

# ONE RING TO RULE THEM ALL♦: INDIVIDUAL JUDGMENTS, NATIONWIDE INJUNCTIONS, AND UNIVERSAL HANDCUFFS

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One of the earliest decisions by the Supreme Court of the United States—*Marbury v. Madison*—sets forth one of the most ancient principles of Anglo-American law—viz., there is a judicial remedy for every legal wrong.<sup>1</sup> Over the last three administrations, numerous inferior federal courts have taken that principle a giant step further. Those courts have decided that, when the government acts unlawfully, they may not only remedy the plaintiff’s injury but also protect everyone else by enjoining the Executive Branch from repeating the same conduct.<sup>2</sup> Sometimes labeled “nationwide,” “universal,”

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♦ J.R.R. TOLKIEN, *THE LORD OF THE RINGS* 65 (1954) (“He [Sauron the Great, the Dark Lord] only needs the One; for he made that Ring himself, it is his, and he let a great part of his own former power pass into it, so that he could rule all the others.”).

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1 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” (quoting 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*23)). The irony of *Marbury* is that the Court denied William Marbury the relief he was entitled to receive because the statute authorizing the Court to hear his case was unconstitutional. *Id.* at 162, 180.

2 *See, e.g., Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *vacated and remanded as moot*, 138 S. Ct. 353 (2017); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017); *Guilford Coll. v. Wolf*, No. 1:18CV891, 2020 WL 586672, at \*12 (M.D.N.C. Feb. 6, 2020); *HIAS, Inc. v. Trump*, 415 F. Supp. 3d 669, 686–87 (D. Md. 2020); *El Paso County v. Trump*, 407 F. Supp. 3d 655, 668 (W.D. Tex. 2019), *injunction stayed*, No. 19-51144 (5th Cir. Jan. 8, 2020); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017), *aff’d*, 888 F.3d 272 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, Nos. 17-2991 & 18-2649, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (vacating only the court’s previous decision to rehear the case en banc); *Darweesh v. Trump*, No. 17 Civ. 480, 2017 WL 388504, at \*1

“third-party,” or even “cosmic” injunctions,<sup>3</sup> those orders are better seen as handcuffs, since their purpose and effect is to bind the hands of executive officials to arrest them from doing mischief elsewhere.

Although lacking any historical pedigree in Anglo-American law,<sup>4</sup> during the last three presidential administrations, this practice has spread like kudzu, vexing the efforts of Presidents George W. Bush, Barack Obama, and Donald Trump to institute policies that each one thought lawful, beneficial, and necessary.<sup>5</sup> The Supreme Court has noted the issue, but not resolved it,<sup>6</sup>

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(E.D.N.Y. Jan. 28, 2017); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *see also, e.g.*, Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2097–98, 2097 nn.5–8, 2098 nn.10–11 (2017) (collecting cases).

3 *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (speaking of “cosmic” injunctions); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (explaining his preference for the term “universal” injunction). The nomenclature is misleading. A prevailing party can rely on a final judgment anywhere. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952); *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932). A third party cannot. *See infra* Part III.

4 *See Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425 (2017) [hereinafter Bray, *Multiple Chancellors*]. One commentator has argued that the universal injunction practice has roots in twentieth-century case law. *See Mila Sohoni, The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924, 959–79 (2020). The isolated cases that she cites, even if read to support her claim—but *see* Samuel Bray, *Response to The Lost History of the “Universal” Injunction*, YALE J. ON REG. NOTICE & COMMENT BLOG (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/> (arguing that Professor Sohoni misinterprets or fails to contextualize many of the cases she cites and dramatically misreads *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), a case central to her thesis)—pale by comparison to what Anglo-American courts have *not* done for nearly a millennium. *See, e.g., Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring). Sometimes, the dog that does not bark sends a clear message. Sir Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335, 347 (1930).

5 *See* Bray, *Multiple Chancellors*, *supra* note 4, at 457–59 (detailing a series of nationwide injunctions thwarting different policy proposals by the last three administrations). U.S. Deputy Attorney General Jeffrey Rosen recently noted that nationwide injunctions have become “almost a routine step in a regulation or policy’s lifecycle.” Jeffrey A. Rosen, Deputy Att’y Gen., U.S. Dep’t of Just., Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020). He probably feels under almost constant attack given that this Administration has been hit with nationwide injunctions in numerous areas, such as President Trump’s executive order restricting entry by immigrants from certain countries, his use of military construction funds to build a border wall, his policy of letting states opt out of refugee resettlement programs, and his change to the way the U.S. Citizenship and Immigration Services calculates the duration of illegal aliens’ unlawful presence in the country—to name just a few. *See* Bray, *Multiple Chancellors*, *supra* note 4, at 459.

6 *See Trump v. Pennsylvania*, 140 S. Ct. 918 (2020) (mem.) (order granting certiorari); Petition for Writ of Certiorari at I, *Trump v. Pennsylvania*, No. 19-454 (U.S. petition for cert filed Oct. 3, 2019) (Question Presented No. 3: “Whether the court of appeals erred in affirming a nationwide preliminary injunction barring implementation of the final rules.”); *Dep’t of Homeland Sec.*, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of

although Justices Clarence Thomas and Neil Gorsuch have decried the practice in their separate opinions.<sup>7</sup> The issue has shown no signs of going away, so the Court is likely to address it fairly soon.<sup>8</sup>

A large and growing body of literature criticizes nationwide injunctions,<sup>9</sup> although a handful of scholars have come to their qualified defense.<sup>10</sup> The literature has focused on whether universal injunctions comport with the historic scope of federal courts’ equitable powers and are good policy to boot. Largely missing from the debate is a fulsome analysis of whether the Constitution or the Judicial Code authorizes federal courts to issue such injunctions and whether they are permissible under existing Supreme Court precedent. We argue that the answer to each question is “no.”

Parts I and II explain that no positive law authorizes universal injunctions and that the architecture of the federal judicial system strongly implies that they are overbroad. Part I discusses the Constitution; Part II, the Judicial Code. Part III explains why the Supreme Court’s decisions in *United States v. Mendoza*<sup>11</sup> and *Williams v. Zbaraz*<sup>12</sup> disallow that practice. That Part also addresses the policy arguments for nationwide injunctions and shows that, as long as *Mendoza* and *Zbaraz* are good law, courts cannot bind the federal government always and everywhere by an adverse judgment in one lawsuit. Our conclusion is this: the lower federal courts are obliged to provide complete relief *to the party who prevailed in court—but no further*. Congress is the forum for deciding what relief should be afforded *to the public at large*.

stay); *Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring); *Summers v. Earth Island Inst.*, 555 U.S. 488, 500–01 (2009) (noting the issue but leaving it undecided).

<sup>7</sup> See *Dep’t of Homeland Sec.*, 140 S. Ct. at 599–601 (Gorsuch, J., concurring in the grant of stay); *Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring).

<sup>8</sup> The Court just this July remanded a case with instructions to dissolve a nationwide injunction. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020) (reversing the Third Circuit’s judgment and remanding with instructions to dissolve the nationwide preliminary injunction). In October 2020, the Court granted certiorari in a case presenting the question whether a universal preliminary injunction was overbroad. See *Wolf v. Innovation Law Lab*, No. 19-1212, 2020 WL 6121563 (U.S. Oct. 19, 2020) (mem.) (order granting cert.); *Petition for Writ of Certiorari at I, Wolf v. Innovation Law Lab*, No. 19-1212, 2020 WL 6121563 (U.S. Oct. 19, 2020) (mem.) (No. 19-1212) (Question Presented No. 4: “Whether the district court’s universal preliminary injunction is impermissibly overbroad.”).

<sup>9</sup> See, e.g., DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 275–76 (4th ed. 2010); Siddique, *supra* note 2, at 2099 n.18 (collecting authorities); Sohoni, *supra* note 4, at 923 n.16 (same).

<sup>10</sup> See, e.g., Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017), <https://harvardlawreview.org/2017/12/nationwide-injunctions-nationwide-harm/>; Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 18 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018).

<sup>11</sup> 464 U.S. 154 (1984).

<sup>12</sup> 448 U.S. 358 (1980).

## I. THE CONSTITUTIONAL TEXT

As one branch of a limited government of enumerated powers, the federal judiciary, like Congress and the President, has only the authority that the Constitution or another law expressly or impliedly grants it. What, then, does the Constitution say about remedies? The answer is, not much.<sup>13</sup>

The text expressly addresses remedies only in two places: the Suspension<sup>14</sup> and Just Compensation Clauses.<sup>15</sup> The former relates to habeas corpus, an ancient writ requiring a jailer “to produce the body” so that a court can decide whether the prisoner has been convicted of a crime or just irritated the local sheriff.<sup>16</sup> The Suspension Clause assumes that habeas corpus is available for federal courts to examine the legality of a party’s confinement and prohibits Congress from suspending the writ except when necessary for public safety in the case of insurrection or war.<sup>17</sup> As for the Just Compensation Clause: that is a monetary remedy, payable in the same coin as an award of damages for a contract breach or tort. The Clause guarantees a property owner “just compensation”—viz., the fair market value of the property taken, “what a willing buyer would pay in cash to a willing seller” at the time of the taking<sup>18</sup>—when the government takes his or her private property.<sup>19</sup> What those clauses have in common is that they limit an Article III court’s adjudicative power to the particular dispute between specific parties. In the case of habeas corpus, only “the body” is released, not the entire prison population.<sup>20</sup> In the case of a taking, just compensation is paid only to each particular prevailing property owner for the specific amount of his own peculiar loss.<sup>21</sup> Courts do not revise the Criminal Code, nor do they make land use planning decisions.

Other constitutional provisions deal with judicial remedies by implication. Several provisions grant exclusive adjudicative, managerial, or

13 Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1118 (1969) (“The Constitution is almost completely silent concerning the remedies to be employed for its implementation.”).

14 U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE. L.J. 1425, 1509 n.329 (1987) (“[T]he non-suspension clause is the original Constitution’s most explicit reference to remedies.”).

15 U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

16 See 3 BLACKSTONE, *supra* note 1, at \*131 (“But the great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner.”).

17 See *Boumediene v. Bush*, 553 U.S. 723, 739–52 (2008).

18 *United States v. Miller*, 317 U.S. 369, 374 (1943).

19 See *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 315 (1987).

20 See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807).

21 See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 516 (1979).

remedial authority to Congress or the President, which impliedly forecloses supplementary judicial solutions. Article I vests “[a]ll legislative Powers” in Congress, it defines how a “Bill” may become a “Law,” and it specifies that “[a]ll Bills for raising Revenue” must originate in the House of Representatives.<sup>22</sup> Article I also vests in each chamber of Congress the authority to judge the qualifications of Representatives and Senators, respectively; to punish or expel a member for misconduct; and to decide whether to impeach and remove a member of the Executive Branch.<sup>23</sup> Article II makes the President “Commander in Chief” of the military and empowers him to “grant Reprieves and Pardons” for federal offenses, “make Treaties,” “receive Ambassadors and other public Ministers,” and appoint Supreme Court Justices as well as “other Officers of the United States.”<sup>24</sup> As a result, no court may order Congress to pass a law, expel a member, impeach and remove an executive officer, raise taxes, or declare war. Nor may a court direct the President how to grant mercy, manage the prosecution of a war, make foreign-policy decisions for the nation, or staff the government.

The Article III Vesting Clause grants federal courts the “judicial Power” to adjudicate specified “Cases” and “Controversies.”<sup>25</sup> Those terms draw their meaning not only from the assignment of responsibilities in Articles I and II, but also from the practices of the English common-law and equity courts.<sup>26</sup> That is, the new federal courts were responsible for answering questions of “Law and Equity” that arose while they presided over “Trial[s]” in “criminal prosecutions” or “Suits at common law.”<sup>27</sup> As James Madison put it, the

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22 U.S. CONST. art. I, § 1 (the Vesting Clause); *id.* § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives.”); *id.* § 7, cls. 2, 3 (establishing the bicameralism and presentment requirements).

23 *Id.* art. I, § 2, cl. 5 (granting the House of Representatives “the sole Power of Impeachment”); *id.* § 3, cl. 6 (granting the Senate “the sole Power” to try an impeachment); *id.* § 5, cl. 1 (making each chamber “the Judge of the Elections, Returns, and Qualifications of its own Members”); *id.* cl. 2 (granting each house power to “punish” or “expel” its members).

24 *Id.* art. II, § 2, cls. 1, 2; *id.* § 3.

25 *Id.* art. III, § 1; *id.* § 2 cl. 1.

26 In the words of Justice Felix Frankfurter:

Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted “Cases” or “Controversies.” . . . [E]ven as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.

*Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

27 U.S. CONST. art. III, § 2, cl. 1; *id.* cl. 3; *id.* amend. VI; *id.* amend. VII.

federal courts were to resolve matters “of a Judiciary Nature.”<sup>28</sup> A federal court has the responsibility to enter a final judgment disposing of every criminal and civil case properly filed within its jurisdiction,<sup>29</sup> but that judgment reaches only the parties to that case. As in the case of general civil suits and criminal prosecutions, the court can adjudicate only the dispute between the parties, rather than legislate in a wholesale manner by entering a judgment for everyone potentially affected. The remedy is no broader than the judgement, which itself is confined to the parties.<sup>30</sup> As William Blackstone put it, “[f]inal judgements are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.”<sup>31</sup>

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28 James Madison, Monday Augst. 27th, 1787 In Convention, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 426, 430 (Max Farrand ed., 1966) (referencing the United States Supreme Court).

29 See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–25 (1995) (ruling that Congress cannot reopen a final judgment entered by an Article III court); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (noting that federal courts generally have “the duty . . . to adjudicate a controversy properly before” them (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959))).

30 That is particularly true in the case of a *preliminary* injunction. Its purpose is to maintain the status quo until the case can be resolved on the merits. See, e.g., *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”). A plaintiff need not prove that he will prevail at trial, only that he might be successful and that the “balance of equities” favors leaving the parties where they are. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”). Nationwide injunctions are altogether inappropriate at the preliminary stage because, at that early stage, a plaintiff “is not required to prove his case in full,” and “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Camenisch*, 451 U.S. at 395; see also *Withrow v. Larkin*, 421 U.S. 35, 43 (1975) (“[A] state statute should not be declared unconstitutional by a district court if a preliminary injunction is granted a plaintiff to protect his interests during the ensuing litigation.”).

31 3 BLACKSTONE, *supra* note 1, at \*398. The Federal Rules of Civil Procedure implement Blackstone’s simple conception of a judgment as a declaration of victory or loss for a specific plaintiff or plaintiffs. Rule 17 requires that “[a]n action must be prosecuted in the name of the real party in interest” so that the trial court knows which parties will be affected by a judgment. FED. R. CIV. P. 17(a). Rule 23 allows one party to act as a class representative, but “only if” specified “[p]rerequisites” are satisfied. FED. R. CIV. P. 23(a); see FED. R. CIV. P. 23(a)–(b) defining those “[p]rerequisites”). Rule 54 defines a judgment as “a decree and any order from which an appeal lies.” FED. R. CIV. P. 54(a). It also forbids the judgment from containing any extraneous information, such as recitals of pleadings, a master’s report, or court records. *Id.* In addition, it directs the court to clearly specify which claims and parties the judgment applies to. See FED. R. CIV. P. 54(b). Rule 58, meanwhile, requires that every judgment “be set out in a separate document.” FED. R. CIV. P. 58(a). The purpose of those rules is to give the parties clarity as to when a judgment has been entered and in whose favor so that they have a clear sense of what must happen to enforce,

What that means is this: in a criminal prosecution, a federal court can enter a judgment before trial that dismisses charges improperly brought.<sup>32</sup> After trial, the court can order the accused to be punished or freed, depending on the jury’s verdict, and impose a punishment identified by Congress in the act creating a criminal offense.<sup>33</sup> In a civil action, a court can award the same type of monetary or injunctive relief available in England at law or equity when this nation came into being.<sup>34</sup> That is all. The Article III adjudicative power vested in federal courts is not a charter to substitute appointed judges for elected officials.<sup>35</sup> Nationwide injunctions differ

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preserve, or challenge the trial court’s decision. 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* §§ 2651–52 (4th ed. 2014) (pertaining to Rule 54); 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2781 (3d ed. 2012) (pertaining to Rule 58).

32 No one may be charged with a “capital” or “otherwise infamous crime” unless a grand jury has indicted him for it. U.S. CONST. amend. V. No one may twice be “put in jeopardy of life or limb” for “the same offen[s]e.” *Id.* Everyone accused of a crime shall be tried in the state and district where it was allegedly committed. *Id.* amend. VI. A trial court may dismiss any charges not in compliance with those requirements.

33 *See, e.g.*, *Evans v. Michigan*, 568 U.S. 313, 330 (2013) (ruling that even an erroneous acquittal bars a retrial for the same offense); *Ex parte United States*, 242 U.S. 27, 42 (1916) (ruling that federal courts must impose a sentence consistent with the relevant act of Congress); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (ruling that Congress must define all federal crimes).

34 *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (“The Judiciary Act of 1789 conferred on the federal courts jurisdiction over ‘all suits . . . in equity.’ . . . We have long held that ‘[t]he “jurisdiction” thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.’” (first quoting *Judiciary Act of 1789*, ch. 20, § 11, 1 stat. 73, 78; and then quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939))); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708–09 (1999) (ruling that the Seventh Amendment Civil Jury Trial right applies to common law causes of action and analogous statutory ones).

35 *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (“Our power as judges to ‘say what the law is,’ . . . rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of legal right.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132–33 (2011) (“Under Article III, the Federal Judiciary is vested with the ‘Power’ to resolve not questions and issues but ‘Cases’ or ‘Controversies.’ This language restricts the federal judicial power ‘to the traditional role of the Anglo-American courts.’ . . . In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. . . . If the judicial power were ‘extended to every *question* under the constitution,’ Chief Justice Marshall once explained, federal courts might take possession of ‘almost every subject proper for legislative discussion and decision.’” (first quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); and then quoting 4 *PAPERS OF JOHN MARSHALL* 95 (Charles T. Cullen ed., 1984))); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (“In part those words [‘cases’ and ‘controversies’] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define

markedly from the remedies contemplated by Article III because the former exceed the party-specific reach of the judgment and partake more of legislation.

The Framers did not stumble into the division of labor established by Articles I, II, and III, nor did it occur by happenstance. By the Constitutional Convention of 1787, England already had a long history of courts serving in multiple capacities.<sup>36</sup> In the pre-Norman Era, the Anglo-Saxon kings relied on the *witan*, a council of elders, with whom they would consult to determine what tribal custom fixed as the law.<sup>37</sup> After William I became king, the *witan* became known as the King's Court or *Curia Regis*, which exercised legislative, executive, and judicial power.<sup>38</sup> Late in the fifteenth century, a court of general jurisdiction, consisting of the king's councilors and common-law judges, known as the Star Chamber, emerged as a component of the Privy Council.<sup>39</sup> During the English Civil War, Parliament stripped the Privy Council of its domestic adjudicative authority, but it continued to dispense justice and approve local legislation tentatively adopted in the Crown's colonies, including the ones in America.<sup>40</sup> The House of Lords also exercised legislative and judicial power by serving as one half of a bicameral Parliament and the highest court in England.<sup>41</sup> English law therefore saw nothing improper in the same body wearing more than one lawmaking, law-enforcing, and law-adjudicating hat.<sup>42</sup>

The Framers also had a similar local example to consider. The New York Constitution of 1777 created a Council of Revision that included judges as members and invested that council, rather than the governor, with veto and revisionary power over legislation.<sup>43</sup> Guided by Montesquieu's separation-of-powers theory, the Framers considered and rejected that approach at the Constitutional Convention of 1787,<sup>44</sup> thereby making the point that the judiciary should have no part in the lawmaking process. Because a universal injunction partakes more of the nature of a "Law" than a judgment resolving a "Case" or "Controversy," the decision made at the Constitutional Convention to confine the judiciary to the latter is powerful evidence that courts should limit themselves to entering a judgment that does no more than resolve the case at hand and remedy the injury suffered by the parties.

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the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.”).

36 See, e.g., James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 237–43 (1989).

37 See, e.g., Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. UNIV. L. REV. 293, 327–32 (2016) (describing the evolution of early English law).

38 Barry, *supra* note 36, at 237.

39 See *id.* at 238.

40 *Id.*

41 *Id.* at 239.

42 See *id.* at 238–41.

43 See *id.* at 243–45.

44 See *id.* at 248–57.

## II. THE JUDICIAL CODE

Nothing in the Judicial Code grants courts the legislative-like power some federal judges have assumed. For example, no statute defining federal court jurisdiction permits a court to award a remedy to a nonparty.<sup>45</sup> In fact, two statutes strongly imply that Congress has limited the courts’ remedial power to only the parties to a case. One law divests a district court of jurisdiction when a party has been “improperly or collusively” joined,<sup>46</sup> while the statute creating supplemental jurisdiction limits it to claims “so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”<sup>47</sup> The Declaratory Judgment Act makes that point too.<sup>48</sup> It limits the scope of an equitable remedy to the parties to a lawsuit by providing that that “[i]n a case of actual controversy within its jurisdiction” a federal court “may declare the rights and other legal relations of any interested party seeking such declaration.”<sup>49</sup> Nonparties are not within the case or controversy that allows a declaratory judgment to be awarded.<sup>50</sup>

Those limitations are not modern-day anomalies. Neither the Judiciary Act of 1789 nor any of its offspring granted federal courts the full extent of the judicial power available to them under Article III.<sup>51</sup> That omission is

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45 See 28 U.S.C. §§ 1330–1369.

46 *Id.* § 1359 (“A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”).

47 *Id.* § 1367. Federal Rule of Civil Procedure 19 further bolsters this point. It requires that a district court join a nonparty in the case when that person has an interest in the case that cannot be adequately protected or disposed of without the person’s participation, and requires the court to dismiss an action when “in equity and good conscience” the action cannot proceed among the existing parties. FED. R. CIV. P. 19.

48 28 U.S.C. §§ 2201–2202.

49 *Id.* § 2201. Moreover, declaratory judgments were unknown to the law until 1919, when some state legislatures began to pass such laws. 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2752 (4th ed. 2016).

50 See *supra* note 35; *cf.* Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205 (2020). In that case, a district court ruled that the deadline to receive election ballots had to be extended. *Id.* at 1206–07. In order to give force to that ruling, the district court enjoined state officials, who were not parties to the lawsuit, from releasing the election results for six days after the election. *Id.* at 1207. The Supreme Court reversed those orders to the extent they required state officials to count ballots after the official election deadline, and called the order enjoining nonparties “unusual.” *Id.* at 1207–08.

51 See, e.g., Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802); Judiciary Act of 1802, ch. 31, 2 Stat. 156; Judicial Circuits Act of 1866, ch. 210, 14 Stat. 209; Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385; Judiciary Act of 1869, ch. 22, 16 Stat. 44; Judiciary Act of 1875, ch. 137, 18 Stat. 470, *amended by* Act of Aug. 13, 1888, ch. 866, 25 Stat. 433 (correcting Act of Mar. 3, 1887, ch. 373, 24 Stat. 552); Judiciary Act of 1891, ch. 517, 26 Stat. 826; Judicial Code of 1911, ch. 231, 36 Stat. 1087; Judiciary Act of 1925, ch. 229, 43 Stat. 936. For a more detailed history of the evolution of the modern federal court system, see 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3504 (3d ed. 2008). Some of the aforementioned statutes were more

significant. The Supreme Court has noted that Congress is under no obligation to grant federal courts the full extent of the authority that Article III would permit.<sup>52</sup> In fact, the Court has upheld Congress's authority to limit the remedies available to Article III courts.<sup>53</sup> It therefore cannot be argued that the ability to award nationwide injunctions is a historic incident of the power of the federal judiciary to resolve cases and controversies.

The architecture of the federal judiciary also undermines any such argument. Today's federal system is arranged vertically and horizontally. Congress divided the states into one or more judicial districts<sup>54</sup> and grouped those districts into twelve circuits.<sup>55</sup> District courts are *nisi prius* courts—i.e., triers of fact.<sup>56</sup> Circuit courts have appellate jurisdiction, but only over the districts within each respective circuit.<sup>57</sup> That structure becomes important when one considers the stare decisis effect of a federal court's decision. A circuit court's ruling is a binding precedent for all district courts in that circuit, but it does not establish the law in another circuit.<sup>58</sup> Similarly, district court opinions have no stare decisis effect at all. They do not bind any other court, or even the judge who issued the opinion.<sup>59</sup> To put it another way, the

commonly referred to as the “Midnight Judges Act” (Judiciary Act of 1801), the “Evarts Act” (Judiciary Act of 1891), and the “Judges’ Bill” (Judiciary Act of 1925). *Id.*

52 See *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) (“Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.”); WRIGHT, MILLER, COOPER & FREER, *supra* note 51, § 3526 (discussing Congress’s control over federal court jurisdiction).

53 See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 112 (2004) (upholding a law that prohibits lower courts from restraining the collection of a state tax); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329–30, 333 (1938) (upholding a law that restricts courts’ ability to grant injunctive relief in labor disputes).

54 See 28 U.S.C. §§ 81–131 (2018) (specifying the geographic scope of the districts within each state); *id.* § 132 (establishing a district court within each district).

55 See *id.* § 41 (specifying the composition of the various circuit courts). There also are some additional, specialized courts of appeals. See *infra* note 57.

56 See, e.g., *id.* §§ 1330–1332.

57 See *id.* § 1291; *id.* § 1294 (“[A]ppeals from reviewable decisions of the district and territorial courts shall be taken . . . [f]rom a district court of the United States to the court of appeals for the circuit embracing the district.”). There are a few exceptions to this rule for appeals of cases invoking the specific subject-matter jurisdiction of the specialty courts like the Federal Circuit, the Court of International Trade, and the Court of Federal Claims. See *id.* §§ 1292(c)–(d), 1295.

58 See Lawrence B. Solum, *Stare Decisis, Law of the Case, and Judicial Estoppel*, in 18 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶ 134.02[2] (Daniel R. Coquillette, Gregory P. Joseph, Sol Schreiber, Georgene M. Vairo & Chilton Davis Varner eds., 3d ed. 2015).

59 *Camreta v. Greene*, 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.” (quoting Solum, *supra* note 58, ¶ 134.02[1][d])).

district court for the Southern District of New York must obey Second Circuit precedents, but is free to ignore the diktats of the Ninth Circuit.<sup>60</sup>

Finally, Rule 23 of the Federal Rules of Civil Procedure defines the requirements necessary for a district court to enter a judgment binding on absent parties.<sup>61</sup> The purpose of the rule is to avoid repetitive litigation, but that purpose is constrained by the class certification requirement.<sup>62</sup> In *Baxter v. Palmigiano*, the Supreme Court held that the district court erred by entering a judgment granting classwide relief without first certifying a class.<sup>63</sup> Nationwide injunctions cannot be squared with Rule 23 and *Baxter*. If courts cannot grant classwide judgments to an uncertified class, it is nonsensical to allow them to grant the same relief to an uncertified class of everyone, everywhere.

Some defenders of nationwide injunctions have relied on the Administrative Procedure Act<sup>64</sup> as support.<sup>65</sup> Their argument is that because the APA directs a court to “set aside” unlawful agency action,<sup>66</sup> a court may enjoin the federal government from applying a statute or rule to any other party. That argument is unpersuasive. As Professor Samuel Bray has

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60 See, e.g., *TM Patents v. IBM*, 107 F. Supp. 2d 352, 353 (S.D.N.Y. 2000) (“Only decisions of the United States Supreme Court and the *relevant* Courts of Appeals are binding on a District Court.”).

61 FED. R. CIV. P. 23 (permitting class-wide injunctive relief only if the class certification requirements are satisfied and the relief would be appropriate for every member of the class).

62 See generally 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1751, 1759–69 (3d ed. 2005) (discussing the purpose of class actions and the class certification requirements).

63 425 U.S. 308, 311 n.1 (1976).

64 5 U.S.C. §§ 551–559 (2018).

65 See, e.g., *Amdur & Hausman*, *supra* note 10, at 54 (arguing that under the APA, courts regularly strike down policies wholesale).

66 5 U.S.C. § 706 (2018). The D.C. Circuit has held that the APA permits—but does not require—courts to issue nationwide injunctions because “[w]hen 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 petitioners is proscribed.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). In reaching its holding, the court relied on Justice Blackmun’s dissent in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and a concern that “refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation.” *Id.* As Zayn Siddique explains in his article, the D.C. Circuit’s argument “cannot be justified on precedential or prudential grounds.” Siddique, *supra* note 2, at 2121. First, the D.C. Circuit’s reliance on Justice Blackmun’s dissent is misplaced—aside from the fact that it is a *dissent*—because its permissive language does not support the court’s conclusion that the “ordinary result” of a ruling against the government in an APA case is that a regulation must be struck down. *Id.* Second, the D.C. Circuit ineffectually distinguished a nearly identical case from the Third Circuit that granted only individualized relief despite concluding that the regulation was unlawful. *Id.* And third, the court’s prudential argument was “overstated” and “would not only foreclose possible duplicative litigation in its own circuit but also preclude reasoned consideration by any other court.” *Id.* at 2122–23.

explained, “[n]ational injunctions were not contemplated when the APA was enacted [in 1946].”<sup>67</sup> Moreover, when the APA was enacted, agencies acted primarily through adjudication, not rulemaking, and the choice of “set aside” is consistent with reversing adjudications because “in prior judicial usage the phrase was used for reversing judgments.”<sup>68</sup> Finally, it was settled law when Congress passed the APA in 1946 that nonparties could not benefit from a judgment entered in someone else’s favor.<sup>69</sup> Thus, even in the context of APA cases, no law gives the courts the power to issue nationwide injunctions.

### III. THE SUPREME COURT’S DECISIONS IN *UNITED STATES V. MENDOZA* AND *WILLIAMS V. ZBARAZ*

An act of Congress governs everyone to whom its terms reach.<sup>70</sup> By contrast, an injunction is a coercive remedy used to enforce a court’s judgment,<sup>71</sup> and, as the Supreme Court has made clear, “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”<sup>72</sup> The starting point for analyzing the propriety of any grant of injunctive relief is the underlying judgment, which identifies the parties and the outcome of the case. That is why the Supreme Court’s 1984 decision in *United States v. Mendoza* imposes a substantial roadblock to the nationwide injunction practice.<sup>73</sup> It does not permit a court to use an adverse judgment against the federal government in any other case, and there is no material difference between what *Mendoza* forbids and what numerous courts have done through nationwide injunctions.

*Mendoza* involved the preclusive effect of a judgment entered against the federal government in an earlier lawsuit involving the same legal issue but different parties. The Supreme Court unanimously held that the federal government cannot be estopped from relitigating the validity of a position that it took in an earlier lawsuit that it lost. *Mendoza* effectively rejected every defense of nationwide injunctions that their supporters make. As long as *Mendoza* is good law, no court can enter a nationwide injunction against the federal government outside of a class action.

67 Bray, *Multiple Chancellors*, *supra* note 4, at 438 n.121.

68 *Id.*; *see also* Morgan v. Daniels, 153 U.S. 120, 124 (1894) (explaining that a challenge to a patent-office adjudication is “a proceeding to set aside the conclusions reached by the administrative department” and is analogous to “a suit to set aside a judgment”).

69 *See, e.g.*, Litchfield v. Goodnow’s Administrator, 123 U.S. 549, 552 (1887) (No judgment binds “a stranger to the proceedings.”); RESTATEMENT OF JUDGMENTS § 93 (AM. L. INST. 1942).

70 *United States v. Lee*, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law.”).

71 *See, e.g.*, James Barr Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 261–62 (1908); Siddique, *supra* note 2, at 2107.

72 Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 765 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977).

73 464 U.S. 154 (1984).

At issue in *Mendoza* were the rules of issue and claim preclusion, which were historically called issues of collateral estoppel and *res judicata*. Those rules sought to simplify litigation by preventing the same parties from relitigating a final judgment entered in a lawsuit between them. If *A* prevailed against *B* in litigation, the final judgment resolved their dispute. That judgment, however, did not affect the rights of *C* unless *C* had a close enough relationship with *A* or *B*—called being in “privity” with *A* or *B*—to justify treating *C* as the alter ego of one of them.<sup>74</sup> Over time, critics said that the common law of claim and issue preclusion should apply more broadly,<sup>75</sup> and the Supreme Court ultimately agreed. In 1971, the Court decided in *Blonder-Tongue Laboratories v. University of Illinois Foundation* that in suit by *A* against *C*, *C* could make defensive use of a judgment against *A* in *A*’s prior suit against *B*,<sup>76</sup> and eighteen years later, in *Parklane Hosiery Co. v. Shore*, the Court allowed *C* to make “offensive” use of a judgment against *B* that was obtained in a prior suit brought by *A* against *B*.<sup>77</sup>

*Mendoza* involved the Nationality Act of 1940, which had been amended in 1942<sup>78</sup> to make it easier for foreigners who had served honorably in the U.S. military during World War II to become American citizens by, for example, waiving any residency requirement and permitting qualified applicants to be naturalized overseas, rather than within the United States.<sup>79</sup> That system did not work as planned in the Philippines, however, because because Japanese occupation made U.S. naturalizations impossible until 1945.<sup>80</sup> Moreover, after gaining its independence from the United States in 1946,<sup>81</sup> the Philippine government did not want to lose its citizens to this nation.<sup>82</sup> As the result, the Immigration and Naturalization Service (INS) did not send a representative to the Philippines until 1945 and, even then, temporarily halted all such naturalizations in the Philippines from October 1945 until August 1946.<sup>83</sup> The eligibility window under the amended Nationality Act of 1940, however, closed at the end of 1946.<sup>84</sup> Sergio Mendoza sued, arguing that his inability to apply for citizenship deprived him of due process of law.<sup>85</sup>

74 See, e.g., *Litchfield*, 123 U.S. at 551–52.

75 See, e.g., Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 282 (1957); see also RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (3d ed. 2016).

76 402 U.S. 313, 350 (1971) (holding that a defendant could plead *res judicata* against a plaintiff patentee whose patent had been declared invalid in a prior proceeding).

77 439 U.S. 322, 333 (1979) (barring a defendant from relitigating an issue it lost in earlier litigation).

78 8 U.S.C. §§ 1001–1005.

79 *United States v. Mendoza*, 464 U.S. 154, 156 (1984).

80 *Id.*

81 Treaty of General Relations and Protocol, Phil.-U.S., July 4, 1946, T.I.A.S. No. 1568.

82 *Mendoza*, 464 U.S. at 156.

83 *Id.*

84 *Id.*

85 *Id.* at 156–57.

Pointing to the judgment entered against the government in an earlier lawsuit involving the same claim,<sup>86</sup> the district court held that the government was precluded—viz., collaterally estopped—from relitigating that issue in *Mendoza*.<sup>87</sup> The district court entered judgment in Mendoza’s favor on that ground. The court of appeals affirmed, but the Supreme Court reversed.<sup>88</sup>

The Court recognized that the collateral estoppel effect of a federal court judgment was an issue of federal law, to be decided in the same way that the Court resolved the issues in *Blonder-Tongue* and *Parklane*: by using the old-fashioned common law decision-making process of balancing the benefits and costs of a proposed rule.<sup>89</sup> At the outset, the Court noted that the federal government occupied a unique position in federal court litigation, because it was involved in a far greater number of cases than any private party was and because many constitutional questions can only arise in the context of public litigation.<sup>90</sup> Allowing a nonparty to bind the federal government whenever it lost a case, the Court reasoned, would have serious adverse consequences.

Principal among them was the damage that such a rule would do to the Supreme Court’s own decision-making ability. The Court generally prefers to wait until numerous lower courts, the legal profession, and the academy have fully thrashed out an issue before taking it up. That approach—colloquially known as allowing an issue to “percolate” in the lower courts—gives the Court the opportunity to have the competing arguments fully debated so that the Court can learn the correct, or at least best, answer to a legal issue.<sup>91</sup> Binding the government everywhere and forever once it lost an issue—particularly an important one, or one involving a matter of constitutional law—would jeopardize that valuable educational approach, pithily described by Professor Bray as, “[m]easure twice, cut once.”<sup>92</sup> The federal government would be compelled to appeal every adverse ruling, even if prudential concerns militated against doing so in particular cases, to avoid having one district court judge decide an issue for the entire nation.<sup>93</sup> The Court declined to leave the matter to a case-by-case balancing of the equities associated with each lower

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86 See *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

87 *Mendoza*, 464 U.S. at 157.

88 *Id.* at 164.

89 *Id.* at 162–63.

90 *Id.* at 159 (quoting *INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam)).

91 See *id.* at 160 (“A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. 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. . . . Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government’s petitions for certiorari.”).

92 Bray, *Multiple Chancellors*, *supra* note 4, at 422.

93 See *Mendoza*, 464 U.S. at 161 (citing Brief for United States, at 30–31).

court decision because of the uncertainty it would generate. That approach “leaves the Government at sea because it cannot possibly anticipate, in determining whether or not to appeal an adverse decision, whether a court will bar relitigation of the issue in a later case.”<sup>94</sup> As the result, the Court unanimously held that a party cannot make offensive collateral estoppel use of an adverse final judgment against the federal government.<sup>95</sup>

While *Mendoza* discusses the effect of a judgment at the back end of a case, *Williams v. Zbaraz* discusses the “Case” or “Controversy” requirement at the front end.<sup>96</sup> The plaintiffs in *Zbaraz* challenged the constitutionality of an Illinois law that declined to fund elective abortions,<sup>97</sup> on the ground that the statute denied an indigent woman the right to obtain an abortion under *Roe v. Wade*.<sup>98</sup> Although the federal Hyde Amendment<sup>99</sup> imposed a parallel limit on federal reimbursement for elective abortions, the plaintiffs did not claim that that statute infringed on their rights.<sup>100</sup> Nonetheless, the district court, believing that the two statutes were closely interrelated, held both laws unconstitutional.<sup>101</sup> The Supreme Court reversed, ruling that the district court “lacked jurisdiction to consider the constitutionality of the Hyde Amendment” for two reasons: none of the parties had challenged the constitutionality of that statute, and the district court could have awarded the plaintiffs complete relief based only and entirely on a judgment in their favor holding the Illinois law invalid.<sup>102</sup> Under those circumstances, the Court held, the district court acted in “the absence of a case or controversy sufficient to permit an exercise” of the Article III judicial power.<sup>103</sup> *Zbaraz* therefore stands for the proposition that a district court lacks jurisdiction to grant a prevailing party relief on an issue not in dispute in the case and unnecessary to fully remedy the plaintiff’s injury. It logically follows that a district court lacks jurisdiction to award relief to a nonparty as to whom there is, by definition, no “Case” or “Controversy” with anyone before any litigation is brought.

The rationales that the Court found compelling in *Mendoza* and *Zbaraz* apply perforce in any case involving a universal injunction. Indeed, there is

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94 *Id.* at 162.

95 *Id.* at 155, 162. The literature on nationwide injunctions has only lightly touched on the *Mendoza* decision. Most commentators either give the ruling short shrift or say that it was wrongly decided and should be overruled. See, e.g., Clopton, *supra* note 10, at 22.

96 448 U.S. 358 (1980).

97 *Id.* at 361.

98 Brief of Appellees at 22, *Williams v. Zbaraz*, 448 U.S. 358 (1980) (Nos. 79-4, 79-5, 79-491).

99 Since 1976, Congress has included a rider, known as the Hyde Amendment, on Medicaid appropriations. *Zbaraz*, 448 U.S. at 362 n.4. The Hyde Amendment prohibits the use of federal funds to perform elective abortions. *Id.*

100 See *id.* at 361.

101 *Id.* at 365–66; see also *Zbaraz v. Quern*, 469 F. Supp. 1212, 1221 (N.D. Ill. 1979) (district court decision). The district court felt compelled to do so given an earlier order by the Seventh Circuit. *Id.* at 1216, 1221.

102 See *Zbaraz*, 448 U.S. at 367.

103 *Id.*

little, if anything, that could be added to the Court's discussions to demonstrate why universal injunctions are unsound as a matter of policy. *Mendoza* ensures that no one adverse judgment can foreclose the federal government from implementing a statute or operating a program in connection with persons not named in the judgment. That choice is for Congress to undertake via the passage of a generally applicable "Law." *Mendoza* also avoids the unseemly forum shopping, and asymmetric development of the law, that the contrary rule would encourage. After all, there are hundreds of federal district court judges, and institutional litigants have every incentive to find one to rule in their favor. *Zbaraz* complements *Mendoza* by making clear that a court may not enter judgment on an issue that is not in dispute between the parties. That being so, it should be immaterial whether that judgment embraces issues or people outside of the original dispute.<sup>104</sup> The Court made that point in *Hansberry v. Lee*,<sup>105</sup> holding that it is a violation of due process when a judgment binds a person who is not designated a party to the lawsuit, outside the limited exception for class actions.<sup>106</sup> When a court purports to do that, it is no longer deciding a case or controversy but exercising Congress's power to make laws of general concern. But unlike Congress, the courts are not accountable to the people when they exercise the legislative power.<sup>107</sup>

To be sure, "freezing the first final decision rendered on a particular legal issue"<sup>108</sup> could be said to be a more efficient way of developing contemporary legal doctrines, particularly in important cases of national application, because it would force the government to make its best case the first time an issue arises. But that approach forces the government to win every lawsuit to avoid ever being bound by an adverse judgment. It also puts tremendous pressure on the Supreme Court to loosen restraints imposed on judicial decisionmaking by the doctrine of *stare decisis*. That doctrine represents a judgment that a rule of law adopted by the courts ought to stand unless there is a "special justification" for jettisoning it.<sup>109</sup> *Stare decisis* seeks to generate certainty in the law and confidence in the courts by requiring rules of law to remain in place, except for extraordinary reasons, as individual judges come and go. Put differently, the doctrine exists to prevent the law

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104 See Bray, *Multiple Chancellors*, *supra* note 4, at 471–72, 471 nn.311–12, 472 nn.313–14.

105 311 U.S. 32 (1940).

106 See *id.* at 40–41; see also *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); cf. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (discussed *supra* note 50).

107 See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that a legislature need not give hearings to people affected by legislation because the public's rights are protected by their ability to elect or remove legislators).

108 *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

109 *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

from being batted back and forth like a tennis ball. If the Court were denied the opportunity to wait until numerous lower courts had debated an issue, there is a considerable risk that the Court would later conclude that its initial answer was incorrect. Remorse over giving the wrong answer to a hastily considered issue might increase the Court’s willingness to reconsider its initial decisions, thereby weakening the benefits that stare decisis provides for the legal system. Eliminating the flexibility that the Court enjoys at the front end of the process—enjoys, that is, by allowing numerous lower courts to address an issue—would force the Court to increase the flexibility it has at the “back end”—by upping its willingness to overrule decisions that it now believes are mistaken. That tradeoff does not improve the Court’s decision-making process, but it does increase the risk that the law will be seen as up for grabs and that the Justices will be seen as political actors, as members of Congress in black robes rather than suits. That certainly would not be an improvement in the fact or appearance of impartiality and legitimacy in the legal process.

Indeed, these considerations apply with even greater force to nationwide injunctions than to the offensive use against the government of a prior adverse judgment, as *Parklane* allows. A nationwide injunction has a greater impact than the *Parklane* doctrine because it grants relief to third parties who never file their own lawsuit. The possibility that the same judge who ruled against the government in the first case will reconsider his or her ruling is far less than the likelihood that a new judge might uncritically apply the first judgment. People disagree over controversial issues, and judges are people, so one or more judges are likely to disagree with whoever first decides a case. That, in turn, increases the potential that additional judges will join them in the debate, raising the possibility of a consensus emerging as to the correct or best resolution that differs from the first decision.

Here’s an example. Witness what happened in the litigation over the Sentencing Reform Act of 1984. Between the dates that the Act went into effect on November 1, 1987, and the Supreme Court upheld its constitutionality on January 18, 1989, over various separation-of-powers challenges, one circuit court and at least 145 district courts had ruled that the Act was unconstitutional.<sup>110</sup> Throughout that entire period, no one argued that the federal government was everywhere and forever bound by the first adverse district court ruling. Ultimately, the Supreme Court rejected the rulings of all those courts in *Mistretta v. United States* and upheld the Sentencing Reform Act over the same separation-of-powers challenges that numerous lower courts had found persuasive.<sup>111</sup> The Supreme Court might

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110 Mark Nielsen, Comment, *Mistretta v. United States and the Eroding Separation of Powers*, 12 HARV. J.L. & PUB. POL’Y 1049, 1049 n.6 (1989).

111 488 U.S. 361 (1989). The Court later held that the mandatory nature of the sentencing guidelines was unconstitutional on a materially different ground, the Sixth Amendment Jury Trial Clause, not at issue in the cases leading up to *Mistretta*. See *United States v. Booker*, 543 U.S. 220, 245 (2005).

not have been able to do so if the first district court ruling was dispositive. The result is that the slow-but-steady system works.

Moreover, in cases where, before *Mendoza*, collateral estoppel might have been asserted against the government, percolation serves only one purpose: it allows multiple judges, parties, amici, and scholars to consider the issue and prove the old adage that two (or more) heads are better than one. The issue itself, however, is defined before collateral estoppel may be invoked.<sup>112</sup> In the case of nationwide injunctions, though, percolation serves an additional purpose: it narrows the issues of law and fact implicated by the challenged law, rule, or policy. Whereas collateral estoppel may be invoked only after the issue has been defined, a nationwide injunction may grant relief to third parties even if their hypothetical cases raise quite different issues of law or fact than the plaintiff's. Because the Court's rationale in *Mendoza* for rejecting the *Parklane* doctrine applies with even greater force to nationwide injunctions than it did to nonmutual offensive collateral estoppel, the Court's rationale in *Mendoza* forbids the use of nationwide injunctions.<sup>113</sup>

#### CONCLUSION

Both the Constitution and the Judicial Code, as informed by the lessons of history, are relevant to the legality of nationwide injunctions in two ways. They authorize federal courts to award relief to the parties in a particular "Case" or "Controversy," and they prohibit the courts from entering a judgment that is tantamount to the type of "Law" that only Congress can pass. Nationwide injunctions cross the line separating the former from the latter because they are unnecessary to provide complete relief to the prevailing party, and they prevent the federal government from enforcing an act of Congress against nonparties. The Supreme Court's decisions in *Mendoza* and *Zbaraz* reinforce the evident meaning of the Constitution and Judicial Code by prohibiting federal courts from granting relief beyond the specific parties and claims at issue in a particular case. To uphold nationwide injunctions,

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112 See WRIGHT, MILLER & COOPER, *supra* note 75, § 4417 (examining the various ways that lower courts define the issue and decide whether it is the same as one previously litigated before applying collateral estoppel).

113 Professor Clopton argues that "national-injunction cases are seemingly weak candidates for a percolation argument, given that they proceed quickly to appellate (if not Supreme Court) review and involve numerous interveners and amici curiae who can provide the functional equivalent of district-court percolation." Clopton, *supra* note 10, at 38–39. That argument ignores *Mendoza* and, in any event, is quite unconvincing. First, speed is not an unadulterated good. See *Dep't of Homeland Sec. v. New York*, 139 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (noting that nationwide injunctions may lead to "rushed, high-stakes, low-information decisions"). Second, whatever "functional equivalent" to percolation interveners and amici provide would only be increased if they had more time to craft their arguments while cases percolated below. Third, Professor Clopton's argument merely assumes that every national injunction case will attract the attention of sufficient interveners and amici to provide that functional equivalent.

the Court would need to overrule *Mendoza* and *Zbaraz* because nationwide injunctions effectively nullify those decisions. Unless and until Congress endorses that practice, the federal courts should limit relief to the parties to a lawsuit.