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Bradford Mank

*University of Cincinnati College of Law*

Michael E. Solimine

*University of Cincinnati College of Law*

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# STATE STANDING AND NATIONAL INJUNCTIONS

*Bradford Mank\** & *Michael E. Solimine\*\**

## INTRODUCTION

Two controversies currently roiling the federal courts and federal courts scholarship are whether and to what extent states have standing as plaintiffs in federal court, and when, if ever, federal courts can issue national or nationwide injunctions<sup>1</sup> against the federal government, even when only one or a small number of states or other parties have brought suit. While federal courts have long permitted states to bring suit by virtue of their status as sovereigns, states have more aggressively brought such suits in the wake of the Supreme Court's decision in *Massachusetts v. EPA*,<sup>2</sup> which relaxed the standing requirements for states. Similarly, while for several decades some federal courts have issued injunctions binding the entire nation—beyond the scope of their particular geographic jurisdictions—it is only in the last few years that such injunctions have become a trend. Courts, commentators, and Congress are now weighing in on that trend.<sup>3</sup>

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\* James B. Helmer, Jr. Professor of Law, University of Cincinnati College of Law.

\*\* Donald P. Klekamp Professor of Law, University of Cincinnati College of Law. We thank Jonathan Nash and Paul Nolette for helpful comments on an earlier draft.

1 We use the terms “national” or “nationwide” injunction throughout this Essay, as does most of the literature. *E.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 & n.5 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1070–71 (2018). *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2425 & n.1 (2018) (Thomas, J., concurring) (preferring to use “universal” injunctions); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 349–52 (2018) (same). Nothing in this Essay turns on which term is more appropriate.

2 549 U.S. 497 (2007).

3 For examples of courts weighing in, see *infra* Section III.A; *see also* Trump v. Hawaii, 138 S. Ct. at 2424–29 (Thomas, J., concurring) (criticizing issuance of universal injunctions). For commentators, see, for example, Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), [www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471](http://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471); *supra* note 1. For Congress, bills have been introduced to address the issue. *E.g.*, Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (2018) (proposing to place limits on the effect of injunctions on nonparties); Assigning Proper Placement of Executive Action

Both issues can arise in the same litigation, such as in *Texas v. United States*, where the Fifth Circuit struck down the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program granting lawful immigration status to potentially millions of undocumented immigrants.<sup>4</sup> The court there held that at least one of the twenty-six plaintiff States had standing, and that a nationwide injunction against enforcement of DAPA was appropriate.<sup>5</sup> But the convergence of the issues was almost coincidental, as the court did not discuss both the propriety of state standing *and* of a national injunction in any systematic way. Much the same can be said about the scholarly literature on these topics. Thus, most of the growing literature on national injunctions makes only passing mention, if at all, of states being plaintiffs or of the appropriateness of state standing and how it might bear on the geographic scope of an injunction.<sup>6</sup>

This Essay undertakes to fill that gap in a more extended way. Part I of the Essay addresses the issue of state standing in suits against the federal government, and argues that such standing is well grounded in the traditional *parens patriae* powers of states and should be permitted to protect the health, welfare, and natural resources of their citizens. That is, courts should permit states to have standing under somewhat relaxed criteria as compared to what private plaintiffs must show. Part II turns to national injunctions; discusses the recent increases in the issuance of those decrees; and explores the controversy over when, if ever, federal courts possess powers under equity or standing criteria to bind the entire nation.

Part III addresses both topics in a coordinated manner. It acknowledges the benefit of states suing to protect federalism interests against the incursions of the federal government, but also addresses the pathologies of one or more states bringing suit, particularly in the partisanship demonstrated by states led by attorneys general or governors of states from the same political

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Lawsuits Act, H.R. 2660, 115th Cong. (2017) (proposing to give federal district courts in the District of Columbia exclusive jurisdiction in all suits challenging executive orders, actions, or memoranda).

4 *Texas v. United States*, 809 F.3d 134, 151–62 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

5 *Id.* at 155, 187–88. In the literature and in this Essay, there is some ambiguity on what counts as a "state" involved in a court suit. In the *Texas v. United States* litigation, for example, of the twenty-six States involved, twenty-two were represented by state attorneys general and four were represented by governors. *Texas v. United States*, 86 F. Supp. 3d 591, 604 n.1 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016); *see also infra* note 77 (further discussing distinctions of what counts as a state in this context).

6 *See, e.g.*, Bray, *supra* note 1, at 470 & n.307; Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 512–13 (2017); Frost, *supra* note 1, at 1091–93; Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 PUBLIUS 342, 344–45 (2017). Exceptions to the generalization we make in the text include Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 71–72, 111–13 (2018), and Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985 (2019).

party suing to stop the actions of a presidential administration of a different party. While states in some circumstances have standing to sue, it does not automatically follow that even when successful the entire nation should be subject to an injunction. Rather, we propose an alternative to the dichotomy that courts always (or almost always) or, conversely, never have authority to issue such injunctions. We support the possibility of nationwide injunctions, but before issuing such decrees, courts should take into account factors such as the number and geographic and partisan diversity of the states, who (attorney general or governor) is representing a state, and which one or more states are *opposing* the decrees, as parties or amici curiae. These criteria would better inform and integrate judicial consideration of state standing and national injunctions when they arise in the same case. Finally, Part III critically examines various possible statutory solutions to the problems of national injunctions, including vesting exclusive jurisdiction of suits seeking that relief in the District of Columbia, or requiring that they be heard by a three-judge district court.

## I. STATE STANDING

States have long been permitted to sue in federal court in various capacities, such as in their own proprietary capacity, little different from that of private parties.<sup>7</sup> But it is fair to say that “[t]he most difficult standing cases” are those where a state sues in its *parens patriae* capacity, relying on its quasi-sovereign interests of representing its citizens generally.<sup>8</sup> Most relevant to this Essay, the difficulties are particularly present in cases where states sue the federal government. Those cases “seem to depend in part upon the kind of claim that the state advances, but they are hard to reconcile.”<sup>9</sup>

For our purposes, the most pertinent decision is *Massachusetts v. EPA*,<sup>10</sup> where the Supreme Court in 2007 declared that states are entitled to “special solicitude” for standing in Article III federal courts.<sup>11</sup> Additionally, the Court stated that, in at least some circumstances, states enjoy greater Article III standing rights than private individuals.<sup>12</sup> Justice Stevens in his majority opinion wrote: “We stress here, as did Judge Tatel below, the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan [v. Defenders of Wildlife]*, a private individual.”<sup>13</sup>

But the *Massachusetts* decision failed to articulate a clear rationale for why states are entitled to greater Article III standing rights than private individuals. The Court confusingly relied upon both *Massachusetts*’s procedural

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7 RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 279 (7th ed. 2015).

8 *Id.*

9 *Id.* at 283.

10 549 U.S. 497 (2007).

11 *Id.* at 520.

12 *Id.* at 518.

13 *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

rights under the Clean Air Act and its quasi-sovereign interests.<sup>14</sup> In his dissenting opinion, Chief Justice Roberts correctly pointed out that in the Clean Air Act “Congress treated public and private litigants exactly the same.”<sup>15</sup> Accordingly, the Clean Air Act might possibly provide a basis for state standing, but not for greater state standing rights than private parties.<sup>16</sup>

In the *Massachusetts* decision, the only plausible theory for why states might possess greater standing rights than private individuals is because of their quasi-sovereign interests in protecting the health and welfare of their citizens and the states’ natural resources.<sup>17</sup> In his dissent, however, Roberts argued that Massachusetts’s quasi-sovereign interests in protecting the health and welfare of its citizens and the State’s natural resources could not serve as a basis for a suit against the federal government. This is because the Court’s 1923 decision in *Massachusetts v. Mellon*<sup>18</sup> held that states may not ground a suit against the federal government on quasi-sovereign interests, since the federal government rather than the state is in charge of protecting such interests.<sup>19</sup> For the majority, Stevens attempted to distinguish the *Mellon* decision by arguing that that case merely prevented states from invoking quasi-sovereign interests to block federal regulation of its citizens rather than

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14 *Id.* at 518–20. For further discussion of the unclarity of the decision, see FALLON ET AL., *supra* note 7, at 285–86; Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1733–34, 1746–47, 1786 (2008) [hereinafter Mank, *Should States Have Greater Standing*] (arguing that the *Massachusetts* decision did not clearly articulate its basis for giving greater standing rights to states or to what extent state standing rights are greater); Bradford C. Mank, *State Standing in United States v. Texas: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 218 [hereinafter Mank, *State Standing in United States v. Texas*] (“Justice Stevens’s majority opinion in *Massachusetts* confusingly combined the *parens patriae* or quasi-sovereign rationale for state standing with other theories for recognizing standing, such as the argument that Congress conferred in the CAA [Clean Air Act] a procedural right for states to challenge certain EPA decisions.”).

15 *Massachusetts*, 549 U.S. at 537 (Roberts, C.J., dissenting).

16 *See id.* at 536–37. The different positions of the majority and dissent in *Massachusetts v. EPA* can be viewed as an example of different models of decisionmaking by federal courts. The dispute-resolution model assumes a restrained role for federal court litigation, in that it is primarily meant to resolve concrete disputes between actual parties to the litigation, while giving a wide berth to the politically accountable branches of government to resolve policy disputes. In contrast, the law-declaration model assumes that federal courts can and should take into account public values and the broader impact of decisions. FALLON ET AL., *supra* note 7, at 73–76. *Massachusetts* is best described as an example of the latter model, since the State’s *parens patriae* standing does not depend on “doctrines governing the standing of private parties,” but rather “can be viewed as assertions by the state of generalized grievances of its citizens.” *Id.* at 283.

17 *Massachusetts*, 549 U.S. at 518–20; Mank, *Should States Have Greater Standing*, *supra* note 14, at 1727–29, 1756–59 (discussing state standing upon a quasi-sovereign theory of standing).

18 262 U.S. 447 (1923).

19 *Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting) (discussing *Massachusetts v. Mellon*).

“allowing a State to assert its rights under federal law,” which Massachusetts was doing in relying upon the Clean Air Act to protect its citizens.<sup>20</sup>

*Massachusetts* has provoked continuing controversy due to its unclear position on state standing.<sup>21</sup> For example, because the decision’s attempt to distinguish the *Mellon* decision was problematic, Professors F. Andrew Hessick and William Marshall argue that the “special solicitude” for state standing in the *Massachusetts* decision was not based upon *parens patriae* standing arising from a state’s quasi-sovereign interests in protecting the health and welfare of its citizens and the state’s natural resources, but rather from the Commonwealth’s interest in protecting its coastal areas from future erosion, even though Roberts’s dissenting opinion argued that Massachusetts’s injury was too speculative.<sup>22</sup> They are correct in asserting that the *Massachusetts* decision relied in part upon the alleged injury that Massachusetts was and will be suffering from rising sea levels arguably caused by climate change in finding a standing injury under Article III of the Constitution.<sup>23</sup> However, Hessick and Marshall fail to acknowledge that the *Massachusetts* decision asserts multiple grounds for standing that begin with Massachusetts’s injury from rising sea levels and build upon that injury to arguably open the door to *parens patriae* standing.<sup>24</sup>

In another example, one of us has argued that the *Massachusetts* decision potentially opened the door to a broad theory of *parens patriae* standing that would allow states great latitude in suing the federal government, while acknowledging the confusing and sometimes contradictory analysis in that

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20 *Id.* at 520 n.17 (majority opinion).

21 FALLON ET AL., *supra* note 7, at 285–86 (discussing criticisms); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 203–06 (2017) (arguing that state standing doctrine is often “muddled”); Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1306 (2019) (referring to the “murkiness” of questions raised by the decision).

22 F. Andrew Hessick & William P. Marshall, Essay, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 107 (2018). Hessick and Marshall reference Roberts’s argument that the reputed injury to Massachusetts was too speculative to provide standing. *Id.* at 107 & n.143 (citing *Massachusetts*, 549 U.S. at 541–42 (Roberts, C.J., dissenting)).

23 *Massachusetts*, 549 U.S. at 522–23.

24 See *supra* note 17 and accompanying text. Professor Jonathan Nash argues that the “actual basis” of standing in *Massachusetts* may have been economic injury from rising sea levels, but that the Court’s “murky” analysis purported to rest standing on the special role of state sovereigns. Nash, *supra* note 21, at 203–06. He argues that a better approach than the *Massachusetts* decision’s standing analysis would be “sovereign preemption state standing, under which a state would enjoy Article III standing to sue the federal government when (1) the federal government preempts state law in an area, yet (2) the Executive Branch allegedly underenforces the federal law that Congress enacted to address that very same area.” *Id.* at 201. For a similar approach, see Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 880–95 (2016). It is not clear whether the Supreme Court will move away from looking at economic injuries to states in deciding state standing.

decision.<sup>25</sup> The *Massachusetts* decision's discussion of the Court's 1907 decision in *Georgia v. Tennessee Copper Co.*<sup>26</sup> arguably opens the door to very broad *parens patriae* standing. The *Tennessee Copper* decision allowed states broad authority to sue at least private parties that cause injuries to a state's quasi-sovereign interests in protecting the health and welfare of its citizens and the state's natural resources, and the *Massachusetts* decision did not appear troubled about applying the *Tennessee Copper* decision to a suit against the federal government.<sup>27</sup>

Likewise, one of us has agreed with the Fifth Circuit's decision in *United States v. Texas*<sup>28</sup> granting states broad standing rights against the federal government based upon the *Massachusetts* decision and federalism concerns, but also accepted the Fifth Circuit's concern that there must be some limitations on such standing rights so that states could not sue when the federal government's possible injury to a state or its citizens is comparably small.<sup>29</sup> The Fifth Circuit in the *Texas* decision concluded that Texas had standing to challenge the Obama administration's DAPA program granting lawful immigration status to potentially millions of undocumented immigrants because thousands of potential DAPA recipients in Texas would then be eligible to receive driver's licenses that are heavily subsidized by Texas, and, therefore, the State would suffer an economic injury from DAPA's economic impacts on the State's driver's license program.<sup>30</sup> But the Fifth Circuit's decision spent far less time discussing the subject of nationwide injunctions and was far less convincing in concluding that Texas's standing to challenge DAPA was the grounds for a nationwide injunction against DAPA as opposed to an injunction in favor of only Texas.<sup>31</sup>

Another recent high-profile example of controversies over state standing was the challenge to travel restrictions on citizens of several predominantly Muslim countries issued by the Trump administration.<sup>32</sup> Hawaii argued that those restrictions impinged on the ability of its state universities to attract students and faculty from affected countries.<sup>33</sup> The Ninth Circuit agreed with Hawaii's argument in concluding that Hawaii's "efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the [Immigration and National-

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25 Mank, *Should States Have Greater Standing*, *supra* note 14, at 1733–34, 1746–47, 1756–86.

26 206 U.S. 230 (1907).

27 *Massachusetts*, 549 U.S. at 518–20; Mank, *Should States Have Greater Standing*, *supra* note 14, at 1733–34, 1746–47, 1756–86.

28 *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

29 Mank, *State Standing in United States v. Texas*, *supra* note 14, at 214, 227, 230–33.

30 *Texas v. United States*, 809 F.3d at 151–62.

31 *Id.* at 187–88; *see infra* Section III.C.

32 For details on this litigation, see Frost, *supra* note 1, at 1072–73; Wasserman, *supra* note 1, at 341–43.

33 *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) (per curiam), *rev'd*, 138 S. Ct. 2392 (2018).

ity Act].”<sup>34</sup> But the Ninth Circuit’s opinion failed to document the extent of the alleged injury to state universities. Upon review, the Supreme Court instead rested its finding of Article III standing upon the harm to three individual plaintiffs from the inability of their relatives in affected countries to obtain entrance to the United States, as opposed to Hawaii’s weakly articulated claims of injuries to its state universities.<sup>35</sup>

Whether state standing exists is highly dependent upon the facts articulated, and that in turn is true of whether courts should grant nationwide or narrower injunctions. Courts may impact suits by states depending upon how they define and apply theories of state standing. A further means to appropriately limit state standing rights to reasonable boundaries lies in deciding when state suits seeking nationwide injunctions are appropriate.

## II. NATIONAL INJUNCTIONS

Having addressed and, within limits, approved of the standing of states to bring suit in federal court challenging federal action, we now turn to an overview of the relatively recent increased use of national injunctions in federal court. We will link the topics in Part III of this Essay.

### A. Overview of National Injunctions

As documented well by Professor Samuel Bray, federal judges issuing national injunctions in suits against the federal government were virtually unknown until relatively recently.<sup>36</sup> Injunctions against the government would typically be limited to the specific government dealing with the particular plaintiffs who had brought the suit. This limitation usually had the effect of limiting the geographical scope of the injunction to the boundaries of the district court or of the court of appeals that issued or reviewed the injunction.<sup>37</sup> That changed starting in the 1960s, as courts began issuing nationwide injunctions beyond the scope of the jurisdiction of the particular court.<sup>38</sup> As Bray points out, there was “no major case,” and the shift was “gradual and unplanned.”<sup>39</sup> What accounts for the change? Bray traces the increasing judicial hospitality toward such injunctions to a number of factors, including the passage of statutes in the twentieth century that concentrate judicial review of a particular federal activity in one court, greater use of rulemaking by federal agencies and judicial receptivity to suits seeking preen-

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34 *Id.* (quoting *Hawaii v. Trump*, 859 F.3d 741, 766 (9th Cir. 2017) (per curiam)).

35 *Trump v. Hawaii*, 138 S. Ct. at 2416. A stronger case of harm to state universities was made in the separate Ninth Circuit case of *Washington v. Trump*, but that case was not reviewed by the Supreme Court. *Washington v. Trump*, 847 F.3d 1151, 1158–61 (9th Cir. 2017) (per curiam); *infra* notes 133–34 and accompanying text.

36 Bray, *supra* note 1, at 424–37 (discussing federal court decisions up until 1960).

37 *Id.* at 428–29.

38 *Id.* at 437–52 (discussing cases from the 1960s to the present that issued such injunctions).

39 *Id.* at 428, 456.



forcement review of that rulemaking, and increased judicial confidence in issuing such injunctions in the wake of civil rights litigation in the 1950s and beyond.<sup>40</sup>

While national injunctions were thus not unknown until recent years, it is fair to say that they have been more frequently requested from, and considered and issued by, federal courts during the Obama and Trump administrations and are enjoying a higher level of attention than ever before. In litigation during both administrations, at least some judges have begun to treat them as “an ordinary part of the remedial arsenal of the federal courts,”<sup>41</sup> and there almost seems to be a presumption *in favor* of the national injunction. The record of litigation in recent years supports that conclusion. Consider, during both the Obama and Trump administrations, the suits against and the national injunctions issued concerning the DAPA program, the Deferred Action for Childhood Arrivals (DACA), and the transgender bathroom policy.<sup>42</sup>

One prominent example from that era was the litigation concerning DAPA. There, as we discussed in Part I, twenty-six States filed suit in federal court in Texas, arguing that the DAPA directive violated the Administrative Procedure Act (APA), the federal immigration laws, and the Take Care Clause of Article II of the Constitution. After holding that Texas, at least, had standing and that DAPA violated the APA, the district court issued an injunction, though it didn’t specifically address its geographic scope.<sup>43</sup> The Fifth Circuit affirmed, and devoted a few short paragraphs to the national injunction.<sup>44</sup> The court stressed the ostensible need for nationwide uniformity in the application of immigration laws, argued that “there is a substantial likelihood that a geographically-limited injunction would be ineffective,” and brusquely concluded that it is “not beyond the power of a [district] court, in appropriate circumstances, to issue a nationwide injunction.”<sup>45</sup>

A similar pattern of litigation took place during the Trump administration. Many of the initiatives on immigration were subject to suits that culminated in a nationwide injunction, including the “travel ban” regarding predominantly Muslim countries, the withholding of federal funds from sanctuary cities, and the rescission of DACA.<sup>46</sup> There, too, courts had little trouble concluding that a nationwide injunction was appropriate. Consider

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40 *Id.* at 452–56.

41 *Id.* at 428.

42 For details on this litigation, see Frost, *supra* note 1, at 1076–79.

43 *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

44 *Texas v. United States*, 809 F.3d at 187–88.

45 *Id.* at 188. The parties did not expressly mention the nationwide injunction issue in their briefing in the Supreme Court. See Brief for the Petitioners, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674); Brief for the State Respondents, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). The Supreme Court affirmed by an equally divided vote and thus did not reach the issue. See *United States v. Texas*, 136 S. Ct. 2271.

46 For details on this litigation, see Frost, *supra* note 1, at 1072–79; Wasserman, *supra* note 1, at 340–48.

as one example the litigation that attacked the rescission of DACA. In affirming the district court's issuance of a nationwide injunction, the Ninth Circuit spent about a page and a half on the topic.<sup>47</sup> The court invoked familiar principles of equity that an injunction may affect nonparties to a suit, cited the Fifth Circuit in *Texas v. United States* in stressing the need for uniformity in immigration matters, and chastised the government for failing "to explain how the district court could have crafted a narrower injunction that would provide complete relief to the plaintiffs."<sup>48</sup>

We don't want to suggest that the late Obama administration and the early Trump administration were the subject of nothing but an avalanche of nationwide injunctions, especially in immigration disputes. For example, the district court in *New York v. U.S. Department of Justice*<sup>49</sup> considered a challenge by six States to the Trump administration threatening to cut off federal funds to self-described "sanctuary cities," which had refused to cooperate with the administration's enforcement of immigration laws. The court held for the plaintiffs on the merits, but limited the injunction to "the parties before the Court and their political subdivisions."<sup>50</sup> Acknowledging the potentially broad scope of equitable relief, the court nonetheless held that the "[p]laintiffs have not made a sufficient showing of 'nationwide impact' demonstrating that a nationwide injunction is necessary to completely accord relief to them."<sup>51</sup> This decision, too, did not extensively discuss the issue, and relied in part on the paucity of *other* federal courts' decisions issuing nationwide injunctions in similar litigation around the country.<sup>52</sup>

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47 *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511–12 (9th Cir. 2018).

48 *Id.* at 512; *see also* *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255–56 (9th Cir. 2018) (upholding national injunction against new limits on asylum applications by Trump administration, stressing need for uniformity, and citing the *Texas* and *Regents* decisions, but recognizing "a growing uncertainty about the propriety of [such injunctions]," citing Justice Thomas's concurring opinion in *Trump v. Hawaii*, and *Bray*, *supra* note 1). More recent Ninth Circuit decisions have backed away from a near embrace of a seeming rebuttable presumption in favor of national injunctions. For example, in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), the court, in reversing the district court's grant of a national injunction, stated that national injunctions are permissible, but due to their potentially detrimental effects, including forum shopping, held that the injunction should only apply to the plaintiff states. *Id.* at 582–84 (citing *Bray*, *supra* note 1).

49 343 F. Supp. 3d 213 (S.D.N.Y. 2018), *appeal filed*, No. 19-275 (2d Cir. Jan. 28, 2019).

50 *Id.* at 245.

51 *Id.* (quoting *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018)).

52 *Id.* The court here relied on a Ninth Circuit decision in parallel litigation that had declined to order a national injunction, in part due to an insufficient record on the need for nationwide relief. *Id.* (citing *San Francisco v. Trump*, 897 F.3d at 1244).

B. *Competing Evaluations and Reforms of the Nationwide Injunction*

While many federal court decisions have not extensively discussed the propriety, or lack thereof, of nationwide injunctions,<sup>53</sup> scholars have filled the gap. Critics of the nationwide injunction have raised both constitutional and prudential concerns.

The constitutional challenge is premised on the standing requirements of Article III of the Constitution. A plaintiff can only sue in federal court if she demonstrates a concrete and particularized injury and the actual or threatened enforcement of a law. A generalized grievance or a putative threat to the larger community will not itself confer standing on a particular plaintiff. It follows from these premises, so the argument runs, that a court cannot properly award relief to persons not parties to the suit, i.e., those who have not shown that they meet the standing requirements.<sup>54</sup>

Critics have also advanced prudential arguments, drawing on the traditional flexibility of equitable principles that underlie any injunction. One flaw, they argue, is that nationwide injunctions encourage forum shopping, since plaintiffs do not need to successfully sue in multiple fora.<sup>55</sup> This is nicely illustrated by some of the aforementioned litigation. In *Texas v. United States*, twenty-six Republican-oriented States (we refer to the political affiliation of the state attorney general or governor representing the state) sued in a federal district court in Texas, several of whose judges had already entered injunctions in cases brought by states against Obama-administration initiatives.<sup>56</sup> In a mirror image of litigation strategy, Democratic-oriented states have filed numerous cases in the presumably hospitable forum of the Ninth Circuit to challenge various iterations of the immigration initiatives of the Trump administration.

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53 A notable exception is Justice Thomas's concurring opinion in *Trump v. Hawaii*, 138 S. Ct. 2392, 2425–29 (2018) (Thomas, J., concurring), which discusses the policy concerns and cites to the scholarship both supporting and attacking the nationwide injunction. The majority did not address the issue, as it reversed on the merits the Ninth Circuit decision to enjoin the Trump administration's travel ban. Justice Sotomayor briefly stated in her dissent that a nationwide injunction was appropriate. *Id.* at 2446 n.13 (Sotomayor, J., dissenting).

54 Bray, *supra* note 1, at 471–72; Wasserman, *supra* note 1, at 359–63; see also Bruhl, *supra* note 6, at 511–14 (criticizing on similar grounds courts' decisions that a nationwide injunction can be premised upon only one state, among a group of plaintiff states, satisfying the standing requirements).

55 Bray, *supra* note 1, at 457–61; Wasserman, *supra* note 1, at 363–64. While ubiquitous in a large country with multiple fora in which to sue, nonetheless forum shopping undermines rule-of-law values by implying that different judges are being selected by litigants because their decisions are predictable. Bray, *supra* note 1, at 457–61.

56 For further discussion of recent forum and judge shopping in suits brought by states, see Adam Liptak, *Texas' One-Stop Shopping for Judge in Health Care Case*, N.Y. TIMES (Dec. 24, 2018), <https://www.nytimes.com/2018/12/24/us/politics/texas-judge-obamacare.html>, where Liptak discusses Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297 (2018).

Other asserted institutional flaws of nationwide injunctions have been advanced by critics. These include that such injunctions lead to a lack of percolation of important legal issues. The percolation model assumes that the Supreme Court is best served by having the benefit of the views of several lower federal courts when the Court addresses a difficult issue.<sup>57</sup> The granting of a nationwide injunction potentially cuts off percolation, since by its very nature, the government may seek an immediate resolution in the U.S. court of appeals and the Supreme Court itself.<sup>58</sup> Still other problems are that the widespread use of the injunction increases the risk of conflicting rulings on requests for national injunctions,<sup>59</sup> and that it typically bypasses the requirements of Federal Rule of Civil Procedure 23(b)(2), which outlines criteria for an injunction to be issued on behalf of a class.<sup>60</sup>

Supporters of the nationwide injunction have responded. On the constitutional objection, they argue that it is a well-settled maxim of equity jurisprudence that a court is permitted to grant complete relief to a plaintiff. When a federal program is under challenge, it may require the court to enjoin the activities of the government beyond the geographic boundaries of the court's jurisdiction.<sup>61</sup> Thus, in the abovementioned cases, Texas in the DAPA litigation could be adversely affected if the DAPA program were only enjoined in that state; DAPA beneficiaries in other states could make their way to Texas. Likewise, in the litigation against the travel ban, Hawaii could be affected by the limitation on immigrants elsewhere in the United States. Also, the objection based on asserted lack of standing is in tension with the entire notion of a class action. In a certified class action, the named plaintiff by definition *represents* nonparties to the suit, namely, the members of the class.<sup>62</sup>

Supporters of nationwide injunctions also counter the institutional criticisms of the device. They contend, among other things, that in certain types of cases such as those involving immigration or the environment, it will be almost impossible to grant complete relief to a particular or small group of plaintiffs where the effect of the federal program crosses state lines.<sup>63</sup> Put another way, it may be practically impossible for the administrators of a fed-

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57 Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 145–47 (2014) (discussing pros and cons of percolation).

58 Bray, *supra* note 1, at 461–62.

59 *Id.* at 462–64.

60 *Id.* at 464–65; Wasserman, *supra* note 1, at 366–68.

61 See Frost, *supra* note 1, at 1081–84.

62 *Id.* at 1084–86. One prominent supporter, Professor Amanda Frost, points out that the different conceptions of how the national injunction relates to standing can be seen as a function of different dispute-resolution and law-declaration models of the federal judicial process. As Frost observes, critics of the national injunction tend to follow the former model, while supporters would typically follow the latter. *Id.* at 1087–88. The canonical discussion of these models, cited by Frost, *id.* at 1087 n.103, points out that they are not hermetically sealed from each other, and that the Supreme Court has incorporated elements of both in its jurisprudence, while emphasizing different elements of the models in different eras. See FALLON ET AL., *supra* note 7, at 75.

63 Frost, *supra* note 1, at 1090–94.

eral program to conduct the program differently in different parts of the country.<sup>64</sup> To the extent such injunctions encourage forum shopping, they argue that it is simply an inevitable aspect of a federal government that has different, geographically bound courts in different parts of the federation.<sup>65</sup>

What is to be done with the national injunction? For some critics, the answer is easy. All injunctions should only bind the parties to the suit, a bright-line rule that would have the practical effect of forbidding virtually all such injunctions.<sup>66</sup> A variation of this approach would be to follow a rebuttable presumption against such injunctions, but allow them under some narrow circumstances, where class actions or other nonnational remedies are not appropriate.<sup>67</sup> For some supporters, a more hospitable judicial attitude is appropriate, and that attitude needs no change and indeed should be adopted as the status quo.<sup>68</sup> This would seem to be almost a presumption in favor of the injunction. A nuanced version of that approach would acknowledge some of the criticisms of the injunction,<sup>69</sup> but deal with them by insisting that district judges attend closely to the pros and cons of such injunctions on the facts of particular cases.<sup>70</sup> Under this suggested approach, a district judge should determine if “a nationwide injunction [is] essential to provide the plaintiff with complete relief, protect nonparties from imminent and irreparable harm, or avoid duplicative litigation and administrative confusion.”<sup>71</sup>

Where do we stand on this debate? If one were to adopt the position that an injunction should bind only parties to the suit, it would effectively negate the national injunction (save, perhaps, for the heretofore unusual situation of all fifty states being parties to the suit). The near mirror image of that conclusion is that such injunctions are almost always necessary (with perhaps rare exceptions) in suits against the federal government. Either position would largely moot out the remainder of this Essay, since those solutions

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64 *Id.* at 1098–101.

65 See Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 57 (2017).

66 Bray, *supra* note 1, at 469. One of the bills introduced in Congress in 2018 would implement this rule. See Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (2018); see also sources cited *supra* note 3. Similarly, Justice Thomas has argued that such injunctions “are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (Thomas, J., concurring). He further expressed “skept[ic]ism” that district courts have the authority to enter universal injunctions,” based on the “historical limits on equity and judicial power.” *Id.* at 2425, 2429.

67 Wasserman, *supra* note 1, at 386.

68 See, e.g., Malveaux, *supra* note 65, at 58.

69 Frost, *supra* note 1, at 1104–15.

70 *Id.* at 1115–18.

71 *Id.* at 1116; see also Matthew Erickson, Note, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331 (2018) (proposing a balancing test focusing on the parties before the court, the nature of the claim being litigated, and the effect of the remedy on the forum court).

would usually make it unnecessary to consider how the characteristics of the one or more states bringing suit should inform the granting of such relief.

Instead, we argue that *some* national injunctions may be appropriate. Our conclusion is drawn from our analysis in Part I. There, we argued that *parens patriae* actions by states, at least in some circumstances, were consistent with the constitutional design and precedent. We further concluded that suits by states against the federal government were appropriate to protect state interests, i.e., to prevent significant economic or physical injury to state citizens, and served as a check against federal and particular executive overreach. A corollary of these principles, we submit, is that states can act in concert, and that effective action by states in this regard at least contemplates national injunctions. What Part I didn't address is when a national injunction is appropriate in light of the concerns raised by Part II. It is to that issue that we next turn.

### III. STATES SEEKING NATIONAL INJUNCTIONS: PROBLEMS AND SOLUTIONS

In Part I we addressed the *parens patriae* standing of states that sue the federal government in federal court, and concluded that courts should permit such standing, relax the usual standing requirements, but nonetheless require that states have some injury to proceed (to deter the inappropriate filing of such suits).<sup>72</sup> In Part II we critically examined the rise in the granting of national injunctions in suits against the federal government, and concluded that the concerns raised by critics suggested that courts reviewing such injunctions should only grant them in limited circumstances.<sup>73</sup>

In this Part we combine these two lines of analysis. As we previously observed,<sup>74</sup> there is now an abundant literature on the issues raised in Parts I and II, but very little of it expressly considers whether and to what extent the characteristics of a state or states claiming standing to sue the federal government, and requesting a national injunction, should inform the grant or denial of such injunctions.<sup>75</sup> We undertake that task below.

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<sup>72</sup> See *supra* note 29 and accompanying text.

<sup>73</sup> We do not address considerations that may be appropriate if private parties, or political subdivisions, request national injunctions.

<sup>74</sup> See *supra* note 6 and accompanying text.

<sup>75</sup> Most scholars who have contributed to each topic have not contributed to both. An exception is Frost, *supra* note 1, at 1076 n.54, who points out that she had earlier argued that "Texas's claimed injury in [the *Texas v. United States* litigation] did not constitute a cognizable injury for the purposes of establishing standing." *Id.* (citing Amanda Frost & Stephen I. Vladeck, *Limit State Access to Federal Court*, N.Y. TIMES (Dec. 22, 2015), <https://www.nytimes.com/2015/12/22/opinion/limit-state-access-to-federal-court.html>). The cited op-ed seems to sweep more broadly than Frost's summary, arguing that "litigation is not an alternative to the political process," and that it "is not difficult to imagine a future in which any and all executive branch decisions would first be brought before a federal court by whichever state attorneys general object to that policy." Frost & Vladeck, *supra*. This suggests a broader opposition to the notion of states having *parens patriae* standing in federal court, at least to challenge federal programs. Frost did not mention nationwide

### A. *Political and Litigation Activism of States*

It is difficult to exaggerate the increased regulatory and litigation activity of most states, led mostly by state attorneys general,<sup>76</sup> alone and in concert, in the last three decades. The increased activity can be traced to a variety of factors, including filling the perceived gap left by deregulation during the Reagan administration; the increased staffing and resources available to state attorneys general; the greater coordination of attorneys general from different states, in part facilitated by the National Association of Attorneys General; and the higher political profile of the office of attorney general in many states.<sup>77</sup> This has led to a variety of initiatives, including the settlement by the tobacco companies with almost all of the states in 1998, and the frequent joint filing of amicus curiae briefs in the Supreme Court by states—to mention only two examples.<sup>78</sup> Such initiatives have continued unabated since then.<sup>79</sup>

For purposes of this Essay, the most relevant activity by states has been their filing of suits, frequently together, in federal court challenging the legality of a variety of actions by the federal government. Parts I and II of this Essay have already described some of this “high profile public-law litigation”<sup>80</sup> by states, especially during the Obama and Trump administrations. These suits are not a recent phenomenon, but they have markedly increased in the past several years. Between 1980 and 2010, there were only a handful of such suits filed yearly. Since 2010 the number has increased, and since 2014 the yearly number has shot up, to over thirty in 2016.<sup>81</sup>

The increased litigation by states has also been characterized by their political polarization. This is no doubt traceable to the apparent increased polarization of much of political life in the United States.<sup>82</sup> Thus, states associated with Republicans (i.e., states led by GOP attorneys general or governors) almost exclusively sued the Obama administration in federal court,

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injunctions in her earlier article, and in her later article does not explicitly address how state standing may inform the grant or denial of such injunctions.

76 For the most part we treat states and state attorneys general interchangeably, since the latter represent the former in most situations. But not all do, and sometimes another state official, especially a governor, may represent a state, and even where that is not true, governors and attorneys general can be at odds regarding the position of a state. We further address this point *infra* Sections III.B–C.

77 See generally PAUL NOLETTE, *FEDERALISM ON TRIAL* (2015).

78 Lemos & Young, *supra* note 6, at 65–74; Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 357–70 (2012).

79 Lemos & Young, *supra* note 6, at 73–74.

80 *Id.* at 45.

81 Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 *PUBLIUS* 469, 473–74 (2018) (providing data on suits brought by states from 1980 to 2016).

82 Anthony Johnstone, *Hearing the States*, 45 *PEPP. L. REV.* 575, 609–14 (2018) (discussing coordinated activities and fundraising of the Republican Attorneys General Association and the Democratic Attorneys General Association); Lemos & Young, *supra* note 6, at 85–95 (discussing increasing partisan activity of state attorneys general).

while the reverse has been true during the Trump administration.<sup>83</sup> Many of these suits sought a national injunction against enforcement of a federal program. Consider, as high-profile examples, litigation already discussed in this Essay. In *Texas v. United States*,<sup>84</sup> twenty-six GOP States sued the Democratic Obama administration to overturn the DAPA initiative. Fifteen States, all Democratic, plus the District of Columbia, filed an amicus curiae brief in the Supreme Court supporting DAPA.<sup>85</sup> (Also, no fewer than ten GOP governors of other States eventually appeared as parties or amici in the case on the side of the plaintiffs.)<sup>86</sup> In contrast, in *Trump v. Hawaii*,<sup>87</sup> one Democratic State sued to overturn the travel ban of the Republican Trump administration. By amicus curiae briefs filed in the Supreme Court, sixteen Democratic States and the District of Columbia supported the suit,<sup>88</sup> while an equal number of GOP States supported the government.<sup>89</sup>

### B. *The Benefits and Costs of States Suing the Federal Government*

A proximate cause of the increased litigation by states as plaintiffs in federal court can be directly traced to the standing issue, and in particular the holding in *Massachusetts v. EPA*.<sup>90</sup> While state standing was not impossible before that decision and it did not establish a bright-line rule that states *always* have standing to sue the federal government, it clarified that states could, in some circumstances, bring such suits. Indeed, as we discussed in Part I, it apparently diluted the usual standing requirements for states, though the scope of the holding remains unclear. In any event, the decision, in conjunction with other factors we addressed above, no doubt facilitated and encouraged states to bring suit.<sup>91</sup>

Has the increased appearance by states as plaintiffs, suing the federal government, been a benefit or detriment to our political and legal institutions? Several arguments have been advanced in favor of this more activist role by states. First, and most fundamentally, states are independent (albeit subordinate) sovereigns in our federal system. When states, individually or collectively, conclude that Congress or the President or both have unlawfully and adversely affected state laws, interests, or policy choices in a preemptive

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83 See Hessick & Marshall, *supra* note 22, at 84–85 (discussing examples); Lemos & Young, *supra* note 6, at 74–85 (same).

84 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

85 Bruhl, *supra* note 6, at 512.

86 Nolette, *supra* note 6, at 352–53.

87 138 S. Ct. 2392 (2018).

88 See generally Brief for the States of New York et al. as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

89 See generally Brief for the States of Texas et al. as Amici Curiae in Support of Petitioners, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965). Fourteen of the states appeared through their attorneys general, while two others were represented by their governors. *Id.* at 1.

90 549 U.S. 497 (2007).

91 Lemos & Young, *supra* note 6, at 71; Nolette, *supra* note 6, at 371.



manner, it is an appropriate check for a state to resist that change in federal court. States, in short, have interests in our federal constitutional order, and can use appropriate political and judicial tools to protect those interests.<sup>92</sup>

States are also appropriate actors to bring such suits, and have advantages over private actors who purport to represent state interests. State attorneys general (almost all independently elected<sup>93</sup>) or governors who represent states as parties or amici in suits don't operate in a vacuum. They are elected officials responsible to and presumably representative of the state polity, or a considerable portion of it. They typically have greater resources and can represent a broader array of interests as compared to a private party or interest group.<sup>94</sup> Attorneys general can accentuate their leverage by joining with their counterparts in other states.<sup>95</sup> As with any other of their official actions, they need to balance the time and resources devoted to court action with that demanded from their other duties. Thus, of necessity, it is likely to be a more deliberative action by a state than a suit by an individual private plaintiff. By the same token, a state suit (or appearance as amicus) is a real-time signal to a court of the concerns of high-profile elected representatives of the state.<sup>96</sup>

States suing can also be described as the "litigation safeguards of federalism."<sup>97</sup> The term is a nod toward the well-known "political safeguards of federalism" theory, which posited that state interests were adequately represented by members of Congress elected from individual states, so judicial enforcement of federalism limits on the national government was inappropriate.<sup>98</sup> That safeguards theory has not fared well in practice or in the literature, since it appears members of Congress make policy for many reasons, but consistent and principled protection of state interests is far down the list. That is, members of Congress may pass laws (or not) based on political considerations, what they consider to be good policy, or any number of reasons, but not necessarily to limit the powers of the federal government, or to protect the states' federalism interests.<sup>99</sup> In contrast, litigation activity is a

92 Hessick & Marshall, *supra* note 22, at 94–96; Mank, *State Standing in United States v. Texas*, *supra* note 14, at 230.

93 Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1101 (2018) (noting that as of 2017, "[f]orty-four states separately elected their attorney general").

94 See Mank, *Should States Have Greater Standing*, *supra* note 14, at 1781.

95 *Id.* at 1782. Such collective efforts can lead to a broader and presumably more effective judgment or settlement in the case. See *id.* That doesn't necessarily mean that a nationwide injunction is *always* appropriate, as we endeavor to demonstrate in the balance of this Essay.

96 The points made in this paragraph are discussed in Hessick & Marshall, *supra* note 22, at 96–97; Lemos & Young, *supra* note 6, at 113; Solimine, *supra* note 78, at 376–79.

97 Lemos & Young, *supra* note 6, at 117; see also Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023 (2017).

98 Francis, *supra* note 97, at 1024, 1036–38.

99 For discussion of the political safeguards theory and its many critics, see Lemos & Young, *supra* note 6, at 117–118; Solimine, *supra* note 78, at 374–76, 381–83.

public activity where one or more states must present transparent and ostensibly neutral (i.e., law-based) reasons for advancing state interests, as tested in an adversarial proceeding.<sup>100</sup> Litigation might then compare favorably with the highly uncertain fate of federalism interests in Congress or the executive branch.<sup>101</sup>

These are powerful arguments, and indeed they inform our support of states being able to sue in federal court, and to be able to be granted a national injunction, at least within some circumstances. Nonetheless, significant problems attend the embrace of states suing the federal government. State attorneys general, to state the obvious, are elected politicians as well. They, too, may file suits on behalf of their states for any number of reasons, not necessarily for federalism interests regarding their states. They may file suit (or not) in whole or in part to appeal to voters, enhance their own reelection chances, contribute to their plans for other and higher elective offices, raise money, or for other political reasons, broadly described.<sup>102</sup> A corollary of this point is the increasing partisanship of states suing, especially in a collective manner. There is abundant evidence that in recent years, litigation activity (both filing suit and filing amicus briefs) by state attorneys general is more polarized and less bipartisan than before.<sup>103</sup> Due to the work of entrepreneurial (and ambitious) attorneys general, a general desire to work with other state officials of the same party, and a general bandwagon effect, states are increasingly prone to sue together.<sup>104</sup>

Another reason to be cautious about embracing a state bringing suit as truly representative of that state's interests is concerns about *which* state official is filing the suit. Typically the state attorney general is authorized to bring the suit, but that officer may be at odds, by virtue of being from different political parties or otherwise, with the governor or the state legislature, who are opposed to the suit (or conversely wish a suit to be brought or an

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100 Francis, *supra* note 97, at 1040–47.

101 Lemos & Young, *supra* note 6, at 117–19.

102 Grove, *supra* note 24, at 895–99; Hessick & Marshall, *supra* note 22, at 99–100; Solimine, *supra* note 78, at 384–85. This is not to say that, in a representative democracy, it is illegitimate for an elected state official to take these “political” considerations into account when bringing suit. But it does suggest that “states may not have such a . . . pristine role” in suing to check the national government, and that “even if states are granted standing, the credibility and gravitas of their claims may be diminished.” Hessick & Marshall, *supra* note 22, at 100. Hessick and Marshall are not addressing national injunctions, but as we argue below, their concerns transfer to that arena as well. See *infra* Section III.C.

103 See Shane A. Gleason, *The Dynamics of Legal Networks: State Attorney General Amicus Brief Coalition Formation*, 39 *Just. Sys. J.* 253 (2018); Lemos & Young, *supra* note 6, at 86–92. Some caution should be noted when making sweeping generalizations about the political polarization of state litigation activity, by ourselves, and others. For example, there is more bipartisanship among state attorneys general, both in filing suits and in joining together on amicus briefs, with regard to state suits against business interests, as opposed to those against the federal government. Lemos & Young, *supra* note 6, at 94–95; see also Nolette, *supra* note 6, at 364–70 (discussing regulatory areas where state attorneys general cooperated in a bipartisan way with the Obama administration).

104 See Lemos & Young, *supra* note 6, at 73–74; Solimine, *supra* note 78, at 387.

amicus curiae brief filed, when the attorney general does not).<sup>105</sup> It is not unheard of for the attorney general to file suit or an amicus brief even though not supported by the governor or state legislature, or vice versa.<sup>106</sup> While the attorney general rather than the governor may be vested with authority, as a matter of state law, to bring suit on behalf of the state, it is not immediately obvious that any given attorney general is a better representative of the state polity than, say, the governor. While, again, most attorneys general are separately elected, the electorate may or may not have given weight to the past or anticipated litigative activities of that official when casting a vote. (The same can be said for the governor as litigator, of course.) On the whole, the legislature may be a more representative and deliberative body when it comes to speaking for the entire state polity.<sup>107</sup>

Finally, just as we observed that members of Congress may not be particularly faithful guardians of federalism in that body, the same can be said of litigation by state attorneys general. When states, or a group of states, sue to set aside some federal program, it may be against the wishes of *another* group of states that are in favor of the federal program. Simply put, not all states may agree on the propriety of a federal program, and states that successfully sue are “trying to make policy for the whole country.”<sup>108</sup> It is one thing for a particular state to sue to stop implementation of a federal initiative for that state. It is another thing when there is a horizontal conflict among the states on the propriety of a federal law, and one or more states sue to set aside the federal law on its face. If successful, that suit sets a regulatory regime for the entire country.<sup>109</sup> This undermines traditional values of federalism, such as states serving as laboratories of federalism and promoting interstate competition.<sup>110</sup>

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105 See Hessick & Marshall, *supra* note 22, at 100–01; Solimine, *supra* note 78, at 384–85.

106 See, e.g., Solimine, *supra* note 78, at 384–85 (discussing the divergent activity in some states between the attorney general and the governor in the litigation challenging the constitutionality of the Affordable Care Act in the Obama administration).

107 For further discussion, see Lemos & Young, *supra* note 6, at 114–15; Solimine, *supra* note 78, at 384–85. The potential divergence in this regard between the attorney general, governor, and legislature of a state was highlighted in bills passed by the lame-duck sessions of the GOP majority legislatures of Wisconsin and Michigan following the 2018 midterm elections, when Democrats were elected to the former positions. The new laws placed limits on the powers of the new attorneys general to bring suit or abandon present suits on behalf of the state. Astead W. Herdon, *Michigan Republicans Follow in Contentious Footsteps*, N.Y. TIMES, Dec. 7, 2018, at A19. In Wisconsin, the changes were reportedly motivated in part by the desire of the legislature to prevent the newly elected Democratic attorney general from withdrawing from continuing litigation against the Affordable Care Act. Mitch Smith & Monica Davey, *Wisconsin Governor Signs Bill Stifling Democrat Who Beat Him*, N.Y. TIMES, Dec. 15, 2018, at A1.

108 Lemos & Young, *supra* note 6, at 96.

109 *Id.* at 95–105; Solimine, *supra* note 78, at 385–89.

110 Solimine, *supra* note 78, at 385.

C. *Judicial Limits on States Suing for National Injunctions*

National injunctions cannot and should not be evaluated in a vacuum. Most recently, such injunctions have been sought by states (alone or in combination) suing the federal government. As we indicated above,<sup>111</sup> a growing literature has suggested judicial limitations on the routine granting of such injunctions. We have added to that discussion by considering the benefits and costs of litigation by states to enforce federalism interests. In light of these factors, we now suggest criteria for courts to consider when states request national injunctions.<sup>112</sup> We draw on the litigation activity of states themselves, as litigants and amici, in particular cases as a proxy to measure and balance these competing interests. This fits well with the functional concerns raised by the separate critiques of the appropriateness of state standing and of national injunctions.<sup>113</sup>

Put another way, we argue that we should harness the recent increased litigation activity of states in federal court. That litigation can be usefully examined by courts as informational signals in deciding when a nationwide injunction is appropriate. If a relatively large number of states, as parties or amici, support the issuance of such an injunction, then an injunction applying to all states becomes less objectionable. The reverse is true if a relatively large number of states, as parties or amici, oppose a nationwide injunction. In short, the fact of state participation, as party or amici, and the arguments and information they present, can be a rich and nuanced database for courts to consider.<sup>114</sup> The benefits increase as the number of participating states increases.

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111 See *supra* Section II.B.

112 These are not necessarily exclusive of other criteria courts should consider when deciding whether to grant a national injunction.

113 Courts count states in analogous contexts, that is, in deciding whether to impose nationwide uniformity as a matter of constitutional law. For example, the Supreme Court considers the landscape of state law when deciding whether punishments are cruel and unusual under the Eighth Amendment. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 579–81 (2005). The Court also gives interpretative weight to the number of states that file or join in amicus curiae briefs in support of a particular position. *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010). Another particularly relevant example is *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). There the Court considered a constitutional challenge by one State to the preclearance provisions of section 5 of the Voting Rights Act of 1965. The Court effectively considered it a request for a nationwide injunction, as it recognized “that the questions presented were of urgent concern to the entire country,” and invited all states to participate as amici curiae. *Id.* at 307. Twenty-six States accepted the invitation, with five backing the challenge while the rest supported the law. *Id.* at 307 n.2. The Court has not repeated the exercise, see Solimine, *supra* note 78, at 380 n.114, but perhaps it (or any lower federal court) should consider doing so when faced with requests for national injunctions.

114 See Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1867–78 (2018) (arguing federal courts should pay deference to amicus curiae participation by states in federal court cases involving procedural and jurisdictional issues that impact states).

One factor should be the precise nature of how states satisfy standing. Even under apparently relaxed standing requirements as compared to private parties, states must still satisfy the familiar factors of injury, standing, and redressability.<sup>115</sup> And the strength of the showing may vary from case to case. It may also vary from state to state in those cases where more than one state is collectively suing. Relaxed or not, states must show some significant interest or effect upon their polities, even if it may not be as concrete as that demanded of private plaintiffs. To be sure, some cases may be pushing (if not necessarily crossing) the boundaries of such a requirement. Some scholars have contended that *Texas v. United States* (where the injury was the issuance of driver's licenses to DAPA recipients) may be one such case,<sup>116</sup> but one of us has argued that the economic impact of subsidizing driver's licenses for Texas was significant enough to merit standing.<sup>117</sup> That said, when courts consider the strong medicine of a national injunction that affects *all* states, it should consider the depth of injury to the state (or states) requesting that relief.<sup>118</sup> The stronger the nature of the injury, in one or among several states, the better case there is for a national injunction.<sup>119</sup>

Another set of factors can be drawn from the characteristics of the state or states bringing suit. One would be the size of the coalition bringing suit. There is a more justifiable case to be made for a national injunction, setting national policy for all states, if a significant number of geographically dispersed states request such relief.<sup>120</sup> A larger number of states will ameliorate

115 See *supra* Part I.

116 Hessick & Marshall, *supra* note 22, at 105–06, 108 (suggesting that the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), applied a relaxed approach to state standing that would not have met normal standing requirements).

117 See *Texas v. United States*, 809 F.3d at 151–62; Mank, *State Standing in United States v. Texas*, *supra* note 14, at 227 (defending result in *Texas* but cautioning that state standing should not be based on “relatively trivial issues”).

118 Illustrating the flexible nature of the factors we propose, we would not necessarily argue that states requesting national injunctions need to assert, say, proprietary interests, or specific statutory authorization, see *infra* Section III.D, as opposed to *parens patriae* interests. For example, if many states could demonstrate *parens patriae* standing based upon rises in sea level due to climate change, it might justify a national injunction if enough states were affected on the East and West Coasts, and the Gulf of Mexico.

119 In making this argument, we do not need to take a position on the “one plaintiff is enough rule,” which holds that as long as one plaintiff among several has standing, the case may proceed and affect all of the parties. See Bruhl, *supra* note 6. The court in *Texas* (like most courts) followed this rule, making it only necessary to determine that Texas, among the twenty-six States suing, had standing. *Id.* at 512–13. Even if that is the correct rule, we argue that courts should take into account the actual injury of each state that has joined as a plaintiff, as one factor to weigh in deciding whether to grant a national injunction.

120 Cf. Johnstone, *supra* note 82, at 620–21 (arguing that the Supreme Court should give interpretative weight to state amicus curiae briefs submitted by a majority, or perhaps supermajority of states); Solimine, *supra* note 78, at 393 (same). While we do not advocate a bright-line rule on the number, it could be informed by the requirement of the National Association of Attorneys General (NAAG) that at least thirty-six attorneys general sign on to a letter before it becomes official policy of the NAAG. See *Policy*, NAT'L ASS'N ATT'YS

concerns about horizontal overreaching by one state or a small number of states, and make it more likely that states with diverse interests are joining together. There are various ways a court could gauge the size and scope of a coalition. One could consider sheer numbers, the populations of the states involved, how each one or more claims to have standing, and perhaps other metrics.<sup>121</sup> The heterogeneity of states supporting a national injunction, measured by ideology or in other ways, enhances the credibility of the arguments advanced by the coalition.<sup>122</sup>

By the same token, courts should consider how many and what kind of states are *opposing* the request for a national injunction.<sup>123</sup> Typically this would be done in the litigation itself, by states filing amicus briefs or seeking intervention as a party.<sup>124</sup> This, too, should inform, in a presumably useful adversarial way, the scope of coverage of any granted injunction. A possibly related factor would be the issue of which public official claims to represent the state.<sup>125</sup> In most states, the attorney general is the authorized official to bring suit or file an amicus brief. But whatever state is involved, another state official (e.g., the governor) may seek to participate and articulate a possibly different position by that state. We suggest that a court consider such different positions as well, since such dissonant voices would suggest that the state interest is not clear.

Still another related factor could be indicia of partisanship.<sup>126</sup> Courts could consider the political background of the state officials bringing, or

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GEN., <https://www.naag.org/naag/policy.php> (last visited Jan. 11, 2019). We thank Paul Nolette for bringing this to our attention.

121 Cf. Solimine, *supra* note 78, at 392–93 (discussing similar factors regarding the weight to be given amicus briefs filed by many states).

122 See Greg Goelzhauser & Nicole Vouvalis, *Amicus Coalition Heterogeneity and Signaling Credibility in Supreme Court Agenda Setting*, 45 PUBLIUS 99, 100–02 (2014).

123 See Bruhl, *supra* note 6, at 512–13 (complaining that the Fifth Circuit’s decision in *Texas v. United States* ignored the fact that sixteen States appeared as amici to oppose the suit by twenty-six States).

124 E.g., *Texas v. United States*, 340 F. Supp. 3d 579, 591 (N.D. Tex. 2018) (pointing out that, in litigation challenging constitutionality of the Affordable Care Act after 2017 statutory amendments removing the individual mandate, nineteen States and the governor of another were plaintiffs, while sixteen States and the District of Columbia intervened as defendants), *aff’d per curiam by an equally divided court*, 136 S. Ct. 2271 (2016).

125 Cf. Hessick & Marshall, *supra* note 22, at 109 (arguing that courts should only permit state standing “upon a proper showing that the state officer or entity bringing the suit is the single correct party to maintain the action in the federal court”). A corollary of this point is that courts could also consider how, if at all, state attorneys general change their positions in cases after a new state attorney general is elected. See David Schultz, *Blue Wave Roils Environmental Lawsuits as States Turn to Courts*, BLOOMBERG ENV’T (Jan. 8, 2019), <https://news.bloombergenvironment.com/environment-and-energy/blue-wave-roils-environmental-lawsuits-as-states-turn-to-courts>.

126 Cf. Hessick & Marshall, *supra* note 22, at 108 (arguing that courts should “demand some indicia of bipartisanship as a prudential matter before relaxing the injury in fact requirement for states”); Johnstone, *supra* note 82, at 616, 620–21 (citing Michael E. Solimine, Essay, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 166 n.86 (2016))

opposing, the suit. The larger and more bipartisan the coalition bringing suit, the more confident a court can be that a suit (and a concomitant request for a national injunction) has not been submitted purely for political (and forum-shopping) reasons. This factor has the admirable purpose of responding to the reality of highly partisan suits by states, and the perception of politicized decisionmaking by courts in those suits. Nonetheless, like the other factors we outline, it should be considered with caution. How to measure partisanship in this context is not without problems. A state attorney general may be from one party, and most of the other major state elected officials may be from the other. And, of course, there are different brands of Democrats and Republicans (not to mention independents and members of other political parties), and different shades of blue and red states (to use modern parlance). Nonetheless, while referring to federal judges as associated with the party of the appointing President is a common (if controversial) tactic,<sup>127</sup> using the GOP-Democratic divide to categorize nonjudicial state actors is a familiar step in American civic discourse, and can be used here.<sup>128</sup>

We suggest that courts consider these factors as a series of soft presumptions rather than bright-line rules. Granted, if we fashioned them as the latter, say, always requiring that a supermajority of states be suing as a prerequisite for a national injunction, it would be easier for courts to apply. But ease of application is not the goal. Injunctive relief by its origin and nature requires a balancing of equitable factors, and we suggest that courts consider the factors we outline when deciding whether to enter such an injunction.

To illustrate how these factors could apply, we return to the two decisions we've mentioned throughout this Essay. In *Texas v. United States*, twenty-six States brought suit, but the court held that it need only decide that the lead plaintiff, Texas, had standing, and the record is not clear on the standing of the remaining plaintiffs.<sup>129</sup> We can say that Texas's standing was

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(arguing that the Court should only give weight to state amicus curiae briefs filed by bipartisan groups of state attorneys general or other state officials).

127 See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>. There have long been concerns, inside and outside the legal community, of the Supreme Court (and lower federal courts) being perceived as overtly politicized, and they have been exacerbated by the recent increased political polarization. For an overview, see Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. (forthcoming 2019).

128 It is worth noting it was used by Roberts, speaking for a unanimous Court, when he gave weight to amicus curiae briefs filed by, as he explicitly mentioned, bipartisan groups of governors and state attorneys general. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016). We nonetheless acknowledge that a federal court, properly concerned with perceptions of its own alleged partisanship, might find it awkward to explicitly consider and evaluate the partisan composition of states in this context.

129 The lower courts only decided that Texas had standing and found it unnecessary to decide whether some or all of the other plaintiffs also had standing. *Texas v. United*

probably strongest among the states involved in the litigation, given its significant number of immigrants, the economic impact of the DAPA program on its driver's license program, and its contiguous border with Mexico.<sup>130</sup> While the states comprising and supporting the plaintiffs were geographically diverse, without exception they were all affiliated with the Republican Party.<sup>131</sup> To be sure, the opposing amici states were all affiliated with Democrats, but there is no doubt that bipartisanship was glaringly lacking. On balance, application of the factors we propose suggests that a national injunction was not appropriate.

We think the same conclusion is called for in the travel ban litigation. That litigation, too, had a strong flavor of partisanship in the membership of the amici states supporting and opposing Hawaii as the plaintiff.<sup>132</sup> But the argument for state standing of Hawaii, as we see it, was weaker than that of Texas in the DAPA litigation because Hawaii failed to provide much concrete evidence that the travel ban had affected or would affect a significant number of students and faculty at its state universities, even though the Ninth Circuit found that this argument was sufficient for state standing.<sup>133</sup> We acknowledge that a stronger showing of the impact of the travel ban on visiting faculty and students from the affected countries was made in the separate Ninth Circuit decision of *Washington v. Trump*,<sup>134</sup> which was not reviewed by the Supreme Court. But even in that case, the number of affected faculty and scholars was relatively small.<sup>135</sup> Even if Hawaii's state standing claims of injury to its state universities from the travel ban were better documented, those claims would not justify a nationwide injunction unless a large and diverse number of other states were experiencing similar harms. Furthermore, large numbers of ideologically similar states were on both sides of the suit, and on balance a national injunction was not appropriate.<sup>136</sup>

#### D. Congressional Limits on States Suing for National Injunctions

We have previously noted several proposals for limiting the national injunction through congressional legislation.<sup>137</sup> These include forbidding an injunction from binding any nonparties; requiring that any suit against

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States, 809 F.3d 134, 155 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591, 643 (S.D. Tex. 2015).

130 *Texas v. United States*, 809 F.3d at 151–62.

131 See *supra* notes 84–85 and accompanying text.

132 See *supra* notes 88–89 and accompanying text.

133 *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) (per curiam), *rev'd*, 138 S. Ct. 2392 (2018).

134 *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

135 *Id.* at 1158–61.

136 In evaluating the DAPA and travel ban cases, we are not exclusively relying on the partisan composition of the states, or even asserting that it is the most important factor. We can contemplate a court granting a nationwide injunction sought by a group of states, large in number and diverse in other ways, even if all were affiliated with one political party.

137 See *supra* note 3 and accompanying text.



the federal government be exclusively filed in one district court, like that for the District of Columbia; or that such suits be filed before a specially convened three-judge district court. None of these proposals directly addresses the issue of state standing. But they could, and so we also address that possibility. We discuss all of these proposals in the context of our interrelated critique of state standing and of the national injunction.

We have already addressed one proposal: a statute that would prevent injunctions from applying to nonparties, which would effectively adopt Bray's proposed bright-line rule.<sup>138</sup> Acknowledging in general the costs and benefits of national injunctions, and states suing the federal government, we cannot categorically rule out the propriety of such injunctions (whether or not sought by a state as plaintiff). Our judicial limits proposed in Section III.C call for an admittedly nuanced inquiry by the court, and thus we do not support the blunt instrument of statutorily forbidding all national injunctions in all circumstances.

Another proposal would provide for exclusive jurisdiction in one federal district court, such as that for the District of Columbia.<sup>139</sup> This step would of course curtail the problem of states and other plaintiffs shopping for a favorable forum. It is no accident that the District of Columbia was designated, as Congress has frequently provided that court to be the exclusive forum for appeals from federal administrative agencies, and other disputes.<sup>140</sup> Notable examples of the latter are the currently defunct preclearance provision of the Voting Rights Act of 1965,<sup>141</sup> and the provision of the Bipartisan Campaign Reform Act (BCRA) of 2002 requiring all constitutional challenges to BCRA to be brought before a specially convened three-judge district court panel in the U.S. District Court for the District of Columbia.<sup>142</sup>

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138 See *supra* Section II.B.

139 Frost, *supra* note 1, at 1105 (discussing the Assigning Proper Placement of Executive Action Lawsuits Act, H.R. 2660, 115th Cong. (2017)); see also Bray, *supra* note 1, at 452–53 (discussing the option of designating one court to hear such cases). Another variation on this theme would be to transfer similar cases from around the country to one federal court, via the Judicial Panel on Multidistrict Litigation (JPML), 28 U.S.C. § 1407 (2012), or for the JPML to similarly transfer parallel appeals of government agency decisions to one circuit, via 28 U.S.C. § 2112.

140 See generally Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013).

141 Under section 5 of the Voting Rights Act of 1965, 52 U.S.C. § 10304 (Supp. V 2018), certain states, mainly in the Deep South, that were required to preclear changes to their election laws with the U.S. Department of Justice had the option to file a declaratory judgment action seeking preclearance before a specially convened three-judge district court in the District of Columbia. That procedure is currently defunct, given *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated the current version of the coverage formula in section 4 of the Voting Rights Act of 1965, 52 U.S.C. § 10303 (Supp. V 2018), which designated which states were subject to preclearance.

142 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113–14.

Specialized courts of all kinds are typically created to provide for more efficient and quality judicial decisionmaking by a group of judges who, by repetition, are more expert on the subject matter.<sup>143</sup> For the federal courts in the District of Columbia (trial and appellate), there is the added benefit that the judges there are perceived to be especially highly qualified and excellent judges within the federal system. And, not being tied directly to any state, the federal judges in the District of Columbia are arguably chosen in a less political manner (i.e., not tied to the political vagaries of a particular state or their senatorial sponsors, as are most other federal judges), and so adjudications in the District of Columbia may have a nonpartisan or bipartisan patina absent in the rest of the country.<sup>144</sup> Finally, it might seem particularly appropriate for a federal court in the seat of the national government to decide if a national injunction is called for, as compared to the decision of a federal court in a far-flung state.

But placing exclusive jurisdiction of such adjudications in the District of Columbia carries its own costs. A major problem with this option is that it eliminates the possibility of percolation, which ostensibly aids the Supreme Court in its decisionmaking.<sup>145</sup> The hurried appellate litigation often attendant to a single judge's issuance of a national injunction would seemingly be no less true for one issued in the District of Columbia. If, as we argue, the decision to grant a national injunction requires a careful weighing of factors, it is not obvious why the judges in the District of Columbia, able though they undoubtedly are, are better positioned to make such a decision as compared to federal judges elsewhere in the United States. Indeed, we contemplate that judges elsewhere will *not* be routinely granting national injunctions, but they will still be considering (rightly so) whether to grant an injunction for the state where they sit (or perhaps for a political subdivision thereof). Under the proposal, then, federal judges in the District of Columbia would be placed in the awkward position of deciding cases focusing on the particular circumstances of a state, not of the District of Columbia itself.<sup>146</sup> Finally, in recent years, the selection process for federal judges in the District of Columbia has undergone its own politicization, at least for the U.S. Court of Appeals for the District of Columbia Circuit, as the D.C. Circuit has become an incubator of Supreme Court Justices.<sup>147</sup> Thus, on balance,

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143 See LAWRENCE BAUM, *SPECIALIZING THE COURTS* 32–34 (2011); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111–14 (1990).

144 Solimine, *supra* note 57, at 148–49.

145 *Id.* at 142–48 (discussing the pros and cons of percolation, and whether the Court actually uses the putative benefits of percolation).

146 This problem is already present, given the statutes providing for exclusive jurisdiction in the District of Columbia to review many agency decisions, and the related venue provisions, even when the major effect of the challenged action is within a state. *Id.* at 148 & n.134; Michael E. Solimine, Essay, *Rethinking District of Columbia Venue in Voting Rights Preclearance Actions*, 103 GEO. L.J. ONLINE 29, 34–35 (2014).

147 Solimine, *supra* note 57, at 149.

we see this proposal as no panacea to resolve the conundrum of national injunctions.

Another proposal would be to specially convene a three-judge district court, either in the District of Columbia or simply in the state where proper venue lies.<sup>148</sup> According to its proponent, Fifth Circuit Judge Gregg Costa, a three-judge court issuing a nationwide injunction “would have greater legitimacy than one issued by a single judge” for the simple reason that three minds are greater than one.<sup>149</sup> It could “also reduce the benefits of forum shopping,” by requiring suits seeking such relief to “be randomly assigned to one of the regional circuits” for convening of the court.<sup>150</sup> Costa also argues that the “best antidote to forum-shopping would be the mandatory review by the Supreme Court,” which would expedite the resolution of the litigation.<sup>151</sup> He acknowledges that the proposal would undermine the benefits of percolation, but points out that there could still be percolation on the merits of the underlying case, since plaintiffs could still sue around the country seeking injunctions for one state.<sup>152</sup>

As Costa observes, the proposal is similar to an “old” solution to similar problems. Congress in 1910 created the three-judge district court as a reaction to the perceived problems of single district judges too easily enjoining *state* laws during the Progressive Era. It was thought that a court consisting of the one district judge before whom the suit was originally filed and two other judges assigned by the chief judge of the circuit (typically one circuit judge and one district judge) would give greater legal acumen to such important cases, would be better accepted by the public (as opposed to the actions of just one judge), and would resolve cases quickly given the opportunity for a direct appeal to the Supreme Court.<sup>153</sup> In 1937, Congress extended the Court’s jurisdiction to constitutional challenges to *federal* statutes, a minor part of the failed court-packing plan of the same year. The latter extension was motivated in part by the many injunctions entered by single district judges against New Deal legislation.<sup>154</sup> Apparently, none of the injunctions

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148 Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/>.

149 *Id.*

150 *Id.* He pointed out that a random assignment model is similar to current law that assigns all suits to one circuit when multiple suits are brought challenging agency action. *Id.*; see also *supra* note 139.

151 Costa, *supra* note 148.

152 *Id.*

153 For discussion of the early history of the three-judge district court, see Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 111–18 (2008).

154 See Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 610–15 (1938); Solimine, *supra* note 57, at 125, 139.

issued in the 1930s were nationwide,<sup>155</sup> and as best as we can tell, the latter types of three-judge district courts were subsequently not in the forefront of issuing nationwide injunctions.<sup>156</sup>

Costa's proposal is not without its merits, but ultimately, we do not think it is a panacea. Dissatisfaction with both types of three-judge district courts festered in the 1960s and 1970s among federal judges and by policymakers, premised on the logistical awkwardness of assembling three judges to try a case; the burdens of direct appeals on the Supreme Court's docket; and the belief that the normal course of litigation was appropriate for challenges to state or federal statutes, just like all other litigation in federal court.<sup>157</sup> These concerns culminated in Congress abolishing the court in 1976, except for reapportionment cases, which were perceived to be important enough to warrant special treatment.<sup>158</sup>

It is not clear to us that the three-judge district should be revived to deal with national injunctions. Some of the concerns that drove the 1976 legislation would apply to the proposal, namely, the complications of assembling three judges to try the case, and lack of obvious superiority to the usual process of trying and appealing cases. That would be coupled, as Costa acknowledges, with the lack of percolation of cases.<sup>159</sup> And given the breadth of statutes and actions of various kinds by Congress, the President, and agencies, there would seem to be a target-rich environment for suits against the federal government, many of which, it would seem, would lead to the convening of a three-judge court and a resulting direct appeal. On the other hand, one could argue that suits against federal initiatives seeking nationwide injunctive relief are important in their own way, much like reapportionment actions. No doubt there is some truth to that analogy. But we are not convinced that the three-judge district court is even necessary for apportionment cases,<sup>160</sup> and we are similarly not convinced that it should be extended to cases seeking national injunctions.<sup>161</sup>

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155 Bray, *supra* note 1, at 434–35. Nor, as best as we can tell, was there a pattern of such suits being brought by states in the 1930s.

156 One of the cases pointed out by Bray from the 1960s, starting a trend where a nationwide injunction was sought, was from a three-judge district court. See *id.* at 439–40 (discussing the three-judge court in *Flast v. Gardner*, 267 F. Supp. 351 (S.D.N.Y. 1967), *rev'd sub nom.* *Flast v. Cohen*, 392 U.S. 83 (1968)). While a national injunction was sought in that case, the case was resolved solely on the standing of the private-party plaintiffs. *Flast*, 392 U.S. 83.

157 Solimine, *supra* note 153, at 134–42 (discussing the criticisms).

158 *Id.* at 142–48 (discussing the 1976 legislation).

159 Costa argues that percolation could continue in suits before single district courts where litigants only sought local injunctions, but in light of the experience in the Obama and Trump administrations, we are not sure plaintiffs (or their attorneys) would restrain themselves from requesting broader injunctive relief. See generally Costa, *supra* note 148.

160 Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 126–28, 131–33 (1996) (making this argument).

161 Solimine, *supra* note 57, at 152–56, 160 (arguing generally that a three-judge district court, or some other specialized court, is unnecessary to be created as a forum for constitutional challenges to federal legislation).

Finally, should federal statutes address the issue of states having standing to sue in federal court? As we outlined in Part I, states have long been held to have *parens patriae* authority to bring suit in federal court, at least as long as the state articulates some sovereign interest of that jurisdiction. But apart from that authority, many federal statutes authorize enforcement of federal law by states, typically designating the state attorney general as the agent to bring suit in federal court.<sup>162</sup> The rationale for such provisions is that the deterrence and compensation goals of a federal law are enhanced when states, in addition to the federal government itself and private plaintiffs, are empowered to enforce it in federal court.<sup>163</sup> The standing of states in this context has not proven to be controversial.<sup>164</sup> This is probably because the statutes typically do not authorize a state to enforce federal law with no conditions attached. While we hesitate to generalize the provisions of a broad array of different statutes, many of them authorize state enforcement when it is brought “on behalf of the residents” of a state, “threatened or adversely affected” by the regulated practice,<sup>165</sup> or when it “affects or may affect such State or its residents.”<sup>166</sup> A well-known example, allowing states to enforce the antitrust laws, indicates that states can sue as *parens patriae* for “injury sustained by such natural persons” residing in the state.<sup>167</sup> By presenting evidence of such factors, states presumably would demonstrate that they individually have standing in particular cases.

How do these statutes inform the problem of state standing and requests by states for national injunctions? Presumably, critics of state standing would support a statute that simply forbids states qua states to have standing in federal court, at least requiring states to meet the same Article III standing requirements of private plaintiffs.<sup>168</sup> Conversely, supporters of state standing, at least under some circumstances, might support legislation broadly authorizing state standing, perhaps even solely based on *parens patriae* principles.<sup>169</sup> We adopt neither position, as we argue that the status quo on state standing essentially gets it right.

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162 Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 708 (2011).

163 *Id.* at 712–13.

164 *Id.* at 712 n.64.

165 15 U.S.C. § 7706(f)(1) (2012).

166 *Id.* § 1477.

167 *Id.* § 15c(a)(1). Other examples are collected in Lemos, *supra* note 162, at 708–17.

168 *Cf.* *Massachusetts v. EPA*, 549 U.S. 497, 536–38 (2007) (Roberts, C.J., dissenting) (suggesting that state standing was undermined by lack of a specific statute authorizing a state to bring suit).

169 Whether Congress would have the constitutional authority, consistent with the standing requirements of Article III articulated by the Supreme Court, to enact a statute of the latter kind is beyond the scope of this Essay.

## CONCLUSION

We have discussed the intersection of recent, heightened concerns over two aspects of federal court litigation: whether and to what extent states have standing to sue to challenge congressional legislation or presidential initiatives, and when, if ever, federal courts can issue nationwide injunctions. We argue that the phenomena are not hermetically sealed from each other, and that resolving the former can inform judicial resolution of the latter. In particular, in deciding whether to issue national injunctions, federal courts should take into account not only the asserted basis of the standing of states challenging federal law, but also such factors as the number of those states, their geographic and political heterogeneity, and the characteristics of states who might be opposing such suits. Taking such factors into account will give more sound institutional grounding to court decisions to grant or deny requests for national injunctions.

