Two Views on the Nationwide Injunction

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- Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 **Harv. L. Rev.** 417 (2017).
- Amanda Frost, *In Defense of Nationwide Injunctions*, 93 **N.Y.U. L. Rev.** __ (forthcoming 2018), available at SSRN.

I feel a bit like Gilligan in one of my favorite episodes of Gilligan's island. The Professor and the Skipper are having an argument over some issue vital to the castaway's prospects of being rescued from the island. Gilligan is standing in the middle agreeing with everything both parties to the argument say, and finally the two disputants become fed up with Gilligan's endorsement of diametrically opposing views and they turn on him. In this Jot, I praise two articles that take conflicting views on an issue vital to the future of administrative law, namely, when should federal courts, confronted with unconstitutional or otherwise illegal Executive Branch action, issue nationwide injunctions: Sam Bray's *Multiple Chancellors: Reforming the National Injunction*, and Amanda Frost's *In Defense of Nationwide Injunctions*. Hopefully, the reader won't turn on me.

Bray's article, which was reviewed by Professor Kevin Walsh in a pre-publication Jot in the Courts Law section of Jotwell, is deeply skeptical of the nationwide injunction, arguing that federal injunctions should be no broader in scope than necessary to protect the plaintiff from the injury underlying the plaintiff's standing to seek the injunction in the first place. By contrast, Frost's article contends that federal courts should be willing to grant nationwide relief not only when necessary to provide plaintiffs with complete relief but also when necessary to protect numerous similarly situated parties who cannot quickly bring their claims to federal court.

Both articles attempt to come to terms with the recent proliferation of nationwide injunctions, which federal courts have issued in response to wide-ranging actions taken by the Obama and Trump administrations. As Bray reports, preliminary injunctions issued by individual federal judges shut down the Obama administration's DAPA (Deferred Action for Parents of Americans) program and the Trump administration's executive order restricting entry into the United States by people from a group of majority-Muslim countries.

Bray's analysis contains historical, practical, and constitutional elements. Bray's main historical point is that the nationwide injunction is a recent development that is generally inconsistent with traditional English and American equity practices. History and tradition are important in this context because analysis of the powers of judges sitting in equity tends to be heavily informed by those factors. Bray's main practical points are that in the United States, plaintiffs can easily engage in forum shopping by filing their injunctive suits in districts and circuits populated by judges known to be receptive to their claims and that nationwide injunctions short circuit the percolation of issues in multiple lower courts that is vital for informed and effective Supreme Court review. Bray's constitutional point is that nationwide injunctions frequently go beyond the scope of the case or controversy that provides the basis for federal court jurisdiction under Article III of the Constitution. For all of these reasons, he concludes that federal courts should not issue nationwide injunctions but rather should provide relief only in favor of the particular plaintiff or plaintiffs in the litigation.

Frost builds the analysis that leads her to be much more open to the nationwide injunction on a similar amalgam of practical and constitutional considerations, but she concludes they point in the opposite direction. Frost agrees with Bray that nationwide injunctions come with costs, such as increasing the effects of forum shopping, reducing the percolation of legal issues before the Supreme Court is required to intervene, and raising the possibility of conflicting injunctions based on conflicting doctrinal conclusions. To her, these problems counsel restraint but not abandonment of the nationwide injunction. Frost argues that as a practical matter, nationwide injunctions are often necessary to provide complete relief to plaintiffs and to avoid harm to thousands of similarly situated individuals. She also points out that in some situations, for example, a case concerning the validity of a federal policy with nationwide effects such as an air or water pollution rule, it would be difficult if not impossible to confine an injunction to the scope of a particular plaintiff's injury.

As far as the traditional and constitutional powers of federal equity courts, Frost disagrees with Bray's conclusions. She finds no rule of equity or constitutional limitation barring courts from issuing injunctions that control the government's treatment of non-parties. Her answer to Bray's historical arguments is basically, "things change." As the federal government's power expands, courts need to keep pace and augment their remedies to deal with the scope of both legislative and executive illegality.

Her focus here is mainly on executive power, which makes sense. She notes also that the rise in the nationwide injunction may coincide with increased unilateral Executive Branch activity, in which major policy initiatives are undertaken without direct legislative support. In an era of congressional gridlock, Presidents of both political parties have found it necessary to act unilaterally, and she views the nationwide injunction as a necessary counter to potentially excessive executive power.

My own view is…I find plenty to agree with in both articles. Whether one agrees or disagrees with Bray's or Frost's arguments, the way they present them in these articles is worthy of high praise, adding significantly to the understanding of these important legal and policy issues. They are both excellent contributions to what is certain to be an ongoing debate among scholars of administrative law, federal courts, civil procedure, and the substantive fields in which the nationwide injunction continue to play an important role. As an administrative law nut, I wish they both grappled more with the meaning of the APA's instruction that reviewing courts should "hold unlawful and set aside" unlawful agency action. But that does not affect my bottom line which is—read these articles with an open mind and you won't be disappointed.

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