr. of Oral Arg. 36. According to Pennsylvania, his approval of the trial prosecutor’s request to pursue capital punishment in Williams’s case amounted to a brief administrative act limited to “the time it takes to read a one-and-a-half-page memo.” Ibid. In this Court’s view, that characterization cannot be credited. The Court will not assume that then-District Attorney Castille treated so major a decision as a perfunctory task.
requiring little time, judgment, or reflection on his part.

Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he "sent 45 people to death rows" as district attorney. Seelye, Castille Keeps His Cool in Court Run, Philadelphia Inquirer, Apr. 30, 1993, p. B1; see also, e.g., Brennan, State Voters Must Choose Next Supreme Court Member, Legal Intelligencer, Oct. 28, 1993, pp. 1, 12. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional Brady violations during Williams's prosecution. App. 131-145, 150-154. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

The potential conflict of interest posed by the PCRA court's findings illustrates the utility of statutes and professional codes of conduct that "provide more protection than due process requires." Caperton, 556 U. S., at 890. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 828 (1986). Most ques-
tions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See Brief for American Bar Association as Amicus Curiae 5, 11–14; see also ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b) (2011) (no judge may participate “in any proceeding in which the judge’s impartiality might reasonably be questioned,” including where the judge “served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding”); ABA Center for Professional Responsibility Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (Dec. 14, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (as last visited June 7, 2016) (28 States have adopted language similar to ABA Model Judicial Code Rule 2.11); 28 U. S. C. §455(b)(3) (recusal required where judge “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding”). At the time Williams filed his recusal motion with the Pennsylvania Supreme Court, for example, Pennsylvania’s Code of Judicial Conduct disqualified judges from any proceeding in which “they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter....” Pa. Code of Judicial Conduct, Canon 3C (1974, as amended). The fact that most jurisdictions have these rules in place suggests that today’s decision will not occasion a significant change in recusal practice.

Chief Justice Castille’s significant, personal involvement in a critical decision in Williams’s case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the
case “must be forbidden if the guarantee of due process is to be adequately implemented.” Withrow, 421 U. S., at 47.

III

Having determined that Chief Justice Castille’s participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist’s failure to recuse amounts to harmless error if the jurist is on a multimeber court and the jurist’s vote was not decisive. See Lavoie, supra, at 827–828 (addressing “the question whether a decision of a multimeber tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case,” where that member’s vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect “not amenable” to harmless-error review, regardless of whether the judge’s vote was dispositive. Puckett v. United States, 556 U. S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his Lavoie concurrence,

“The description of an opinion as being ‘for the court’ connotes more than merely that the opinion has been
joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court’s perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member’s involvement plays a part in shaping the court’s ultimate disposition.” 475 U. S., at 831.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge’s vote was necessary to the disposition of the case. The fact that the interested judge’s vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See id., at 831–832 (Blackmun, J., concurring in judgment).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeaned the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who
were exposed to a disqualified judge may still be influenced by their colleague's views when they reheat the case. Brief for Respondent 51, 62. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927).

* * *

Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U. S. 238, 242 (1980).

The judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*
CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams’s fifth habeas petition—which raised a claim unconnected to the prosecution’s decision to seek the death penalty—could be heard on the merits or was instead untimely. This Court now holds that because Chief Justice Castille made a “critical” decision as a prosecutor in Williams’s case, there is a risk that he “would be so psychologically wedded” to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition. Ante, at 6–7 (internal quotation marks omitted). According to the Court, that conclusion follows from the maxim that “no man can be a judge in his own case.” Ante, at 6 (internal quotation marks omitted).

The majority opinion rests on proverb rather than precedent. This Court has held that there is “a presumption of honesty and integrity in those serving as adjudicators.” Withrow v. Larkin, 421 U.S. 35, 47 (1975). To overcome that presumption, the majority relies on In re Murchison, 349 U.S. 133 (1955). We concluded there that the Due
Process Clause is violated when a judge adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case. Here, however, Williams does not allege that Chief Justice Castille had any previous knowledge of the contested facts at issue in the habeas petition, or that he had previously made any decision on the questions raised by that petition. I would accordingly hold that the Due Process Clause did not require Chief Justice Castille's recusal.

I

In 1986, petitioner Terrance Williams stood trial for the murder of Amos Norwood. Prosecutors believed that Williams and his friend Marc Draper had asked Norwood for a ride, directed him to a cemetery, and then beat him to death with a tire iron after robbing him. Andrea Foulkes, the Philadelphia Assistant District Attorney prosecuting the case, prepared a one-and-a-half page memo for her superiors—Homicide Unit Chief Mark Gottlieb and District Attorney Ronald Castille—"request[ing] that we actively seek the death penalty." App. 424a. The memo briefly described the facts of the case and Williams's prior felonies, including a previous murder conviction. Gottlieb read the memo and then passed it to Castille with a note recommending the death penalty. Id., at 426a. Castille wrote at the bottom of the memo, "Approved to proceed on the death penalty," and signed his name. Ibid.

At trial, Williams testified that he had never met Norwood and that someone else must have murdered him. After hearing extensive evidence linking Williams to the crime, the jury convicted him of murder and sentenced him to death. 524 Pa. 218, 227, 570 A.2d 75, 79–80 (1990).

In 1995, Williams filed a habeas petition in Pennsylvania state court, alleging that his trial counsel had been ineffective for failing to present mitigating evidence of his
childhood sexual abuse, among other claims. At a hearing related to that petition, Williams acknowledged that he knew Norwood and claimed that Norwood had sexually abused him. ___ Pa. ___.__, 105 A. 3d 1234, 1240 (2014). The petition was denied. Williams filed two more state habeas petitions, which were both dismissed as untimely, and a federal habeas petition, which was also denied. See Williams v. Beard, 637 F. 3d 195, 238 (CA3 2011).

This case arises out of Williams's fifth habeas petition, which he filed in state court in 2012. In that petition, Williams argued that he was entitled to a new sentencing proceeding because the prosecution at trial had failed to turn over certain evidence suggesting that "Norwood was sexually involved with boys around [Williams's] age at the time of his murder." Crim. No. CP–51–CR–0823621–1984 (Phila. Ct. Common Pleas, Nov. 27, 2012), App. 80a.

It is undisputed that Williams's fifth habeas petition is untimely under Pennsylvania law. In order to overcome that time bar, Pennsylvania law required Williams to show that "(1) the failure to previously raise [his] claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence." ___ Pa., at ___, 105 A. 3d, at 1240. The state habeas court held that Williams met that burden because "the government withheld multiple statements from [Williams's] trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys," and Williams was unable to access those statements until an evidentiary proceeding ordered by the court. App. 95a.

The Commonwealth appealed to the Pennsylvania Supreme Court, and Williams filed a motion requesting that Chief Justice Castille recuse himself on the ground that he had "personally authorized his Office to seek the death penalty" nearly 30 years earlier. Id., at 181a (em-
phasis deleted). Chief Justice Castille summarily denied the recusal motion, and the six-member Pennsylvania Supreme Court proceeded to hear the case. The court unanimously reinstated Williams’s sentence.

According to the Pennsylvania Supreme Court, Williams failed to make the threshold showing necessary to overcome the time bar because there was “abundant evidence” that Williams “knew of Norwood’s homosexuality and conduct with teenage boys well before trial, sufficient to present [Norwood] as unsympathetic before the jury.” ___ Pa., at ___, 105 A. 3d, at 1241. The court pointed out that Williams was, of course, personally aware of Norwood’s abuse and could have raised the issue at trial, but instead chose to disclaim having ever met Norwood. The court also noted that Williams had raised similar claims of abuse in his first state habeas proceeding. *Ibid.* Chief Justice Castille concurred separately, criticizing the lower court for failing to dismiss Williams’s petition as “time-barred and frivolous.” *Id.*, at ___, 105 A. 3d, at 1245.

II

A

In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere “in the very idea of free government” and are “the inalienable right of a citizen of such a government.” *Twinning v. New Jersey*, 211 U. S. 78, 106 (1908). A fair trial and appeal is one such right. See *Lisenba v. California*, 314 U. S. 219, 236 (1941); *Aetna Life Ins. Co. v. Lavoie*, 475 U. S. 813, 825 (1986). In ensuring that right, “it is normally within the power of the State to regulate procedures under which its laws are carried out,” unless a procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.*, at 821 (internal quotation marks
omitted).

It is clear that a judge with “a direct, personal, substantial, pecuniary interest” in a case may not preside over that case. *Tumey v. Ohio*, 273 U. S. 510, 523 (1927). We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted “an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.” *Mayberry v. Pennsylvania*, 400 U. S. 455, 465–466 (1971) (internal quotation marks omitted); see *Murchison*, 349 U. S., at 139.

Prior to this Court’s decision in *Caperton v. A. T. Massey Coal Co.*, 556 U. S. 868 (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton*, however, the Court adopted a new standard that requires recusal “when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Id.*, at 872 (internal quotation marks omitted). The Court framed the inquiry as “whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Id.*, at 883–884 (internal quotation marks omitted).

B

According to the majority, the Due Process Clause required Chief Justice Castille’s recusal because he had “significant, personal involvement in a critical trial decision” in Williams’s case. *Ante*, at 9. Otherwise, the majority explains, there is “an unacceptable risk of actual bias.” *Ante*, at 11. In the majority’s view, “[t]his conclusion follows from the Court’s analysis in *In re Murchison*.” *Ante*, at 6. But *Murchison* does not support the majority’s
new rule—far from it.

*Murchison* involved a peculiar Michigan law that authorized the same person to sit as both judge and “one-man grand jury” in the same case. 349 U.S., at 133 (internal quotation marks omitted). Pursuant to that law, a Michigan judge—serving as grand jury—heard testimony from two witnesses in a corruption case. The testimony “persuaded” the judge that one of the witnesses “had committed perjury”; the second witness refused to answer questions. *Id.*, at 134–135. The judge accordingly charged the witnesses with criminal contempt, presided over the trial, and convicted them. *Ibid.* We reversed, holding that the trial had violated the Due Process Clause. *Id.*, at 139.

The Court today, acknowledging that *Murchison* “differs[s] in many respects from a case like this one,” *ante*, at 7, earns full marks for understatement. The Court in fact fails to recognize the differences that are critical.

First, *Murchison* found a due process violation because the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge. As a result, the judge had made up his mind about the only issue in the case before the trial had even begun. We held that such prejudgment violated the Due Process Clause. 349 U.S., at 137.

Second, *Murchison* expressed concern that the judge’s recollection of the testimony he had heard as grand juror was “likely to weigh far more heavily with him than any testimony given” at trial. *Id.*, at 138. For that reason, the Court found that the judge was at risk of calling “on his own personal knowledge and impression of what had occurred in the grand jury room,” rather than the evidence presented to him by the parties. *Ibid.*

Neither of those due process concerns is present here. Chief Justice Castille was involved in the decision to seek the death penalty, and perhaps it would be reasonable under *Murchison* to require him to recuse himself from
any challenge casting doubt on that recommendation. But that is not this case.

This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that "the information on which he relies could not have been obtained earlier with the exercise of due diligence." 349 Pa., at __, 105 A.3d, at 1240. Even if Williams were to overcome the timeliness bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. The problem in Murchison was that the judge, having been "part of the accusatory process" regarding the guilt or innocence of the defendants, could not then be "wholly disinterested" when called upon to decide that very same issue. 349 U.S., at 137. In this case, in contrast, neither the procedural question nor Williams's merits claim in any way concerns the pretrial decision to seek the death penalty.

It is abundantly clear that, unlike in Murchison, Chief Justice Castille had not made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition. How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence.

Williams does not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over such evidence, and he does not argue that Chief Justice Castille had previously made any decision
with respect to that evidence in his role as prosecutor. Even assuming that Chief Justice Castille remembered the contents of the memo almost 30 years later—which is doubtful—the memo could not have given Chief Justice Castille any special “impression” of facts or issues not raised in that memo. Id., at 138.

The majority attempts to justify its rule based on the “risk” that a judge “would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position.” Ante, at 7 (internal quotation marks omitted). But as a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams’s fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an “objective risk of actual bias,” ante, at 13, that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

* * *

The Due Process Clause did not prohibit Chief Justice Castille from hearing Williams’s case. That does not mean, however, that it was appropriate for him to do so. Williams cites a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as judge in a case that he has prosecuted. Because the Due Process Clause does not mandate recusal in cases such as this, it is up to state authorities—not this Court—to determine whether recusal should be required.

I would affirm the judgment of the Pennsylvania Supreme Court, and respectfully dissent from the Court’s contrary conclusion.
THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 15–5040

TERRANCE WILLIAMS, PETITIONER v.

PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA, EASTERN DISTRICT

[June 9, 2016]

JUSTICE THOMAS, dissenting.

The Court concludes that it violates the Due Process Clause for the chief justice of the Supreme Court of Pennsylvania, a former district attorney who was not the trial prosecutor in petitioner Terrance Williams’ case, to review Williams’ fourth petition for state postconviction review. Ante, at 8–9, 14. That conclusion is flawed. The specter of bias alone in a judicial proceeding is not a deprivation of due process. Rather than constitutionalize every judicial disqualification rule, the Court has left such rules to legislatures, bar associations, and the judgment of individual adjudicators. Williams, moreover, is not a criminal defendant. His complaint is instead that the due process protections in his state postconviction proceedings—an altogether new civil matter, not a continuation of his criminal trial—were lacking. Ruling in Williams’ favor, the Court ignores this posture and our precedents commanding less of state postconviction proceedings than of criminal prosecutions involving defendants whose convictions are not yet final. I respectfully dissent.

I

A reader of the majority opinion might mistakenly think that the prosecution against Williams is ongoing, for the majority makes no mention of the fact that Williams’
sentence has been final for more than 25 years. Because the postconviction posture of this case is of crucial importance in considering the question presented, I begin with the protracted procedural history of Williams’ repeated attempts to collaterally attack his sentence.

A

Thirty-two years ago, Williams and his accomplice beat their victim to death with a tire iron and a socket wrench. Commonwealth v. Williams, 524 Pa. 218, 222–224, 570 A. 2d 75, 77–78 (1990) (Williams I). Williams later returned to the scene of the crime, a cemetery, soaked the victim’s body in gasoline, and set it on fire. Id., at 224, 570 A. 2d, at 78. After the trial against Williams commenced, both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor’s decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille’s only involvement in Williams’ criminal case. Thereafter, a Pennsylvania jury convicted Williams of first-degree murder, and he was sentenced to death. Williams I, 524 Pa., at 221–222, 570 A. 2d, at 77. The Supreme Court of Pennsylvania affirmed his conviction and sentence. Id., at 235, 570 A. 2d, at 84.

Five years later, Williams filed his first petition for state postconviction relief. Commonwealth v. Williams, 581 Pa. 57, 65, 863 A. 2d 505, 509 (2004) (Williams II). The postconviction court denied the petition. Id., at 65, 863 A. 2d, at 510. Williams appealed, raising 23 alleged errors. Ibid. The Supreme Court of Pennsylvania, which included Castille in his new capacity as a justice of that court, affirmed the denial of relief. Id., at 88, 863 A. 2d, at 523. The court rejected some claims on procedural grounds and denied the remaining claims on the merits. Id., at 88–88, 863 A. 2d, at 511–523. The court’s lengthy opinion did not mention the possibility of Castille’s bias, and Williams
apparently never asked for his recusal.

Then in 2005, Williams filed two more petitions for state postconviction relief. Both petitions were dismissed as untimely, and the Supreme Court of Pennsylvania affirmed. Commonwealth v. Williams, 589 Pa. 355, 909 A. 2d 297 (2006) (per curiam) (Williams III); Commonwealth v. Williams, 599 Pa. 495, 962 A. 2d 609 (2009) (per curiam) (Williams IV). Castille also presumably participated in those proceedings, but, again, Williams apparently did not ask for him to recuse.1

Williams then made a fourth attempt to vacate his sentence in state court in 2012. ___ Pa. ___, ___, 105 A. 3d 1234, 1237 (2014) (Williams VI). Williams alleged that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. The allegedly exculpatory evidence was information about Williams’ motive. According to Williams, the prosecution should have disclosed to his counsel that it knew that Williams and the victim had previously engaged in a sexual relationship when Williams was a minor. Williams VI, ___ Pa., at ___, 105 A. 3d, at 1237.2 The state postcon-

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2Setting aside how a prosecutor could violate Brady by failing to disclose information to the defendant about the defendant’s motive to kill, it is worth noting that this allegation merely repackaged old arguments. During a state postconviction hearing in 1998, Williams had presented evidence of his prior sexual abuse, including “multiple sexual victimizations (including sodomy) during his childhood,” to support his ineffective assistance claim. Williams II, 581 Pa. 57, 98, 863 A. 2d 505, 530 (2004) (Saylor, J., dissenting). And he had “argued [that the victim] engaged in homosexual acts with him.” Williams VI, ___ Pa., at ___, 105 A. 3d, at 1236. Then, in his federal habeas proceedings, Williams admitted that his plan on the night of the murder was to threaten to reveal to the victim’s wife that the victim was a homosexual, and he contended that his attorney should have presented related
viction court agreed and vacated his sentence. *Id.*, at __, 105 A. 3d, at 1239.

The Commonwealth appealed to the Supreme Court of Pennsylvania. Only then—the fourth time that Williams appeared before Castille—did Williams ask him to recuse. App. 181. Castille denied the recusal motion and declined to refer it to the full court. *Id.*, at 171. Shortly thereafter, the court vacated the postconviction court's order and reinstated Williams' sentence. The court first noted that Williams' fourth petition "was filed over 20 years after [Williams'] judgment of sentence became final" and "was untimely on its face." *Williams VI, __ Pa.*, at __, 105 A. 3d, at 1239. The court rejected the trial court's conclusion that an exception to Pennsylvania's timeliness rule applied and reached "the inescapable conclusion that [Williams] is not entitled to relief." *Id.*, at __, 105 A. 3d, at 1239–1241; see also *id.*, at __, 105 A. 3d, at 1245 (Castille, J., concurring) (writing separately "to address the important responsibilities of [state postconviction] trial courts in serial capital [state postconviction] matters").

Finally, Williams filed an application for reargument. App. 9. The court denied the application without Castille's participation. *Id.*, at 8. Castille had retired from the bench nearly two months before the court ruled.

B

As this procedural history illustrates, the question presented is hardly what the majority makes it out to be. The majority incorrectly refers to the case before us and Williams' criminal case (that ended in 1990) as a decades-long "single case" or "matter." *Ante*, at 8; see also *ante*, at 7–9. The majority frames the issue as follows: whether

the Due Process Clause permits Castille to “ac[t] as both accuser and judge in [Williams] case.” *Ante*, at 5. The majority answers: “When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.” *Ante*, at 7 (emphasis added). Accordingly, the majority holds that “[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant’s case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level.” *Ante*, at 14 (emphasis added). That is all wrong.

There has been, however, no “single case” in which Castille acted as both prosecutor and adjudicator. Castille was still serving in the district attorney’s office when Williams’ criminal proceedings ended and his sentence of death became final. Williams’ filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding “is not part of the criminal proceeding itself” but “is in fact considered to be civil in nature,” *Pennsylvania v. Finley*, 481 U. S. 551, 556–557 (1987), and brings with it fewer procedural protections. See, e.g., *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U. S. 52, 68 (2009).

Williams’ case therefore presents a much different question from that posited by the majority. It is more accurately characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner’s criminal case was pending. For the reasons that follow, that different question merits a different answer.

II

The “settled usages and modes of proceeding existing in
the common and statute law of England before the emigration of our ancestors” are the touchstone of due process. *Tumey v. Ohio*, 273 U. S. 510, 523 (1927); see also *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). What due process requires of the judicial proceedings in the Pennsylvania postconviction courts, therefore, is guided by the historical treatment of judicial disqualification. And here, neither historical practice nor this Court’s case law constitutionalizing that practice requires a former prosecutor to recuse from a prisoner’s postconviction proceedings.

A

At common law, a fair tribunal meant that “no man shall be a judge in his own case.” 1 E. Coke, Institutes of the Laws of England §212, *141a (“[A]liquis non debet esse judex in propriâ causâ”). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, e.g., *Dr. Bonham’s Case*, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (C. P. 1610) (opining that a panel of adjudicators could not all at once serve as “judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture”). Nor could he adjudicate a case in which he was a party. See, e.g., *Earl of Derby’s Case*, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K. B. 1614). But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of judges “cannot be challenged,” according to Blackstone, “[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.” 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768) (Blackstone); see also, e.g., *Brookes v. Earl of Riv-
ers, Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

The early American conception of judicial disqualification was in keeping with the "clear and simple" common-law rule—"a judge was disqualified for direct pecuniary interest and for nothing else." Frank, Disqualification of Judges, 56 Yale L. J. 605, 609 (1947) (Frank); see also R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges §1.4, p. 7 (2d ed. 2007). Most jurisdictions required judges to recuse when they stood to profit from their involvement or, more broadly, when their property was involved. See Moses v. Julian, 45 N. H. 52, 55–56 (1863); see also, e.g., Jim v. State, 3 Mo. 147, 155 (1832) (deciding that a judge was unlawfully interested in a criminal case in which his slave was the defendant). But the judge's pecuniary interest had to be directly implicated in the case. See, e.g., Davis v. State, 44 Tex. 523, 524 (1876) (deciding that a judge, who was the victim of a theft, was not disqualified in the prosecution of the theft); see also T. Cooley, Constitutional Limitations 594 (7th ed. 1903) (rejecting a financial stake "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment"); Moses, supra, at 57 ("[A] creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit"); Inhabitants of Readington Twp. Hunterdon County v. Dilley, 24 N. J. L. 209, 212–213 (N. J. 1853) (deciding that a judge, who had previously been paid to survey the roadway at issue in the case, was not disqualified).

Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legisla-
tures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "had been of counsel for either party." Act of May 8, 1792, §11, 1 Stat. 278–279. Many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule. See, e.g., Wilks v. State, 27 Tex. App. 381, 385, 11 S. W. 415, 416 (1889); Fuchheimer v. Washington, 77 Ind. 366, 368 (1881) (per curiam); Sjoberg v. Nordin, 26 Minn. 501, 503, 5 N. W. 677, 678 (1880); Whipple v. Saginaw Circuit Court Judge, 26 Mich. 342, 343 (1873); Mathis v. State, 50 Tenn. 127, 128 (1871); but see Owings v. Gibson, 9 Ky. 515, 517–518 (1820) (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. See, e.g., Terry v. State, 24 S. W. 510, 510–511 (Tex. Crim. App. 1893); Mathis, supra, at 128.

This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the same case. In Carr v. Fife, 156 U. S. 494 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. Id., at 497–498. The Court left it to the judge "to decide for himself whether it was improper for him to sit in trial of the suit." Id., at 498. Likewise, in Taylor v. Williams, 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law,
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disqualified from sitting in a case in which he had been of counsel” and concluded “that the fact that the presiding judge had been of counsel in the case did not necessarily render him interested in it.” *Id.*, at 585–586. *A fortiori*, the Texas court held, a judge was not “interested” in a case “merely from his having been of counsel in another cause involving the same title.” *Id.*, at 586 (emphasis added); see also *The Richmond*, 9 F. 863, 864 (CCED La. 1881) (“The decisions, so far as I have been able to find, are unanimous that ‘of counsel’ means ‘of counsel for a party in that cause and in that controversy,’ and if either the cause or controversy is not identical the disqualification does not exist”); *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. 322 (1894) (same); *Cleghorn v. Cleghorn*, 66 Cal. 309, 5 P. 516 (1885) (same).

This limitation—that the same person must act as counsel and adjudicator in the same case—makes good sense. At least one of the State’s highest courts feared that any broader rule would wreak havoc: “If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges.” *Blackburn v. Craufurd*, 22 Md. 447, 459 (1864). Indeed, any broader rule would be at odds with this Court’s historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. See Frank 622–625. The examples are legion; chief among them is *Marbury v. Madison*, 1 Cranch 137 (1803), in which then–Secretary of State John Marshall sealed but failed to deliver William Marbury’s commission and then, as newly appointed Chief Justice, Marshall decided
whether mandamus was an available remedy to require James Madison to finish the job. See Paulsen, Marbury’s Wrongness, 20 Constitutional Commentary 343, 350 (2003).

Over the next century, this Court entered the fray of judicial disqualifications only a handful of times. Drawing from longstanding historical practice, the Court announced that the Due Process Clause compels judges to disqualify in the narrow circumstances described below. But time and again, the Court cautioned that “[a]ll questions of judicial qualification may not involve constitutional validity.” Tumey, 273 U.S., at 523. And “matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion.” Ibid.; see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) (“The Due Process Clause marks only the outer boundaries of judicial disqualifications”).

First, in Tumey, the Court held that due process would not tolerate an adjudicator who would profit from the case if he convicted the defendant. The Court’s holding paralleled the common-law rule: “[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.” 273 U.S., at 523 (emphasis added); see also Ward v. Monroeville, 409 U.S. 57, 59, 61 (1972) (deciding that a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality’s revenue). Later, applying Tumey’s rule in Aetna Life Ins., the Court held that a judge who decided a case involving an insurance company had a “direct, personal, substantial, and pecuniary” interest because he had brought a similar case against an insurer and his opinion for the court “had the
clear and immediate effect of enhancing both the legal status and the settlement value of his own case.” 475 U.S., at 824 (alterations and internal quotation marks omitted).

Second, in In re Murchison, 349 U.S. 133 (1955), the Court adopted a constitutional rule resembling the historical practice for disqualification of former counsel. Id., at 139. There, state law empowered a trial judge to sit as a “one man judge-grand jury,” meaning that he could “compel witnesses to appear before him in secret to testify about suspected crimes.” Id., at 133. During those secret proceedings, the trial judge suspected that one of the witnesses, Lee Roy Murchison, had committed perjury, and he charged another, John White, with contempt after he refused to answer the judge’s questions without counsel present. See id., at 134–135. The judge then tried both men in open court and convicted and sentenced them based, in part, on his interrogation of them in the secret proceedings. See id., at 135, 138–139. The defendants appealed, arguing that the “trial before the judge who was at the same time the complainant, indictor and prosecutor, constituted a denial of fair and impartial trial required by” due process. Id., at 135. This Court agreed: “It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.” Id., at 137. Broadly speaking, Murchison’s rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding.3

3The Court has applied Murchison in later cases involving contempt proceedings in which a litigant’s contemptuous conduct is so egregious that the judge “become[s] so personally embroiled” in the controversy that it is as if the judge is a party himself. Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); see also Taylor v. Hayes, 418 U.S. 488, 501–503 (1974).
Both Tumey and Murchison arguably reflect historical understandings of judicial disqualification. Traditionally, judges disqualified themselves when they had a direct and substantial pecuniary interest or when they served as counsel in the same case.

B

Those same historical understandings of judicial disqualification resolve Williams' case. Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as "counsel" in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief.

As discussed above, see Part I-B, supra, this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding. See Finley, 481 U.S., at 556–557. Our case law bears out the many distinctions between the two proceedings. In his criminal case, Williams was presumed innocent, Coffin v. United States, 156 U.S. 432, 453 (1895), and the Constitution guaranteed him counsel, Gideon v. Wainwright, 372 U.S. 335, 344–345 (1963); Powell v. Alabama, 287 U.S. 45, 68–69 (1932), a public trial by a jury of his peers, Duncan v. Louisiana, 391 U.S. 145, 149 (1968), and empowered him to confront the witnesses against him, Crawford v. Washington, 541 U.S. 36, 68 (2004), as well as all the other requirements of a criminal proceeding. But in postconviction proceedings, "the presumption of innocence [has] disappear[ed]." Herrera v. Collins, 506 U.S. 390, 399 (1993). The postconviction petitioner has no constitutional right to counsel. Finley, supra, at 555–557; see also Johnson v. Avery, 393 U.S. 483, 488 (1969). Nor has this Court ever held that he has a right to demand that his postcon-
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viction court consider a freestanding claim of actual innocence, Herrera, supra, at 417–419, or to demand the State to turn over exculpatory evidence, Osborne, 557 U. S., at 68–70; see also Wright v. West, 505 U. S. 277, 293 (1992) (plurality opinion) (cataloguing differences between direct and collateral review and concluding that “[t]hese differences simply reflect the fact that habeas review entails significant costs” (internal quotation marks omitted)). And, under the Court’s precedents, his due process rights are “not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief.” Osborne, supra, at 69.

Because Castille did not act as both counsel and judge in the same case, Castille’s participation in the postconviction proceedings did not violate the Due Process Clause. Castille might have been “person[ally] involve[d] in a critical trial decision,” ante, at 9, but that “trial” was Williams’ criminal trial, not the postconviction proceedings before us now. Perhaps Castille’s participation in Williams’ postconviction proceeding was unwise, but it was within the bounds of historical practice. That should end this case, for it “is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is ‘due’ process.” Pacific Mut. Life Ins. Co. v. Haslip, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment).

C

Today’s holding departs both from common-law practice and this Court’s prior precedents by ignoring the critical distinction between criminal and postconviction proceedings. Chief Justice Castille had no “direct, personal, substantial pecuniary interest” in the adjudication of Williams’ fourth postconviction petition. Tumey, 273 U. S., at 523. And although the majority invokes Murchison, ante,
at 6–8, it wrongly relies on that decision too. In *Murchison*, the judge acted as both the accuser and judge in the *same* proceeding. 349 U.S., at 137–139. But here, Castille did not. See Part II–B, *supra*.

The perceived bias that the majority fears is instead outside the bounds of the historical expectations of judicial recusal. Perceived bias (without more) was not recognized as a constitutionally compelled ground for disqualification until the Court’s recent decision in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, the Court decided that due process demanded disqualification when “extreme facts” proved “the probability of actual bias.” *Id.*, at 886–887. *Caperton*, of course, elicited more questions than answers. *Id.*, at 893–898 (ROBERTS, C. J., dissenting). And its conclusion that bias alone could be grounds for disqualification as a constitutional matter “represents a complete departure from common law principles.” Frank 618–619; see Blackstone 361 (“[T]he law will not suppose a possibility of bias or favor in a judge”).

The Court, therefore, should not so readily extend *Caperton*’s “probability of actual bias” rule to state postconviction proceedings. This Court’s precedents demand far less “process” in postconviction proceedings than in a criminal prosecution. See *Osborne, supra*, at 69; see also *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961) (concluding that the Due Process Clause does not demand “inflexible procedures universally applicable to every imaginable situation”). If a state habeas petitioner is not entitled to counsel as a constitutional matter in state postconviction proceedings, *Finley, supra*, at 555–557, it is not unreasonable to think that he is likewise not entitled to demand, as a constitutional matter, that a state postconviction court consider his case anew because a judge, who had no direct and substantial pecuniary interest and had not served as counsel in this case, failed to recuse himself.
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The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution. See, e.g., Aetna Life Ins., 475 U. S., at 821 (“We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal”). And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he “served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding” in its Code of Judicial Conduct. See Pa. Code of Judicial Conduct Rule 2.11(A)(6)(b) (West 2016). Officials in Pennsylvania are fully capable of deciding when their judges have “participated personally and substantially” in a manner that would require disqualification without this Court’s intervention. Due process requires no more, especially in state postconviction review where the States “ha[ve] more flexibility in deciding what procedures are needed.” Osborne, supra, at 69.

III

Even if I were to assume that an error occurred in Williams’ state postconviction proceedings, the question remains whether there is anything left for the Pennsylvania courts to remedy. There is not.

The majority remands the case to “[a]llow an appellate panel to reconsider a case without the participation of the interested member,” which it declares “will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.” Ante, at 14. The majority neglects to mention that the Supreme Court of Pennsylvania might have done just that. It entertained Williams’ motion for reargument without Castille, who had retired months before the court denied the motion. The Supreme Court of Pennsylvania is free to decide on remand that it cured any alleged deprivations.
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tion of due process in Williams’ postconviction proceeding by considering his motion for reargument without Castille’s participation.

* * * *

This is not a case about the “‘accused.’” Ante, at 14 (quoting Tumey, supra, at 532). It is a case about the due process rights of the already convicted. Whatever those rights might be, they do not include policing alleged violations of state codes of judicial ethics in postconviction proceedings. The Due Process Clause does not require any and all conceivable procedural protections that Members of this Court think “Western liberal democratic government ought to guarantee to its citizens.” Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353, 358 (1981) (emphasis deleted). I respectfully dissent.