NATIONWIDE INJUNCTIONS, RULE 23(B)(2), AND THE REMEDIAL POWERS OF THE LOWER COURTS

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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.*

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[1] *See, e.g.*, Josh Gerstein, *Conservative Legal Tactic Could Imperil Clinton Agenda*, POLITICO (Sept. 29, 2016, 12:05 PM), http://www.politico.com/story/2016/09/states-federal-judges-injuctions-government-228234 [https://perma.cc/AFJ3-7T36] (explaining that the practice of federal judges issuing broad, often nationwide, injunctions in federal government actions has thwarted many key parts of President Obama's agenda, and "some aspects of

United States,[2] 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.[3] The case was filed on behalf of a coalition of several states, but was not a class action.[4]

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.[5]

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.[6] In *Halbig v. Burwell*,[7] the Court of Appeals for the District of Columbia Circuit held that an Internal Revenue Service ("IRS") regulation[8] providing subsidies to people who purchase health insurance through exchanges established by the federal government was invalid.[9] The plaintiffs, all from states in which the federal government had

Hillary Clinton's platform").

[2] No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016).

[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 . . . .").

[5] Klayman v. Obama, 142 F. Supp. 3d 172, 179, 198 (D.D.C. 2015), *vacated as moot, appeal dismissed*, No. 15-5307, 2016 U.S. App. LEXIS 6190 (D.C. Cir. Apr. 4, 2016) (per curiam); *see also* Klayman v. Obama, 957 F. Supp. 2d 1, 43-44 (D.D.C. 2013) (enjoining the Government from collecting metadata just from the two plaintiffs' accounts through the NSA's Bulk Telephony Metadata Program), *injunction and stay granted*, No. 13-0851, 2013 U.S. Dist. LEXIS 177169 (D.D.C. Dec. 16, 2013), *rev'd*, 800 F.3d 559 (D.C. Cir. 2015).

[6] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[7] 758 F.3d 390 (D.C. Cir. 2014), *vacated, reh'g en banc granted*, No. 14-5018, 2014 U.S. App. LEXIS 17099, at *3 (D.C. Cir. Sept. 4, 2014) (en banc), *dismissed*, No. 14-5018 2015 U.S. App. LEXIS 16286, at *3 (D.C. Cir. July 9, 2015) (en banc).

[8] 26 C.F.R. § 1.36B-2(a)(*l*) (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 for the D.C. Circuit's reasoning in a parallel case from the Court of Appeals for the Fourth

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.[10] 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 President Trump, vividly illustrates how activities from both sides of the

Circuit. King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (concluding that "Section 36B allows tax credits for insurance purchased on any Exchange created under the [Affordable Care] Act," based on the Court's interpretation of congressional intent).

[10] *Halbig*, 758 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(e)(*l*)(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.

[11] *Id.* at 394; *see also* Cent. United Life Ins. Co. v. Burwell, 827 F.3d 70, 73, 75 (D.C. Cir. 2016) (affirming permanent injunction invalidating ACA regulations prohibiting people from purchasing "*stand-alone* fixed indemnity plans"). The D.C. Circuit vacated the *Halbig* injunction when it ordered en banc rehearing, Halbig v. Burwell, No. 14-5018, 2014 U.S. App. LEXIS 17099, at *3 (D.C. Cir. Sept. 4, 2014) (en banc), and later dismissed the case following the Supreme Court's ruling in *Burwell*. *Halbig*, 2015 U.S. App. LEXIS 16286, at *3 (D.C. Cir. July 9, 2015) (en banc).

[12] 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *clarified by* 780 F. Supp. 2d 1307 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom.* Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[13] *Florida*, 780 F. Supp. 2d at 1298, 1305-07. The District Court for the Eastern District of Virginia similarly held that the individual mandated violated the Commerce Clause but declined to issue an injunction. Commonwealth *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 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.

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.[15] These programs would have suspended the deportation of various classes of undocumented immigrants and authorized them to work legally in the United States.[16] The lawsuit challenging the programs was filed by a coalition of twenty-six plaintiff states, but was not a class action.[17] An equally divided Supreme Court ultimately affirmed the injunction.[18]

Similarly, at the outset of the Trump Administration, the states of Washington and Minnesota obtained a nationwide injunction against President Trump's executive order[19] temporarily prohibiting people from certain terror-prone countries from entering the United States.[20] 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."[21]

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.[22] Lower courts,

[15] 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).

[16] *Id*. at 608-14.

[17] *Id*. at 607-08.

[18] Texas v. United States, 136 S. Ct. 2271, 2272 (2016).

[19] E.O. 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 FED. REG. 8,977 (Jan. 27, 2017).

[20] Washington v. Trump, No. C17-0141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay denied*, No. 17-35101, 2017 WL 526497 (9th Cir. Feb. 9, 2017) (per curiam).

[21] Washington v. Trump, No. 17-35101, 2017 WL 526497, at *9 (9th Cir. Feb. 9, 2017) (per curiam). The impact of orders of varying breadth from federal district and circuit courts throughout the nation also contributed to substantial uncertainty on the path to the Supreme Court's ruling upholding the right to same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015). For a comprehensive and illuminating history of the procedural and remedial aspects of this litigation, see Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 243 (2016).

[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 for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO

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,[23] many important rulings of the lower courts may persist for years before the Supreme Court reviews them.[24] Moreover, because many critical decisions concerning the scope of relief in a case are discretionary,[25] the district court's determinations are particularly important in determining the consequences of a case.

L. REV. 2017, 2030-34 (2015); 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, 995 (2012); Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. REV. 597, 637 (1983); Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1134 (2005).

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, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 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. Revesz, *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 VAND. L. REV. 471 (1986) (analyzing the doctrinal approaches to nonacquiescense); 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 NEV. L.J. 787, 794-804 (2012).

[23] SUP. CT. R. 10.

[24] Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 84.

[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, Califano v. Yamasaki, 442 U.S. 682, 703 (1979), and, in some jurisdictions, whether to grant relief to third-party nonlitigants 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).

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.[26] It contends that the two major lines of Supreme Court precedent which establish the scope of lower courts' powers 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.[27] 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.[28] 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.[29]

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.[30] 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,[31] 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 enforce particular plaintiffs' rights without necessarily enforcing third parties'

[26] 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. Krentler-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].

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.[32] 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.[33] 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.[34] If a Defendant-Oriented injunction would be necessary, the court should require the case to proceed as a Rule 23(b)(2) class action;[35] otherwise, the case may proceed as a nonclass suit in which the plaintiffs may seek a Plaintiff-Oriented Injunction.[36] 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.[37]

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*,[38] which held that a single district court judge may enforce his or her view of the law across the nation by certifying a nationwide class of plaintiffs to challenge a federal regulation,[39] and *United States v. Mendoza*,[40] in which the Court substantially limited the res

[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.

[35] FED. R. CIV. P. 23(b)(2).

[36] Morley, *supra* note 25, at 553.

[37] *Id*. at 555-56.

[38] 442 U.S. 682, 706 (1979).

[39] *Id.* at 701-02 (explaining that the district court "has the discretion . . . to certify a class action for the litigation").

[40] 464 U.S. 154 (1984).

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 *Califano*'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 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"

[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").

constitutional violations.[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 reform.[43] 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.[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 *Califano*, the Court embraced a sweeping view of lower courts' powers, authorizing them to certify nationwide classes in challenges to federal legal provisions.[45] Yet only a few years later, in *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.[46] The Court has neither recognized nor resolved the tension between these lines of authority. The concerns identified in *Mendoza*, however, call into question *Califano*'s embrace of nationwide class certification.

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[42] *See generally* Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 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 nonmerits requirements for injunctive relief).

[43] *See generally* Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing Under* eBay, *and the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 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").

[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).

[45] Califano v. Yamaski, 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.").

[46] United States v. Mendoza, 464 U.S. 154, 162 (1984).

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 th[e] 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*. ("[Plaintiffs] 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."[56] It nevertheless refused "to adopt the extreme position that such a [nationwide] class may never be certified."[57]

Califano 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."[58] 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."[59] 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.[60]

Califano'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.[61] Paradoxically, despite the potentially dramatic and widespread effects of a district court's ruling, any opinion accompanying that ruling lacks any precedential value.[62] Applying *Califano*, 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.[63]

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[56] *Id*. at 702.

[57] *Id*. at 702-03.

[58] *Id*. at 702.

[59] *Id*.

[60] *Id*. at 702-03.

[61] 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. 32, 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 Opts Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 605 (2015).

[62] *See infra* Section III.C (explaining that district court opinions lack precedential value).

[63] *See, e.g.*, Linquist v. Bowen, 813 F.2d 884, 887 (8th Cir. 1987); Barnett 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[64] and equal protection component of the Fifth Amendment's Due Process Clause[65] generally prohibit the government from discriminating among people with regard to their fundamental constitutional rights.[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 other, similarly situated right holders would violate these equal protection restrictions.[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.[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

F.2d 17, 21-22 (2d Cir. 1986); Pope v. R.R. Retirement Bd., 672 F.2d 972, 976 (D.C. Cir. 1982).

[64] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[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).

[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.").

[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.").

[68] *Cf.* Stieberger 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); Lopez 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*[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.[70] Equal protection, however, has never been understood as requiring instant nationwide application of every district court constitutional ruling.[71] Moreover, *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. Mendoza *and Restricting the Power of Lower Courts*

Mendoza, decided only a few years after *Califano*, offers a starkly different assessment of the proper role of lower courts in the federal judicial system. *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.[72] The Government is not bound by that ruling in subsequent cases

[69] *See infra* Section I.B.

[70] *See* Estreicher & 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.").

[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.

[72] United States v. 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* 18A 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 *United States v. Mendoza*."); *cf.* 18 JAMES WM. MOORE 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. 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* 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"

involving other people.[73] To the contrary, the Government remains free to relitigate against other litigants the same constitutional or statutory issues that it previously lost.[74]

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.[75] 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."[76] 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, conserves 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, "estopping the Government spares a party that has already prevailed once from having to relitigate." *Id.*

[73] *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 Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 848 (1986) ("[A]lthough 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.").

[74] *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))).

[75] *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.").

[76] *Id.* at 160.

the Supreme Court from seeing the practical consequences of different possible interpretations of the law in different jurisdictions.[77]

Third, the Court wanted to protect the Government from having to "appeal every adverse decision in order to avoid foreclosing further review."[78] The Court placed great weight on preserving the Government's discretion to decide whether to appeal adverse judgments.[79] *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."[80] 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.[81] 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."[82]

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.[83] It is primarily concerned with securing adequate relief for all adversely affected people and avoiding disparities in the enforcement of statutory or constitutional rights.[84] *Mendoza*

[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 185-87 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; *Califano* 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 *Califano* 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."[85] 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,[89] and usually cannot give rise to "clearly established" law for purposes of § 1983 or *Bivens*.[90] 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.[91]

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.[92] This requirement was an extension

[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 201-02 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,[93] adopted as a response to *Ex parte Young*,[94] mandating that three-judge panels adjudicate suits seeking injunctions against state laws.[95] In 1976, Congress eliminated the three-judge court requirement in nearly all cases.[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 certiorari process[97]—outweighed its perceived benefits.[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 *Mendoza* seems to

[28 U.S.C. § 2284].").

[93] Michael E. Solimine, *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).

[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).

[95] Act of June 18, 1910, ch. 309, § 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"); *see also* Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 936, 938 (codified at 28 U.S.C. § 380 (2012)) (requiring three-judge panels for a final hearing in a suit seeking to enjoin enforcement of a state law).

[96] *See* Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1-2, 90 Stat. 1119, 1119 (repealing 28 U.S.C. § 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. § 2284(a), actions under the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(1), (a)(3), 116 Stat. 81, 113-14 (codified at 52 U.S.C. § 30110 note (2012)), and litigation under § 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, § 5(a), 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304(a)).

[97] Act of Aug. 24, 1937, ch. 753, § 3, 50 Stat. 751, 753 ("An appeal may be taken directly to the Supreme Court of the United States . . . ."), *repealed by* Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

[98] *See* Michael E. Solimine, *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.

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[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.

[101] 28 U.S.C. § 2072(b) (2012) (providing that the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right").

More fundamentally, none of the standards or procedures set forth in Rule 23 are well suited to be used as the basis for determining whether a district court's ruling should have nationwide effect. Because *Califano* 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).

[105] FED. R. CIV. P. 23(b)(2).

[106] FED. R. CIV. P. 23(b)(3); *see* Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 352 (1988).

[107] Weber, *supra* note 106, at 351.

such as a school, hospital, or prison.[108] Many commentators have argued that Rule 23(b)(2) actions promote the interests of both governmental defendants and the public at large.[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.[110]

While Rule 23 imposes substantial obstacles to class certification in many types of cases,[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.[112] Indeed, many courts have held that the numerosity requirement is relaxed in Rule 23(b)(2) cases.[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.[114]

Rule 23(a)'s commonality and typicality requirements[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

[108] *Id.* at 363, 365.

[109] *See, e.g.*, Wilton, *supra* note 22, at 602.

[110] Maureen Carroll, *Class Action Myopia*, 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.").

[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).

[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").

[113] *See, e.g.*, Sueoka v. United States, 101 F. App'x 649, 653 (9th Cir. 2004) ("Because plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed . . . .").

[114] *See* WILLIAM B. RUBENSTEIN, NEWBERG 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).

[115] FED. R. CIV. P. 23(a)(2)-(3) (setting forth the commonality and typicality requirements, respectively, for class certification).

overbroad;[116] be enacted for an impermissible purpose;[117] fail to further a legitimate,[118] important,[119] or compelling government interest;[120] burden more speech or conduct than is permissible to achieve the government's interest;[121] impose impermissible content- or viewpoint-based discrimination;[122] exceed the scope of the government's authority under the constitutional provision that purportedly authorizes the law;[123] or be supported by an insufficient evidentiary record.[124]

Similarly, a regulation may be invalid on any of these grounds, or because it exceeds the scope of an agency's organic statute[125] or violates some other statutory restriction.[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

[116] 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).

[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).

[118] Romer v. Evans, 517 U.S. 620, 635 (1996) (applying rational basis scrutiny).

[119] Craig v. Boren, 429 U.S. 190, 197-98 (1976) (applying intermediate scrutiny).

[120] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 748, 753 (2011) (applying strict scrutiny).

[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").

[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).

[123] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (holding that Congress lacked the power under the Commerce Clause to require individuals to purchase health insurance); United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that a federal law prohibiting gun possession in school zones exceeded Congress's power under the Commerce Clause).

[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").

[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).

[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).

will invariably involve common questions of law, and the class representative's claim will be typical of them.

These considerations also will generally be sufficient to ensure the adequacy of the class representative.[127] A class representative need not be knowledgeable about the case or the underlying legal issues.[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.[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 *Mendoza* and *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 *Mendoza* or the efficiency and fairness concerns articulated in *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. *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.[130] Class members are entitled to receive notice only if a case

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[127] FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties . . . fairly and adequately protect the interests of the class").

[128] *See* Surowitz 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").

[129] *See, e.g.*, Probe 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").

[130] FED. R. CIV. P. 23(c)(2)(A) (specifying that notice is optional for members of putative Rule 23(b)(2) classes); *see also* 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"); 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,

is settled without a formal adjudication;[131] even then, they are not permitted to opt out,[132] but rather may only file an objection for the court's consideration.[133] 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.[134] 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.[135] 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.[136] The definiteness and ascertainability requirements either do not apply in Rule 23(b)(2) cases,[137] or apply in a far less demanding and precise manner.[138] Class definitions in constitutional and similar public law

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 association concerning litigation they may oppose).

[131] FED. R. CIV. P. 23(e)(1)-(2) (specifying when class members are entitled to notice).

[132] *See* Weber, *supra* note 106, at 389; *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).

[133] FED. R. CIV, P. 23(e)(5) ("Any class member may object to the proposal if it requires court approval under this subdivision . . . .").

[134] Weber, *supra* note 107, at 374 (emphasizing the problem that members of Rule 23(b)(2) classes may be subject to res judicata despite never learning of the earlier suit).

[135] *E.g.*, *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, *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).

[136] FED. JUDICIAL CT., MANUAL FOR COMPLEX LITIGATION § 21.222, at 270 (4th ed. 2004) (outlining the standards for determining whether the identities of class members are ascertainable).

[137] *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., 386 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, § 3:7 (explaining that definiteness is not required for class actions certified under Rule 23(b)(2)).

[138] *See, e.g.*, *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

cases typically are vague and subjective, or otherwise difficult to apply,[139] 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[140]—including future right holders.[141] It may be difficult or impossible to ascertain the identities of class members based on many of 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

under rule 23(b)(2)).

[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 "[a]ll 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 "[a]ll present, prospective, and future female students at Quinnipiac University who are harmed by and want to end Quinnipiac University's sex discrimination").

judgment, an injunction, and a written opinion.[142] A written opinion setting forth 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

[142] *See* Morley, *supra* note 42, at 2461-66 (describing the different legal effects and 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 judgments). 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.").

[147] *See* Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding that a criminal defendant convicted in state court was collaterally estopped from relitigating issues in federal habeas

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,[148] and of a state court's judgment as a matter of full faith and credit.[149]

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,[151] 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]

proceedings that had been decided against him in the underlying criminal case); *cf.* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 83-85 (1984) (holding that res judicata barred 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).

[148] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001) ("[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."). Federal common law would obviously also govern federal question cases.

[149] *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 privy 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.*; *Hansberry*, 311 U.S. at 41 ("[T]he judgment in a 'class' or 'representative' suit, to

These principles generally apply with equal force to government litigants.[155] The very structure of the Constitution suggests that government officials are bound to follow judgments issued against them by courts of competent jurisdiction.[156] 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,[157] which courts have refused to issue dating back to the Founding Era.[158]

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 relitigating the provision's constitutionality or proper interpretation in subsequent proceedings against third parties.[159] In other words, as Part I explores in greater detail, neither the federal government nor state governments are subject to nonmutual offensive collateral estoppel.[160] Conversely, if a court rejects a particular plaintiff's constitutional challenge to a statute, that judgment would

which some members of the class are parties, may bind members of the class . . . .").

[155] 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 regard 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).

[156] *See* Baude, *supra* note 90, at 1845 ("[T]here are good historical, textual, and structural reasons to treat judicial dispositions of individual cases as legally binding.").

[157] *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.").

[158] 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 (1997) (refusing then-Secretary of State Thomas Jefferson's request for an advisory opinion).

[159] 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").

[160] *Mendoza*, 464 U.S. at 162-63 ("[N]onmutual offensive collateral estoppel simply does not apply against the Government . . . .").

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 civil[165] or criminal[166] 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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[161] *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940) (citing Pennoyer v. Neff, 95 U.S. 714 (1877)); *see also* Taylor v. Sturgell, 553 U.S. 880, 893 (2008).

[162] Califano v. Yamasaki, 442 U.S. 682, 701-03 (1979) (authorizing certification of nationwide class actions).

[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

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.[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."[169] He does not explain, however, what it means to say that a particular remedy is milder, weaker, or stronger than another.[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.[171] More importantly, injunctions carry the possibility of immediate civil and criminal sanctions for violations that declaratory judgments lack.[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.[173] He points out that parties typically will conform their conduct to judicial declarations[174] to avoid

conduct that is affiliated with, rather than the direct cause of or result of, the harm.").

[168] *E.g.*, Steffel v. Thompson, 415 U.S. 452, 467 (1974) (indicating that a declaratory judgment is "a milder alternative" to an injunction (quoting Perez v. Ledesma, 401 U.S. 82, 111-15 (1971))); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 107 n.39 (1978) (describing a declaratory judgment as an "injunction without sanctions"); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 14-15 (1983) (contending that injunctive remedies are more intrusive than declaratory judgments and damage awards).

[169] Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1095 (2014).

[170] *See id.*

[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.").

[172] Bray argues that the immediate availability of contempt makes injunctions more "managerial" than declaratory judgments, rather than harsher. Bray, *supra* note 169, at 1127.

[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.

[174] *Id.* at 1108-09 (arguing that "there is no need for a command" because, "[a]fter [a]

the sanctions for violating the underlying legal right or prohibition that the declaratory judgment is enforcing.[175] 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.[176] 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.[177] Political actors in particular sometimes face strong incentives to challenge courts and push back on constitutional determinations until absolutely compelled to comply.[178] Moreover, in situations where exhaustion requirements or practical considerations preclude a person from quickly "upgrading" a declaratory judgment to a restraining order or injunction,[179] 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.[180] 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

declaratory judgment, everyone knows what to do").

[175] *Id.* at 1110-11 ("[T]here is no need 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.").

[177] *See* Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 204-06 (2005) (explaining how emotions may cause litigants to make "inaccurate predictions" concerning potential litigation); *cf.* Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 252-53 (discussing various reasons why parties do not accurately anticipate litigation outcomes).

[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).

nation.[181] Thus, a single district judge may issue an order prohibiting the 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").[182] 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.[183] 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.[184]

A Defendant-Oriented Injunction, in contrast, completely prohibits the defendant officials and agencies from enforcing the invalidated legal provision against anyone.[185] Defendant-Oriented Injunctions treat nonclass cases as de

[181] Califano v. Yamasaki, 442 U.S. 682, 702-03 (1979) ("The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.").

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

[183] *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).

[184] 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 223-26 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 so long as the plaintiff retains standing to continue enforcing the injunction). Many constitutional and statutory rights are "divisible," however, meaning that the government can enforce or uphold them solely with regard to particular people. *Id.* (defining divisible remedies as those which may be limited "to one or more claimants individually").

[185] 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

facto class actions, granting relief to all right holders rather than just the immediate plaintiffs in the case.[186] Such injunctions raise a variety of troubling constitutional, jurisdictional, and policy concerns,[187] and I have argued elsewhere that courts should generally avoid issuing them.[188] 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,[189] 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.[190] Vertical stare decisis is the obligation of lower courts to follow the ruling.[191]

Stare decisis requires the Court to "sometimes fail[] to enforce what otherwise would be the best interpretation of particular constitutional [and statutory] provisions."[192] 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.[193] As "[*s*]*tare decisis* is not an inexorable command" in

just to the individual plaintiff would be "unconscionable").

[186] Morley, *supra* note 25, at 500-01.

[187] *See id.* at 521-38 (discussing the problems with Defendant-Oriented Injunctions).

[188] *Id.* at 550-53.

[189] 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 VAND. L. REV. 647 (1999).

[190] *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[191] *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013).

[192] Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577-78 (2001).

[193] *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

either type of case,[194] the Court will overturn a precedent when its adverse consequences outweigh the general systemic and reliance considerations underlying stare decisis.[195] 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.[196]

An opinion's precise vertical and horizontal stare decisis effects depend primarily on the level of court that issues it.[197] A Supreme Court opinion binds all federal and state courts throughout the nation as a matter of vertical stare decisis.[198] The Court also affords its own precedents substantial weight as a matter of horizontal stare decisis.[199]

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 Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969, 973 (2008) (identifying Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-10 (1932) (Brandeis, J., dissenting), as the origin of the two-tiered standard of stare decisis).

[194] *Payne*, 501 U.S. at 828.

[195] *See* Montejo 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 overturn 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).

[196] *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*.").

[197] 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. Dorcely, 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).

[198] MOORE ET AL., *supra* note 72, § 134.02[2].

[199] 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

A United States Court of Appeals opinion—whether from the court sitting en banc or from a three-judge panel—binds future three-judge panels of that court as a matter of horizontal stare decisis,[200] as well as all federal district courts within that circuit as a matter of vertical stare decisis.[201] Only a circuit court sitting en banc (or the United States Supreme Court) may overrule a prior en banc or panel ruling.[202] Unlike the Supreme Court, a three-judge panel of the circuit court lacks authority to reconsider and overrule earlier decisions of the court.[203]

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

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that is sure error.").

[200] 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.").

[201] 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.").

[202] *See, e.g.*, United States v. Mitchell, 500 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 to 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))).

[203] *Id.*

[204] 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 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011))); *see also* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 428 (2011) ("[F]ederal 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 Humanities, 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. Aluminum 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).

"one supreme Court" and "such inferior Courts as the Congress may from time to time ordain and establish."[205] This constitutionally prescribed judicial hierarchy strongly implies that "inferior" courts are obligated to follow Supreme Court rulings,[206] 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.[207]

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."[208] Some commentators argue that horizontal stare decisis is a matter of federal common law and may be changed or abrogated by Congress.[209] 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.[210] 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.'"[211] 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)).

[207] *See* Baude, *supra* note 90, at 1845 (discussing statutory reasons why circuit court rulings are binding on district courts). *But see* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 838-39 (1994) (arguing that the vertical stare decisis of circuit court opinions arises from federal common law rather than statute).

[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.").

[209] *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 504-05, 512 (2000) ("Rules of precedent are like rules of evidence for questions of law rather than fact."); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1550-51 (2000) (concluding that Congress may alter the rules of stare decisis because "[n]othing in the text, history or structure of the Constitution, in judicial precedent interpreting it, or in customary practice supports the conclusion that the Constitution itself prescribes a judicial policy of stare decisis having any determinate or readily identifiable content").

[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*

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 *Anastasoff 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,

Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme 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 tiers 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 *Anastasoff* promotes "transparency of judicial decisionmaking" and ensures that like cases are treated alike).

[215] *Anastasoff*, 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

persuasively, that horizontal stare decisis is not constitutionally required, "but rather a matter of judicial policy."[220]

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

having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power.").

[220] *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).

[221] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1013 (2003) ("[S]tare decisis often functions *inflexibly* in the federal courts, binding litigants in a way indistinguishable from nonparty preclusion."); Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 632 ("[F]rom the standpoint of due process, preclusion and precedent operate identically on nonparties."); *see also* 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, 574-75 (1981) (pointing out that a Supreme Court ruling in a constitutional case governs nonparties, making it comparable to a broad class action).

[222] Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1106.

[223] *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (noting that court of appeals decisions can "settle constitutional standards" for qualified immunity purposes); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that qualified immunity protects government officials unless their conduct "violate[d] clearly established statutory or constitutional rights").

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

[225] 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

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.

parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties." Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995). *But see* Ohio Civil Serv. Emps. Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (adopting opposite, minority approach).

[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).

Otherwise, district courts should certify circuit-wide classes under Rule 23(b)(2) in such public law cases.

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 "conduct[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 *Mendoza* 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] *Cf. supra* notes 223-26 and accompanying text (discussing how decisions from the Supreme Court and circuit courts can "clearly establish" conduct as unconstitutional).

[229] Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

[230] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[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 (6th Cir. 1994) ("Because relief for

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.[233] "[I]f 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.[234] 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.[235] 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.

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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 nationwide 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.").

[233] The modern standards for severability are set forth in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2607-08 (2012), and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987).

[234] Morley, *supra* note 25, at 552.

[235] *Id.*

A circuit-wide approach emphasizes each circuit court as a more important source of law than the individual judicial districts within it. Limiting Rule 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*.[236] 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*.[237]

Nationwide injunctions nevertheless run contrary to the Supreme Court's rejection of nonmutual collateral estoppel against the Government in *Mendoza*.[238] 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.[239] 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.

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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").

[237] Califano v. Yamasaki, 442 U.S. 682, 701-02 (1979).

[238] *Mendoza*, 464 U.S. at 162.

[239] *Id.*

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 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.