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De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Election Law, Voting Rights and Other Constitutional Cases

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

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INTRODUCTION

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

1. *See* Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL. F. 279, 280–81 (identifying various types of recent lawsuits).

2. Maggie Haberman & Amy Chozick, *Democrats Wage a National Fight Over Voter Rules*, N.Y. TIMES (June 3, 2015), http://www.nytimes.com/2015/06/04/us/politics/democrats-voter-rights-lawsuit-hillary-clinton.html?_r=0 [http://perma.cc/X99H-TSVH].

3. RICHARD L. HASEN, THE VOTING WARS 4 (2012).

4. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008); Frank v. Walker, 17 F. Supp. 3d 837, 844–63 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, and remanded sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015).

5. *See, e.g.*, Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 531, 545–49 (6th Cir. 2014), *vacated*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); Obama for Am. v. Husted, 697 F.3d 423, 428–36 (6th Cir. 2012).

campaign finance restrictions[6] and federal limits on state sovereignty such as the Voting Rights Act.[7]

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

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6. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434 (2014); Citizens United v. FEC, 558 U.S. 310 (2010).

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); *see* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203–04 (2009).

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

9. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

10. Several commentators have offered valuable insight into the proper way for courts to approach this issue. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 249–51 (1994) (arguing that, if a legal provision violates certain constitutional principles, it must be deemed facially invalid); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1348–51 (2000); *see also* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998). I plan to focus on this subject in future work.

11. Even in constitutional cases, courts must confirm that a plaintiff has standing to seek injunctive relief, *see* City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983), and often at least go through the motions of applying the four-factor standard set forth in *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006), for determining whether an injunction is an appropriate remedy. *See* Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing Under* eBay, *and the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 177, 188–90 [hereinafter Morley, *Statutory Injunctions*].

ly in favor of the plaintiffs in the case ("Plaintiff-Oriented Injunction"), or instead enjoin the defendant officials or agencies ("government defendants") from enforcing or implementing the challenged provision against anyone in the state or even the nation, as appropriate ("Defendant-Oriented Injunction").[12]

A Plaintiff-Oriented Injunction precludes the government defendants from enforcing the challenged provision against the successful plaintiffs in the case, while leaving them free to enforce the provision against other members of the public. Such an order is generally sufficient to resolve the case or controversy before the court and vindicate the plaintiffs' rights, without adjudicating or enforcing the rights of third parties not before the court that the plaintiffs lack standing to assert. Because non-mutual offensive collateral estoppel generally does not lie against the government,[13] the government defendants remain free to defend the provision's validity in subsequent cases, in which other courts may uphold the provision. The limited scope of Plaintiff-Oriented Injunctions also ensures that the effects of a trial or intermediate appellate court's ruling do not extend beyond the scope of its territorial jurisdiction, to parts of the state or nation where its opinions lack the force of law.

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

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

13. United States v. Mendoza, 464 U.S. 154, 158–62 (1984).

purported beneficiaries notice of the suit or an opportunity to opt out.[14]

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

14. This Article uses the phrases "individual-plaintiff case" and "individual-plaintiff lawsuit" to refer to any non-class case brought by one or more individual, non-organizational plaintiffs, or entities asserting associational standing to enforce the rights of their members on their behalf, *see infra* notes 278–79 and accompanying text. When an organization instead contends that applying the challenged legal provision to any member of the public would harm the organization's own institutional interests, *see infra* notes 280–86 and accompanying text, the case is best conceptualized as an "organizational" lawsuit, which implicates unique issues, rather than an individual-plaintiff case. *See infra* Part III.B.

15. *See* McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) ("[I]n reapportionment and school desegregation cases, for example, it is not possible to award effective relief to the plaintiffs without altering the rights of third parties."); *see also* Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963) (entering Defendant-Oriented Injunction, prohibiting defendants from engaging in any segregation, to enforce plaintiffs' right to desegregated transportation facilities); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 632 (2012) (citing school desegregation example); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 648 (2015) (offering other examples). Lisa Marshall Manheim has identified several ways in which redistricting litigation may fail to protect the interests of non-litigants (that is, the general public), who are unavoidably affected by those rulings. Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 599–603 (2013).

16. Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 364 (1988).

17. Williams, *supra* note 15, at 650 ("[I]t will often be possible for courts to craft a narrower equitable remedy that affords complete relief to the particular plaintiff or plaintiffs appearing before it that would not affect the defendant's obligations with respect to other similarly situated individuals.").

election law, voting rights, and other constitutional cases to award "divisible," plaintiff-specific relief, rather than "indivisible," across-the-board relief.[18] The question is whether, and when, they may (or should, or must) do so.

The choice between a Plaintiff- or Defendant-Oriented Injunction assumes particular importance in election law cases because these cases tend to be brought on behalf of individual plaintiffs, or sometimes associational plaintiffs (which implicate unique standing problems[19]), rather than as class actions.[20] The goal of most such plaintiffs is not simply to enforce their own rights, but rather to change the underlying rules by which the campaign or election as a whole will be conducted. Likewise, as discussed at greater length below, the issue assumes primary importance for cases at the trial and intermediate appellate levels, where the court's written opinion concerning the validity of the challenged provision will not definitively resolve the issue across the entire state or nation as a matter of stare decisis.[21]

Courts have adopted inconsistent approaches to determining whether to issue Plaintiff- or Defendant-Oriented Injunctions in non-class cases.[22] Indeed, many courts either fail to recognize that they have a choice in the matter, or overlook most of the critical issues that the decision between a Plaintiff-Oriented Injunction and Defendant-Oriented Injunction implicates. Commentators have begun to recognize the importance of this is-

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

19. *See infra* Part III.B.

20. *See* Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2035 (2015); Garrett, *supra* note 15, at 594; *cf.* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1648 & n.118 (1997) (citing several important civil rights cases which were litigated as individual suits, rather than class actions).

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

22. *See infra* Part I.B.

sue, but have yet to reach a consensus, and have never examined it specifically in the unique context of election law.[23]

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

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

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

lective rights that the choice between Plaintiff- and Defendant-Oriented Injunctions reflects.

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

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

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

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

Part III discusses some potential ways of avoiding both the limitations of Plaintiff-Oriented Injunctions and the challenges posed by Defendant-Oriented Injunctions. This Part considers

Rule 23(b)(2) class actions,[24] lawsuits brought by associational plaintiffs, specialized courts, and stricter application of Equal Protection principles. As this Part demonstrates, none of these alternatives are fully satisfactory.

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

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

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

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

25. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607–08 (2012); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684–85 (1987); Buckley v. Valeo, 424 U.S. 1, 108 (1976) (citing Champlin Refining Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932)).

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

Part IV goes on to suggest that the trial court should conduct this analysis at the *outset* of any non-class, individual-plaintiff case in which the plaintiffs seek to enjoin an allegedly invalid legal provision.[26] If the court concludes that a Defendant-Oriented Injunction would be the required remedy if the plaintiffs prevail, then it should hold that indispensable parties are missing from the case (that is, the non-party beneficiaries of a Defendant-Oriented Injunction),[27] and require the plaintiffs to refile the suit as a Rule 23(b)(2) class action. Conversely, if neither the Constitution nor the challenged legal provision would require the court to issue a Defendant-Oriented Injunction should the plaintiffs succeed, then the court should allow the case to proceed on a non-class basis. If the plaintiffs prevail, they would be eligible to receive only a Plaintiff-Oriented Injunction. This Article's suggestions are independent of each other: a court could adopt the proposed two-prong test for determining the proper breadth of relief while declining to conduct this analysis at the outset of a case. Addressing those issues at the outset, however, allows a court to avoid the standing and asymmetric preclusion concerns discussed in Part II by requiring that suits in which Defendant-Oriented Injunctions would be necessary are brought as Rule 23(b)(2) class actions.

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

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

27. *Cf.* FED. R. CIV. P. 19(a)(1)(A) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . in that person's absence, the court cannot accord complete relief among existing parties . . . .").

not guarantee class members either notice or an opportunity to be heard prior to class certification, res judicata should apply less stringently than usual in any subsequent challenges to the same legal provisions. Class members should be barred from relitigating only specific issues and arguments actually raised on their behalf, rather than all issues and arguments that could have been raised in the initial suit, such as alternate constitutional challenges to the legal provision at issue.[28]

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

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

I. INJUNCTIVE RELIEF IN ELECTION LAW CASES

A court may determine that a legal provision is invalid for any number of reasons. Most basically, it may conclude that the provision violates the U.S. Constitution or a state constitution, either facially or as applied. A court may deem a state law inconsistent with, or preempted by, federal law.[29] Or else a court

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

29. Preemption is a special concern in the context of laws governing congressional elections. The Elections Clause specifically grants Congress power to "make or alter" state laws concerning the "Times, Places and Manner" of such elections.

may invalidate a regulation for violating an agency's organic statute or a framework law such as the Administrative Procedure Act. Whenever a court determines that a statute or regulation is invalid for any of these reasons, it must decide whether to enjoin enforcement of that provision, and how broadly any such injunction should be crafted.

To determine whether to issue a permanent injunction, a federal court applies the four-factor test set forth in *eBay v. MercExchange*.[30] *eBay* requires the court to assess whether the plaintiff has suffered irreparable injury and lacks an adequate remedy at law, the balance of hardships favors the plaintiff, and injunctive relief is in the public interest.[31] Federal courts have periodically declined to issue injunctions to plaintiffs facing impending or ongoing constitutional violations due to their failure to satisfy one or more of these factors.[32] Courts have declined to grant injunctive relief in constitutional cases for a variety of other reasons as well, including lack of standing,[33] laches,[34] and the belief that injunctive relief was unnecessary because the court was confident government officials would enforce its ruling.[35]

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

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U.S. CONST. art. I, § 4, cl. 1. Because of this unique preemption provision, the typical presumption against preemption does not apply when interpreting federal laws enacted under the Clause. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2256–57 (2013); *see also* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 92 (2016).

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

31. *eBay*, 547 U.S. at 393–94.

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

33. City of Los Angeles v. Lyons, 461 U.S. 96, 108 (1983).

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

35. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 166 (1973).

unconstitutional, or instead enter a broader prophylactic injunction, to require or prohibit other conduct that may not actually be constitutionally required or proscribed.[36] Courts in institutional reform cases often enter broad prophylactic injunctions to protect people's rights more effectively.[37] Despite their utility and widespread adoption in a variety of contexts,[38] the Supreme Court has voiced concern about broad prophylactic injunctions on separation of powers and federalism grounds.[39] Similarly, scholars have questioned the propriety of such relief,[40] and Congress has pushed back against such measures in the prison reform context through the Prison Litigation Reform Act.[41]

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

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36. *See generally* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301 (2004) (defending prophylactic injunctions).

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

38. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (discussing historical antecedents to broad institutional injunctions).

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

40. *See, e.g.*, Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 103–06 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 648–49 (1982); Morley, *Statutory Injunctions*, *supra* note 11, at 218–21.

41. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 3626; 28 U.S.C. §§ 1346(b), 1915, 1915A; 42 U.S.C. § 1997 (2012)).

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

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

A. Plaintiff- and Defendant-Oriented Injunctions

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

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

> [t]he named plaintiff could sue on behalf of the class and obtain a decision in the class's favor. Class members could then

42. *See* Carroll, *supra* note 20, at 2032.

43. *See supra* note 20.

44. FED. R. CIV. P. 23 (1963) (amended 1966).

> opt in to get relief from the court. If the named plaintiff lost the case, the result did not bind the class members, who were free to file later lawsuits on the same claim, and win or lose on the merits without any application of res judicata against them.[45]

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

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

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45. Weber, *supra* note 16, at 348.

46. *Id*. at 400; *see* FED. R. CIV. P. 23, Advisory Committee's Note (1966), *available at* 39 F.R.D. 73, 105–06.

47. In certain types of cases, however, even the Supreme Court's decision as to whether to grant an injunction can have practical significance. *See* Morley, *Public Law at the Cathedral*, *supra* note 30, at 2481–83.

48. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

49. *See, e.g.*, Comm. on the Judiciary v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) ("[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court."). Some scholars reject this position, arguing that, while government officials are bound by courts' judgments, they are not required to accept accompanying judicial opinions as definitive constructions of the Constitution or federal laws. *See* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1844–45 (2008); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43–44 (1993). Under this view, judicial opinions simply allow government officials to predict how courts are likely to resolve future cases. While the possibility of future litigation may induce officials to conform their conduct to judicial opinions, particularly those of the Supreme Court, there is no reason (beyond an opinion's persuasive value) for government officials to adhere to such interpretations in matters not subject to judicial review.

50. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 48–49 (1996).

court should have enjoined its enforcement. Rather, the Court "assume[d] the Texas prosecutorial authorities [would] give full credence to [its] decision."[51] For these reasons, Supreme Court cases generally act as de facto class actions.[52]

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

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

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51. 410 U.S. 113, 166 (1973).

52. *Cf.* Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U. DET. J. URB. L. 573, 574, 577, 580 (1981) (arguing that Supreme Court cases involving individual litigants act as de facto class actions because the Court often issues general statements of law that will govern future cases).

53. Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011).

54. United States v. Mendoza, 464 U.S. 154, 158 (1984).

55. *See, e.g.*, Marsh v. Butler Cty., 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("[D]istrict court decisions cannot *clearly* establish a constitutional right."); Richardson v. Selsky, 5 F.3d 616, 623 (2d Cir. 1993) (same). The Supreme Court has approved of this approach without addressing whether a circuit may choose to allow district court rulings to clearly establish the law and allow plaintiffs to overcome public officials' qualified immunity. *Camreta*, 131 S. Ct. at 2033. For these reasons, Timothy Wilton's explanation as to why class certification is largely irrelevant at the trial level no longer remains true, assuming it once was. *See* Wilton, *supra* note 23, at 604 (arguing that government officials generally "apply a legal declaration in an individual action to [any] factually similar group" in order to preserve their qualified immunity from suit, and because of the collateral estoppel effects of the earlier ruling).

56. *See* Morley, *Public Law at the Cathedral*, *supra* note 30, at 2483–85 & nn.178–86 (collecting sources); Weber, *supra* note 16, at 355–58.

Supreme Court for years; others might never get there.[57] Government entities may refrain from appealing adverse rulings due to political pressures, cost constraints, adverse publicity, strategic considerations, and changes in political administrations.[58] Officials who may have felt duty-bound to defend a law's constitutionality in trial-level proceedings may feel no similar compulsion to affirmatively appeal rulings invalidating laws or regulations with which they disagree. Conversely, supporters of a statute might be reluctant to risk having an adverse ruling affirmed by a higher court, thereby enhancing its precedential value and expanding its geographic reach.[59] Even if lower court rulings and judgments are seen as strictly interim measures, courts are currently applying disparate approaches in determining the proper scope of injunctive relief, often without recognizing the underlying issues at play, and there is value to discerning and advocating the correct approach.

B. Current Approaches

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

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57. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 237 (10th ed. 2013) (explaining that the Supreme Court grants very few of the thousands of petitions for certiorari it receives each year).

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

59. *Cf.* Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and Its Lessons About Interest Group Path Manipulation*, 9 GEO. MASON U. C.R. L.J. 207, 207–17 (1999) (discussing a settlement paid to prevent a white victim of affirmative action from pursuing her case in the U.S. Supreme Court in *Taxman v. Board of Education of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997)).

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

1. Presumptive Issuance of Defendant-Oriented Injunctions

Some jurisdictions have held that a court should presumptively enjoin government defendants from enforcing an invalid legal provision against anyone, to the extent of its invalidity.[60] Such assertions sometimes appear without any explanation or consideration of competing factors.[61] Perhaps most surprisingly, some courts use their ability to completely enjoin enforcement of a law through a Defendant-Oriented Injunction as a justification for refusing to certify a proposed class, on the grounds that class certification is purportedly unnecessary.[62] Nationwide Defend-

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

61. *See, e.g.*, Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."); Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178 (4th Cir. 1978) ("[T]he plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action . . . ."); A-1 Cigarette Vending, Inc. v. United States, 49 Fed. Cl. 345, 358 (2001) ("When a challenge is brought to the validity of a regulation, as opposed to a challenge to the application of an otherwise valid regulation, the district court's determination will be binding upon the entire agency across the nation."); Caspar v. Snyder, 77 F. Supp. 3d 616, 642 (E.D. Mich. 2015) ("[A] plaintiff may seek an injunction applicable to all similarly-situated individuals harmed by the same unconstitutional practice, without the necessity of seeking class-action treatment.") (collecting cases); *see also* Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 781 (9th Cir. 1986); Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir. 1984); Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650, 665 (D.C. Cir. 1983); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971) ("Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases" to award Defendant-Oriented Injunctions to individual plaintiffs.); Am. Fed'n Gov't Emps. v. Cavazos, 721 F. Supp. 1361, 1377 (D.D.C. 1989), *aff'd in part and vacated in part*, 926 F.2d 1215 (D.C. Cir. 1991); Walker, *supra* note 23, at 1122–23 & n.27 (discussing examples).

62. *See* Tenny, *supra* note 23, at 1019 n.8 (collecting cases); *see, e.g.*, Ihrke v. N. States Power Co., 459 F.2d 566, 572–73 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972); Wirtz v. Baldor Elec. Co., 337 F.2d 518, 533 (D.C. Cir. 1963); Green v. Williams, No. CIV-4-78-34, 1980 U.S. Dist. LEXIS 17881, at *7–8 (E.D. Tenn. May 18, 1981); Barnes v. Reagen, 501 F. Supp. 215, 221 n.20 (N.D. Iowa 1980); Gray v. Int'l Bhd. of Elec. Workers, 73 F.R.D. 638, 640 (D.D.C. 1977). Earlier editions of the *Manual for Complex Litigation* stated, "It is rarely necessary . . . to maintain a class action in cases in which declaratory or injunctive relief is sought because of the

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

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

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

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

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

63. *See, e.g.*, Biggs v. Quicken Loans, Inc., 990 F. Supp. 2d 780, 785–86 (E.D. Mich. 2014) ("The proposition that a district court may issue injunctions that bind parties outside its geographic jurisdiction is distinct from whether this Court must, as a matter of binding order or precedent, adopt the D.C. Circuit's conclusion that [an agency issuance] is void ab initio.").

64. 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting).

65. *Wirtz*, 337 F.2d at 534.

66. *Id*. at 533.

67. *Id.*

68. *Id*. at 535.

The D.C. Circuit explained, "[A] court order enjoining the Secretary's determination for the sole benefit of [the] plaintiffs-appellees who have standing to sue would . . . give them an unconscionable bargaining advantage over other firms in the industry."[69] After discussing some of the likely negative ramifications of such a limited ruling, the court concluded, "At the very least, substantial wage inequities among firms and employees in the industry might be created, based solely on the random application of a wage determination held invalid as to some but not all members of the industry."[70]

It added that the lawsuit—despite being brought by commercial businesses to further their own interests—was "vindicat[ing] the public interest in having congressional enactments properly interpreted and applied."[71] The court concluded, "'As it is principally the protection of the public interest with which we are here concerned, no artificial restrictions of the court's power to grant equitable relief in the furtherance of that interest can be acknowledged.'"[72] In another case reaching the same conclusion, the court emphasized that a Defendant-Oriented Injunction completely precluding the government defendant from enforcing an invalid regulation would alleviate the need for duplicative litigation from other people adversely affected by it.[73]

Courts in election law and voting rights cases often issue Defendant-Oriented Injunctions without recognizing or addressing most of their ramifications.[74] For example, in *Frank v. Walk-*

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69. *Id.* at 534.

70. *Id.*

71. *Id.* at 534–35.

72. *Id.* at 535 (quoting Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 942 (D.C. Cir. 1958)). It is worth noting that the quoted language from *Virginia Petroleum Jobbers Ass'n* was ripped wholly out of context. That case focused solely on whether a federal court may stay an administrative proceeding before the Federal Power Commission, and had nothing to do with the distinction between Plaintiff- and Defendant-Oriented Injunctions. *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 923–24.

73. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also* A-1 Cigarette Vending, Inc. v. United States, 49 Fed. Cl. 345, 358 (2001) ("It would be senseless to require the relitigation of the validity of a regulation in all federal district courts . . . .").

74. *See, e.g.*, Obama for Am. v. Husted, 697 F.3d 423, 437 (6th Cir. 2012) (issuing Defendant-Oriented Injunction requiring the Ohio Secretary of State to allow the general public to vote during portions of the early voting period open to military voters); Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607, 617 (S.D. Ohio 2014)

er,[75] a group of individual plaintiffs brought a putative class action suit challenging Act 23, Wisconsin's voter identification law.[76] The district court refused to certify the putative class,[77] but held that the law was unconstitutional[78] and entered a Defendant-Oriented Injunction barring the Governor and the state agency responsible for elections from enforcing it.[79] The court explained, "[I]nvalidating Act 23 is the only practicable way to remove the unjustified burdens placed on the substantial number of eligible voters who lack IDs."[80]

The state had argued for a less restrictive alternative, suggesting that the court could permit people without photo IDs to vote if they satisfied certain alternative requirements or signed affidavits at their polling places affirming their identities. The court rejected such suggestions on the grounds that it would have to rewrite the statute to implement them.[81] Importantly, neither the court nor the parties addressed the possibility of granting relief just to the individual plaintiffs by enjoining the photo ID law solely in regard to them.

Intriguingly, the court explained that the plaintiffs' motion for class certification was moot precisely because "all members of the proposed classes will benefit from the permanent injunction whether or not classes are certified."[82] Thus, in the district court's view, there was "no reason to formally certify a class."[83] The district court offered no explanation as to how it could effectively grant classwide relief in a non-class-action case. The Seventh Circuit ultimately overturned the district

("[The Court] ENJOINS Defendants from treating [any] late-jailed electors any differently from late-hospitalized electors."), *vacated on other grounds*, 770 F.3d 456 (6th Cir. 2014).

75. 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

76. 2011 Wis. Sess. Laws 104.

77. *Frank*, 17 F. Supp. 3d at 880.

78. *Id*. at 863 ("[T]he burdens imposed by Act 23 on those who lack an ID are not justified.").

79. *Id*. ("[T]he only practicable remedy is to enjoin enforcement of the photo ID requirement.").

80. *Id.*

81. *Id.* at 880.

82. *Id.*

83. *Id.*

court's ruling on the merits, finding the photo ID law constitutional, and vacated the injunction.[84]

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

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

On appeal, the Fifth Circuit overturned the trial court's conclusion that the law was enacted with a discriminatory purpose, but affirmed its ruling that the law had a disparate impact. *Veasey*, 796 F.3d at 519–20. The appellate court vacated the trial court's injunction and judgment and remanded for further proceedings. *Id*.; *see also* ACLU v. Santillanes, 506 F. Supp. 2d 598, 605–06 (D.N.M. 2007) (holding that the associational plaintiffs lacked independent organizational standing to pursue their claims and could only assert the rights of their members, but entering Defendant-Oriented Injunction barring the city from enforcing its voter identification law against anyone on Equal Protection grounds), *rev'd*, 546 F.3d 1313, 1323–25 (10th Cir. 2008) (overturning injunction because the voter identification law was constitutional); Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1329–31 (N.D. Ga. 2005) (entering preliminary Defendant-Oriented Injunction against Georgia's voter identification law), *subsequent proceeding at* 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006) (entering identical preliminary injunction against amended version of law), *vacated*, 504 F. Supp. 2d 1333, 1372–74 (N.D. Ga. 2007) (denying permanent injunction because the plaintiffs failed to prove their case at trial), *vacated on other grounds*, 554 F.3d 1340, 1355 (11th Cir. 2009) (affirming denial of permanent injunction).

85. Determination on Declaratory Relief and Permanent Injunction at 45, 49, Applewhite v. Commonwealth, No. 300 M.D. 2012, 2014 WL 184988, at *26 (Pa. Commw. Ct. Jan. 17, 2014).

86. *Id*. at *24.

cial, the same analysis renders the photo ID provisions . . . unconstitutional as applied to all qualified electors who lack compliant photo ID."[87]

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

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87. *Id*. at *65.

88. 43 F. Supp. 3d 808, 813–14 (S.D. Ohio 2014) (*NAACP I*), *aff'd* 768 F.3d 524 (6th Cir. 2014) (*NAACP II*), *stay granted sub nom.* Husted v. Ohio State Conference of the NAACP, 135 S. Ct. 42 (2014) (order) (*NAACP III*), *vacated on other grounds sub nom.* Ohio State Conference of the NAACP v. Husted, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (*NAACP IV*).

89. *NAACP I*, 43 F. Supp. 3d at 847–51.

90. *Id*. at 852 (emphasis added).

91. *Id*. at 853.

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

The Fourth Circuit entered a similar Defendant-Oriented Injunction to prevent North Carolina from eliminating its same-day voter registration period. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248–49 (4th Cir. 2014), *stay granted*, 135 S. Ct. 6 (2014) (order), *cert. denied*, 135 S. Ct. 1735 (2015). The Supreme Court likewise stayed that ruling from taking effect immediately before the 2014 election, League of Women Voters of N.C. v. North Carolina, 135 S. Ct. 6 (2014) (order), but ultimately denied certiorari, League of Women Voters of N.C. v. North Carolina, 135 S. Ct. 1735 (2015) (order).

2. Mandatory Issuance of Plaintiff-Oriented Injunctions

Several circuits, in contrast, emphasize the Supreme Court's directive in *Califano v. Yamasaki* that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*."[93] These jurisdictions have held that enjoining enforcement of a law, or otherwise restricting a defendant's conduct, toward parties not before the court violates *Califano*'s proscription because such additional relief generally is unnecessary to make the plaintiffs whole.[94] In their view, a Defendant-Oriented Injunction implicitly converts an individual suit into a de facto class action.[95]

The Supreme Court further bolstered the propriety of Plaintiff-Oriented Injunctions in *Doran v. Salem Inn., Inc.*, in which it held, "[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs."[96] Elsewhere, the Court has held that, in the absence of class certifica-

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

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

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

96. 422 U.S. 922, 931 (1975); *see, e.g.*, McCormack v. Hiedeman, 694 F.3d 1004, 1019–20 (9th Cir. 2012) (applying *Doran* to issue Plaintiff-Oriented Injunction); *see also* United States Dep't of Def. v. Meinhold, 510 U.S. 939, 939 (1993) (order) (staying lower court injunction insofar as it prohibited the military from applying its regulations to anyone other than the individual plaintiff).

tion, an "action is not properly a class action" and should not be treated as such.[97] Many courts have held that these principles require them to issue Plaintiff-Oriented Injunctions, prohibiting enforcement of an unconstitutional[98] or otherwise invalid[99] legal provision only against the individual plaintiffs in a suit while leaving the government defendants free to enforce that provision against anyone else.[100]

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

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97. Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976).

98. *See, e.g.*, Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (narrowing district court's injunction to prohibit the Navy from discharging the individual plaintiff for admitting he was gay, without precluding the Navy from taking such action with regard to anyone else); Vives v. City of New York, 305 F. Supp. 2d 289, 303–04 (S.D.N.Y. 2003) ("Although the Court has no doubt that the enforcement of section 240.30(1) with respect to 'annoying' or 'alarming' conduct is unconstitutional as applied to anyone . . . it is outside the scope of the Court's power to enjoin the NYPD from enforcing the statute against non-parties."), *rev'd in part on other grounds*, 405 F.3d 115 (2d Cir. 2005) (reversing district court's ruling that defendants did not have qualified immunity against plaintiff's claim for damages); Zelotes v. Adams, 363 B.R. 660, 667 (Bankr. D. Conn. 2007) ("An injunction applying only to Plaintiff—i.e., barring Defendant from enforcing § 526(a)(4) against him—will provide Plaintiff with complete relief. It is not necessary to make the injunction any broader."), *rev'd on other grounds*, 606 F.3d 34 (2d Cir. 2010).

99. *See, e.g.*, L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) ("An order declaring the hospice cap regulation invalid, enjoining further enforcement against [the individual plaintiff], and requiring the Secretary to recalculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief. . . . [T]he nationwide injunction must be vacated . . . ."); Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 436 (4th Cir. 2003) (overturning injunction that completely barred the defendant agency from applying its invalid interpretation of a federal statute to all mining within a certain region, because the plaintiff organization alleged injury only in connection with one particular site within that region); Native Angels Home Care Agency, Inc. v. Sebelius, 749 F. Supp. 2d 370, 379 (E.D.N.C. 2010); Russell-Murray Hospice, Inc. v. Sebelius, 724 F. Supp. 2d 43, 60 (D.D.C. 2010).

100. Interestingly, this principle has sometimes been invoked as a response to *Younger* abstention arguments, to demonstrate that a plaintiff's constitutional challenges to a state law could proceed in federal court despite pending state-level prosecutions against other people. *See, e.g.*, Mass. Delivery Ass'n v. Coakley, 671 F.3d 33, 43–44 (1st Cir. 2012); Womens Servs., P.C. v. Douglas, 653 F.2d 355, 358–59 (8th Cir. 1981).

101. Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist., 730 F.2d 258, 273–74 (5th Cir. 1984) ("[A]n injunction . . . is not necessarily made

stood, is a narrow exception to the preference for Plaintiff-Oriented Injunctions. A court may issue a Defendant-Oriented Injunction only if widespread relief is "inevitable to remedy the individual plaintiffs' rights,"[102] as in redistricting or desegregation cases.[103]

In *Virginia Society for Human Life, Inc. v. FEC*, for example, an anti-abortion non-profit corporation challenged an FEC regulation defining the term "express advocacy."[104] The corporation argued that the definition was impermissibly broad, because it caused groups to become subject to the Federal Election Campaign Act's disclosure and other administrative requirements simply for engaging in speech concerning political issues (such as abortion), rather than speech specifically aimed at impending elections.[105] The district court agreed that the regulation violated the First Amendment and enjoined the FEC from enforcing it against the plaintiff corporation or "any other party in the United States of America."[106]

The Fourth Circuit agreed that the regulation was unconstitutional,[107] but held that the "the district court abused its discretion by issuing a nationwide injunction," because it was "broader than necessary to afford full relief to [the corporation]."[108] The court added that "[p]reventing the FEC from enforcing [the regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff]."[109] It also pointed out that a nationwide injunction would prevent other circuits from considering the regulation's constitutional-

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overbroad by extending benefit or protection to persons other than prevailing parties in [a] lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled."); *accord* Brown v. Trs. of Brown Univ., 891 F.2d 337, 361 (1st Cir. 1989); *see also* Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 374 (5th Cir. 1981) ("[T]here are many cases where injunctive relief designed to assist a party will accidently assist persons not before the court.").

102. Zepeda v. INS, 753 F.2d 719, 728 n.1 (9th Cir. 1983).

103. *See supra* note 15.

104. 263 F.3d 379, 381 (4th Cir. 2001) (citing 11 C.F.R. § 100.22(b) (2000)).

105. *Id*. at 381–82.

106. *Id*. at 382.

107. *Id*. at 392.

108. *Id*. at 393.

109. *Id.*

ity for themselves, giving the Fourth Circuit's ruling binding effect outside of the court's geographic jurisdiction.[110]

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

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

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

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110. *Id.*

111. No. 13 Civ. 6769 (PAC), 2013 U.S. Dist. LEXIS 149598 (S.D.N.Y. Oct. 17, 2013), *rev'd*, 733 F.3d 483 (2d Cir. 2013), *on remand* 17 F. Supp. 3d 319 (S.D.N.Y. 2014).

112. *Id*. at *3.

113. *Id*. at *13–14.

114. *Id*. at *18–19.

115. *Id.* at *20.

116. *Id.*

117. N.Y. Prog. & Prot. PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013), *on remand* 17 F. Supp. 3d 319 (S.D.N.Y. 2014).

would apply only to the plaintiff SuperPAC in that case.[118] It held that such a limited injunction would not cause "severe disruptions to the election process itself" or other "sufficiently particularized" injuries that "outweigh[ed] the irreparable harm that stems from restrictions on political speech."[119] On remand, the district court begrudgingly enjoined the defendants from enforcing New York's contribution limit against the SuperPAC plaintiff and its donors.[120]

3. Intermediate or Compromise Approaches

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

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

118. *Id*. at 489.

119. *Id.*

120. N.Y. Prog. & Prot. PAC v. Walsh, 17 F. Supp. 3d 319, 323 (S.D.N.Y. 2014).

121. *See, e.g.*, Ctr. for Native Ecosystems v. Salazar, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011); Doe v. Rumsfeld, 341 F. Supp. 2d 1, 18 (D.D.C. 2004); Heartwood, Inc. v. United States Forest Serv., 73 F. Supp. 2d 962, 977 (S.D. Ill. 1999).

122. *See, e.g.*, U.S. Ass'n of Reptile Keepers v. Jewell, Civ. No. 13-2007 (RDM), 2015 U.S. Dist. LEXIS 65351, at *9 (D.D.C. May 19, 2015).

123. 843 F.2d 1163, 1165 (9th Cir. 1987).

124. 29 C.F.R. §§ 780.115, 780.200 (1982).

125. 29 U.S.C. § 1802(3) (1982).

126. *Bresgal*, 843 F.2d at 1165–66.

Circuit agreed with the plaintiffs' interpretation of the law and held that the regulation was invalid.[127]

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

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

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127. *Id*. at 1168.

128. *Id*. at 1169.

129. *Id.*

130. Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983).

131. *Bresgal*, 843 F.2d at 1170.

132. *Id*. at 1170–71 (emphasis omitted).

133. *Id*. at 1171.

134. *Id.*

135. *Id*. at 1169–70; *see also* Citizens for Better Forestry v. United States Dep't of Agric., Nos. C-05-1144 PJH, C-04-4512 PJH, 2007 U.S. Dist. LEXIS 51378, at *53–55 (N.D. Cal. July 3, 2007) (rejecting similar argument for geographic limits on injunction).

perhaps future employers. *Bresgal* is an example of a court adopting a sweeping, and likely inaccurate, interpretation of the "complete relief" exception to circuit precedents mandating Plaintiff-Oriented Injunctions.

C. Theoretical Tensions Underlying the Dispute

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

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

Allowing individual plaintiffs to obtain injunctions to enforce the rights of others outside the context of class-action liti-

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136. Dorf, *supra* note 10, at 236; *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (holding that a facially unconstitutional law "is unconstitutional in all of its applications").

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

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

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

140. FED. R. CIV. P. 23(a), (b)(2).

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

A second important dichotomy that exacerbates the difficulty of determining the proper scope of injunctive relief concerns the power of district courts themselves. On the one hand, a court has the power to certify statewide or even nationwide classes and issue injunctions restricting a defendant's behavior anywhere in a state or the nation.[141] On the other hand, most trial and intermediate appellate courts tend to have limited territorial jurisdictions; their legal opinions have no precedential force outside those boundaries.[142] The opinions of most trial courts, including federal district courts, generally lack precedential effect even within their territorial jurisdictions.[143] Moreover, government defendants generally are not subject to nonmutual offensive collateral estoppel. In other words, when a

141. Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979).

142. Camreta v. Greene, 131 S. Ct. 2020, 2033 n.7 (2011) ("'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'" (quoting 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 134.02[1][d] (3d ed. 2011))); *see also* Duran-Quezada v. Clark Constr. Group, LLC, 582 F. App'x 238, 239 (4th Cir. 2014) (per curiam) ("[T]he decisions of other circuits are not binding . . . ."); Hill v. Kan. Gas Serv. Co., 323 F.3d 858, 869 (10th Cir. 2003) (same). A few states, such as Maryland, have a single, centralized intermediate appellate court that, like the state supreme court, exercises statewide jurisdiction. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 1-401 to 1-403 (West 2016).

143. *Camreta*, 131 S. Ct. at 2033 n.7.

government official or agency loses a case concerning the validity or proper interpretation of a legal provision, it may attempt to relitigate and prevail on the same points against different opponents.[144] Additionally, trial court opinions generally are not even considered in determining whether a government official may be stripped of qualified immunity because the law she allegedly violated was "clearly established."[145]

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

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

144. United States v. Mendoza, 464 U.S. 154, 158 (1984).

145. *See supra* note 55.

146. *Cf*. Baude, *supra* note 49, at 1844–45 (arguing that the executive branch is obligated to obey court judgments, but not necessarily to adhere to judicial opinions); Merrill, *supra* note 49, at 44 (same). *But see* Cooper v Aaron, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . ."); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000) (arguing that judicial opinions have the same force of law as judgments).

147. Morley, *Public Law at the Cathedral*, *supra* note 30, at 2461–65; *see also* Merrill, *supra* note 49, at 58–59.

148. *Cf*. Walker, *supra* note 23, at 1134–35. Furthermore, important constitutional issues are prevented from "percolating" through the lower courts, to give different courts the opportunity to craft competing approaches for the Supreme Court to consider. *See* Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

149. *See* Walker, *supra* note 23, at 1134.

spective rights and duties toward each other.[150] Even most litigation against the government is of this nature. In a typical Social Security case, for example, a claimant may challenge the interpretation or validity of a Social Security Administration regulation in order to increase the amount of her own benefits, without regard to whether or how the regulation is enforced against others.[151] Or in a criminal case, a defendant asserting a constitutional defense to a statute generally is focused primarily on avoiding conviction, rather than preventing the statute from being applied to others.[152] The real parties-in-interest in such suits are generally involved as litigants.[153]

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

150. Lon L. Fuller, *The Form and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (describing traditional model of adjudication); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–88 (1976).

151. *See, e.g.*, Shinn v Comm'r of Soc. Sec., 391 F.3d 1276 (11th Cir. 2004).

152. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012) (upholding defendant's First Amendment defense to criminal prosecution under the Stolen Valor Act, 18 U.S.C. § 704(b), for lying about receiving military decorations).

153. Fuller, *supra* note 150, at 369, 385–87.

154. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1445 (2014).

155. *See, e.g.*, Citizens United v. FEC, 558 U.S 310, 359–60 (2010).

156. Anderson v. United States, 417 U.S. 211, 226 (1974) (holding that a person has the constitutional right to have his or her vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent" or otherwise invalid ballots); *see also* Reynolds v. Sims, 377 U.S. 533, 555 (1964) (holding that a person's right to vote is "denied by a debasement or dilution of the weight of [his or her] vote just as effectively as by wholly prohibiting the free exercise of the franchise"); Baker v. Carr, 369 U.S. 186, 208 (1962) (holding that the right to vote is violated by "dilution" of people's votes through means such as "stuffing of the ballot box"); *see generally* Morley, *State Constitutions*, *supra* note 8, at 192–93 (discussing the "defensive" right to vote).

detract from, the perceived fairness or integrity of the system.[157] Such cases thus resemble the type of public law structural reform litigation discussed by Owen Fiss[158] and Abram Chayes.[159] Courts that view their role to be the defense of public values and constitutional principles, rather than simply the adjudication of private disputes, will strongly prefer Defendant-Oriented Injunctions.[160]

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

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

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

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

160. Wilton, *supra* note 23, at 615.

161. *See* Walker, *supra* note 23, at 1121.

II. THE PROBLEMS WITH DEFENDANT-ORIENTED INJUNCTIONS

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

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

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162. *See supra* Part I.B.1.

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

164. Alexandra Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545, 556 (2012); *see also* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 256 (1987) (noting that, in cases where plaintiffs seek certain kinds of injunctive relief, "the failure to provide for class treatment could result either in contradiction or inconsistency").

165. *See* Morley, *Public Law at the Cathedral*, *supra* note 30, at 2481–83 (explaining the importance of the distinction between actually being protected by an injunc-

Leaving some rightholders unprotected also can lead to subsequent lawsuits, needlessly wasting judicial resources to re-litigate the same issues and creating a risk of inconsistent verdicts from different courts.[166]

On the other hand, issuance of a Defendant-Oriented Injunction in an individual-plaintiff lawsuit effectively turns the matter into a "'de facto class action[],'"[167] typically without addressing the numerous constitutional, procedural, practical, and policy considerations that such relief implicates. First, the plaintiffs usually lack standing to protect the rights of third parties, and particularly the rights of the public as a whole. Second, relatedly, Defendant-Oriented Injunctions may violate the due process rights of non-parties to the litigation. By seeking a Defendant-Oriented Injunction, individual plaintiffs leverage the rights of third parties who may not even be subject to the court's personal jurisdiction, without their consent, in order to obtain more sweeping relief. Third, Defendant-Oriented Injunctions have unfairly asymmetric preclusive effects. A successful plaintiff can bind the government defendants regarding people who are not before the court. If the defendants prevail, in contrast, that judgment generally does not preclude subsequent actions, either in the same court or other jurisdictions, by third parties.

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

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tion, and merely having a substantial chance of obtaining one). These objections to Plaintiff-Oriented Injunctions in non-class constitutional cases parallel the concerns with underinclusive class definitions in class actions. *See* Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402, 420 (1996) ("The principal harm caused by defining a class narrowly is the potential of denying similarly situated persons the same opportunity for relief for similar claims.").

166. Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 507 (1987).

167. Nagareda, *Embedded Aggregation*, *supra* note 163, at 1108 (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008)).

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

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

A. Standing

Perhaps the most fundamental problem with Defendant-Oriented Injunctions, particularly in federal court, is that courts likely lack subject-matter jurisdiction to grant them. Federal courts are limited to adjudicating live "cases" and "controversies."[168] This "case and controversy requirement," among other things, allows federal courts to adjudicate only disputes in which the plaintiff has standing.[169]

To have standing, a plaintiff must show that he has suffered injury-in-fact, that the defendant caused it, and—most importantly from a remedial perspective—that the "injury will be 'redressed by a favorable decision.'"[170] As the redressability prong of this test implies, a plaintiff must have standing not

168. U.S. CONST. art. III, § 2, cl. 1.

169. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). Elsewhere, I have argued that Article III's case or controversy requirement also requires that the litigants actually be adverse to each other. Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems of Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 661–64, 666–68 (2014). Although the Supreme Court traditionally has characterized the "adverseness" requirement as an essential component of justiciability, *see, e.g.*, Lord v. Veazie, 49 U.S. (8 How.) 251, 254–56 (1850), the majority in *United States v. Windsor*, 133 S. Ct. 2675, 2685–87 (2013), labeled it merely "prudential."

170. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

only to assert a cause of action, but also to pursue each form of relief she seeks.[171]

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

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

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

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

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171. Camreta v. Greene, 131 S. Ct. 2020, 2041 (2011) ("Plaintiffs must establish standing as to each form of relief they request . . . ."); *accord* Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.'" (quoting *Lujan*, 504 U.S. at 560 n.1)).

172. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000).

173. Salazar v. Buono, 559 U.S. 700, 734 (2010).

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

175. *See, e.g.*, *Steel Co.*, 523 U.S. at 108–09; Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

176. *See supra* note 18 and accompanying text.

faces.[177] Once a court orders that a plaintiff's rights be enforced, her claim is mooted.[178]

A broader, Defendant-Oriented Injunction barring the government defendant from enforcing the law against others would not redress any harm to that plaintiff.[179] A plaintiff lacks standing to seek such broader relief, and it would not be a proper exercise of a court's Article III authority to grant it. *Lujan*'s redressability requirement thus prevents a plaintiff from bootstrapping, based on the injury she has suffered to her own rights, to seek an injunction protecting the rights of others.[180]

Of course, to grant complete relief to a plaintiff, a court sometimes must issue an order which winds up benefiting other people. For example, as discussed earlier, if a plaintiff demonstrates that legislative districts have been drawn unconstitutionally, there is no way for the court to order a set of constitutionally valid districts to be drawn for the plaintiff, while allowing the invalidated districts to remain in force for everyone else.[181] Apart from such cases involving "indivisible" rights, however, individual plaintiffs lack Article III standing to seek Defendant-Oriented Injunctions in non-class cases.

A Defendant-Oriented Injunction cannot be analogized to a prophylactic injunction that attempts to prevent future violations of a plaintiff's rights by prohibiting more conduct than is actually unconstitutional or illegal.[182] A Defendant-Oriented Injunction enforces the rights of people other than the plaintiff, despite the absence of any additional marginal benefit concerning the plaintiff's rights. Although courts have broad eq-

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177. *See supra* note 94 and accompanying text; *see also* L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 665 (9th Cir. 2011) ("An order declaring the hospice cap regulation invalid, enjoining further enforcement against [the individual plaintiff], and requiring the Secretary to recalculate its liability in conformity with the hospice cap statute, would have afforded the plaintiff complete relief. . . . [T]he nationwide injunction must be vacated."); Weber, *supra* note 16, at 361.

178. Carroll, *supra* note 20, at 2031.

179. *See, e.g.*, Capograsso v. 30 River Ct. E. Urban Renewal Co., 482 F. App'x 677, 681 (3d Cir. 2012) (holding that a tenant's attempt to seek relief "on behalf of the other former tenants is precisely the sort of claim that does not confer standing").

180. *See supra* note 174.

181. *See supra* note 15.

182. *Cf. supra* notes 36–37 and accompanying text.

uitable discretion in crafting the scope of injunctive relief,[183] Article III imposes outer bounds on the scope of that discretion. Relief that goes beyond redressing a plaintiff's injuries is beyond the court's authority.

Defendant-Oriented Injunctions also exceed prudential limitations on *jus tertii* standing.[184] The general prudential prohibition on *jus tertii* standing provides that, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[185] As the Supreme Court declared in *Broadrick v. Oklahoma*, "constitutional rights are personal and may not be asserted vicariously."[186] Because *jus tertii* is a prudential doctrine, the Court has crafted some exceptions, allowing individuals to sue to enforce the rights of others in certain situations, such as where the plaintiff has a special relationship with those third parties[187] or in First Amendment overbreadth cases.[188] Even when a plaintiff may invoke the rights of third parties, however, Article III still requires the plaintiff to demonstrate that the relief she seeks will redress an injury to herself.[189]

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183. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

184. United Food & Commercial Workers v. Brown Grp., 517 U.S. 544, 557 (1996).

185. Warth v. Seldin, 422 U.S. 490, 499 (1975); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984) ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights . . . .").

186. 413 U.S. 601, 610 (1973).

187. *See* Singleton v. Wulff, 428 U.S. 106, 115–16 (1976).

188. Vill. of Schaumburg v. Citizens for a Better Env't., 444 U.S. 620, 634 (1980). Scholars have made the point that, in a fundamental rights case where the plaintiff contends that a statute is unconstitutional because it is insufficiently tailored, she is effectively asserting the rights of others. Dorf, *supra* note 10, at 265–66, 269, 271. In such cases, the plaintiff need not show that the conduct in which she wishes to engage is constitutionally protected. Rather, she can argue that the law that bars her from performing those acts is invalid because it unnecessarily extends to other situations, interfering with the right of other people to engage in acts the government lacks a permissible basis for prohibiting.

189. *Allen*, 468 U.S. at 751 (holding that, even when *jus tertii* standing is permissible as a prudential matter, the "core component" of standing doctrine "derived directly from the Constitution" requires the plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be

Defendant-Oriented Injunctions are inconsistent with restrictions on *jus tertii* standing. Allowing individual plaintiffs to seek Defendant-Oriented Injunctions that completely prohibit government defendants from enforcing challenged legal provisions enables them to assert the rights of third parties with whom they lack any special relationship. Such a prerogative turns every individual plaintiff into a roving private attorney general.[190] As the Ninth Circuit held:

> [O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated. A person who desires to be a "self-chosen representative" and "volunteer champion," must qualify under rule 23. To be sure, failure to grant class relief may leave a government official—temporarily—in a position to continue treating nonparties in a manner that would be prohibited with respect to named plaintiffs. But that is the nature of the relief.[191]

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

B. Due Process and Other Rightholders

A second problem with Defendant-Oriented Injunctions is that they infringe the due process rights of the third parties whose underlying substantive rights the court is adjudicating and enforcing. When a plaintiff seeks a Defendant-Oriented Injunction, it is typically leveraging the rights of third parties who are not before the court to obtain an order that sweeps far more broadly than is necessary to enforce the plaintiff's own rights.[192] All alleged rightholders across the state or nation be-

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

190. *Cf. Broadrick*, 413 U.S. at 610–11 ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.").

191. Zepeda v. INS, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949)).

192. *Cf.* Williams, *supra* note 15, at 604 ("Compelled adjudication of claims in a mandatory class proceeding deprives individuals of this right to exclude by allowing their property (i.e., their legal claims) to be used by someone else (i.e., the class representatives and their attorneys) without their consent and for a purpose with which they may not agree.").

come, in effect, members of an implied class, despite the fact that they have not been brought before the court, been notified about the case, or consented to such representation. Many of the rightholders may disagree with the plaintiff's proffered interpretation of the constitutional or other legal provisions at issue, or even support the statutes or regulations the plaintiff is challenging.[193]

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

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

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193. *See* Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) ("Federal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons not parties to the litigation," in part because "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights . . . do not wish to assert them . . . ."); Rubenstein, *supra* note 20, at 1650 (recognizing that rightholders may not support or wish to be part of a civil rights suit, and would "rather not have the case in court"); Maximilian A. Grant, Comment, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239, 246 (1996) ("[W]here a class action seeks equitable relief in pursuit of political or ideological goals, class cohesion cannot be presumed."); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505–11 (1976).

194. Morley, *State Constitutions*, *supra* note 8, at 192–93.

195. Anderson v. United States, 417 U.S. 211, 226 (1974).

process before adjudicating and enforcing their constitutional or other legal entitlements.[196] When a plaintiff initiates judicial proceedings, it invokes and thereby implicitly consents to the court's personal jurisdiction.[197] When a person becomes an involuntary plaintiff through the actions of some other litigant, however, she should be entitled to the same service-of-process protections as a defendant.[198]

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

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

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196. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946); *see also* FED. R. CIV. P. 4(k)(1)–(2).

197. *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."); Merchs. Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 289 (1907) (holding that, by filing a counterclaim, a defendant effectively becomes a plaintiff and submits to the personal jurisdiction of the court).

198. *See* Indep. Wireless Tel. Co. v. Radio Corp. of Am., 269 U.S. 459, 473 (1926) (holding that a court may join a third party as a plaintiff without its consent only if it is outside the court's jurisdiction for service of process and it has received prior notice of the proceedings).

199. *Cf.* Weber, *supra* note 16, at 391, 394 (making the same due process argument regarding members of a class certified under Rule 23(b)(2) who were not given an opportunity to opt out); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (emphasizing that notice and an opportunity to be heard are central to the concept of due process). *But see infra* notes 204–08, 274–76 and accompanying text (explaining that such purported rights are not available in Rule 23(b)(2) class actions, and that the Court has never decided whether the Due Process Clause protects them in that context).

200. 553 U.S. 880, 884–85 (2008).

201. Weber, *supra* note 16, at 374–76 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)); Williams, *supra* note 15, at 619–21 (citing Tulsa Prof'l Collection

gues, an important component of such an entitlement is "the right to decide *whether or not to sue*" to enforce it.[202] He explains, "Judicial recognition of . . . an autonomy-based right to seek vindication of one's legal claims in court seems to strongly support the existence of a corollary autonomy-based right to refrain from asserting those claims as well."[203] A Defendant-Oriented Injunction deprives rightholders of their constitutionally protected interest in deciding for themselves whether to assert and seek enforcement of their underlying rights.

The Supreme Court held in *Phillips Petroleum Co. v. Shutts* that putative class members outside of a court's territorial jurisdiction have a due process right to opt out of class actions seeking monetary damages.[204] It left open the question of whether putative class members may claim a similar due process right to opt out of suits for injunctive relief,[205] but later noted the "serious possibility" that a denial of such opt-out rights would violate due process.[206] Mark C. Weber agrees that *Shutt*'s reasoning carries over to the context of injunctions,[207] but some lower courts have rejected this conclusion.[208]

Perhaps the most powerful response to these objections is that rightholders are already deprived of control over their causes of action, without notice or an opportunity to be heard, in the context of Rule 23(b)(2) lawsuits.[209] A Defendant-Oriented Injunction is a milder tool than a Rule 23(b)(2) lawsuit because it allows third parties to reap the benefits of a favora-

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Servs. v. Pope, 485 U.S. 478, 485 (1988); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985)).

202. Williams, *supra* note 15, at 623.

203. *Id*. at 629; *cf*. Weber, *supra* note 16, at 390 (discussing the right to "use a system of adjudication to obtain one's own decision").

204. 472 U.S. 797, 812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.").

205. *Id*. at 811 n.3 ("We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

206. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011).

207. Weber, *supra* note 16, at 385.

208. *See, e.g.*, Messier v. Southbury Training Sch., 183 F.R.D. 350, 355–56 (D. Conn. 1998); Ahearn v. Fibreboard Corp., No. 6:93-CV-526, 1995 U.S. Dist. LEXIS 11523, at *34 (E.D. Tex. July 27, 1995); Avagliano v. Sumitomo Shoji Am., Inc., 107 F.R.D. 748, 749–50 (S.D.N.Y. 1985).

209. *See infra* Part III.A.

ble ruling without subjecting them to the res judicata effects of an unfavorable one.[210] On the other hand, commentators have also challenged the constitutionality of Rule 23(b)(2) on these very grounds,[211] and the Supreme Court has not yet squarely addressed the issue.[212]

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

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

C. Asymmetric Preclusion

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

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210. *See infra* Part II.C.

211. Williams, *supra* note 15, at 623, 629; Weber, *supra* note 16, at 401 (arguing that members of a Rule 23(b)(2) class should be subject to res judicata only if they were given notice and an opportunity to opt out of the proceedings); *see also* Grant, *supra* note 193, at 251–56 (arguing that the inclusion of class members in a lawsuit without giving them notice and an opportunity to opt out violates their First Amendment right to refrain from associating themselves with litigation they may oppose).

212. *See supra* notes 205–06 and accompanying text.

213. *See infra* Part II.D, Part III.A.

214. Nagareda, *Embedded Aggregation*, *supra* note 163, at 1113; *see* Carroll, *supra* note 20, at 2020–21. *But see* Robert Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 288 (1992) (supporting "nonparty preclusion" of people who had not participated, either directly or through a surrogate, in an earlier case).

sive symmetry exists when a lawsuit will have the same res judicata effect on both plaintiffs and defendants. Richard Nagareda explains that a plaintiff "ought not to be positioned to wield the bargaining leverage of a class-wide trial without, at the same time, affording to the defendant the assurance of a commensurately binding victory were the defendant, rather than the plaintiff class, to prevail on the merits."[215]

When a court is willing to grant a Defendant-Oriented Injunction, res judicata applies asymmetrically to the plaintiffs and defendants. If an individual plaintiff prevails, the court will impose a broad Defendant-Oriented Injunction, barring the government defendant from enforcing the challenged legal provision against anyone. In other words, a victory from any individual plaintiff binds the government defendant with regard to all other rightholders, and prevents that defendant, its privies, or agents[216] from relitigating the issue against other rightholders.

Conversely, if an individual plaintiff loses, res judicata does not preclude other rightholders from raising identical challenges to the same legal provision,[217] perhaps with different adjudicative or legislative facts, or in different courts or before a different judge.[218] Thus, third-party rightholders stand to benefit from a ruling in favor of the individual plaintiff, but face no consequences from an adverse ruling if the individual plaintiff loses. The Civil Rules Advisory Committee amended Rule 23 in 1966 to abolish "spurious" class actions specifically to eliminate such asymmetric preclusion.[219] The fairness concerns underlying the principle of preclusive symmetry thus counsel against Defendant-Oriented Injunctions.

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215. Nagareda, *Embedded Aggregation*, *supra* note 163, at 1113.

216. *See* FED. R. CIV. P. 65(d)(2).

217. Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *see also* Martin v. Wilks, 490 U.S. 755, 762 (1989) (discussing "our 'deep-rooted historic tradition that everyone should have his own day in court'" (quoting 18 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449 (1981))).

218. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880 (2008) (permitting the plaintiff to sue the FAA for denying a FOIA request, even though an associate of his had unsuccessfully sued the FAA in a different court for denying a previous, identically worded request).

219. *See supra* note 46 and accompanying text.

It might be objected that, although other rightholders may not be formally bound by res judicata or collateral estoppel, an adverse ruling in an earlier case still will limit future suits as a matter of stare decisis. Trial court rulings, however, are not precedential and have no stare decisis effect, even within the same jurisdiction.[220] Even an intermediate appellate court ruling, in systems such as the federal judiciary that are divided regionally, is not binding outside of the court's territorial jurisdiction. Thus, most rulings in individual-plaintiff cases will not bar subsequent litigants from raising the same claims as a matter of stare decisis.

It also might be objected that asymmetric preclusion is not problematic or unfair.[221] Jeremy Bentham himself rejected a mutuality requirement for claim preclusion.[222] The Supreme Court authorized non-mutual defensive collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[223] and non-mutual offensive collateral estoppel (at least against private parties) in *Parklane Hosiery Co., Inc. v. Shore*.[224] Whatever the merits of those rulings in the context of purely private disputes, the Court held in *United States v. Mendoza* that the government generally should not be subject to non-mutual offensive collateral estoppel.[225] It explained that permitting non-mutual offensive collateral estoppel against the Government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[226] It also would "force the Solicitor General . . . to appeal every adverse decision in order to avoid foreclosing further review."[227] Many subsequent cir-

220. *See supra* notes 142–43 & accompanying text.

221. Weber, *supra* note 16, at 404; *see also* Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 303 (1929).

222. 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827).

223. 402 U.S. 313, 322–25, 327–30, 350 (1971) (discussing opposition to mutuality requirement for res judicata).

224. 439 U.S. 322, 329–33 (1979) (explaining why mutuality should not be required for offensive collateral estoppel).

225. 464 U.S. 154, 158–62 (1984). *Mendoza* thus precludes plaintiffs suing the government from invoking *Parklane Hosiery*.

226. *Id.* at 158.

227. *Id*. at 161.

cuit courts later applied this ruling to state litigants, as well,[228] although not to municipalities.[229]

Defendant-Oriented Injunctions are contrary to *Mendoza*. An injunction completely barring a government defendant from enforcing a challenged legal provision "freez[es] the first final decision rendered" on the issue.[230] Moreover, it effectively compels the government defendant to appeal, rather than waiting for a more favorable fact pattern or allowing the law to percolate through various courts.[231] Indeed, a Defendant-Oriented Injunction is an even stronger remedy than non-mutual offensive collateral estoppel, because it takes effect without another rightholder having to file a subsequent lawsuit. The same reasons that led the *Mendoza* Court to bar plaintiffs from asserting non-mutual offensive collateral estoppel against government defendants apply with even greater force to preclude them from seeking Defendant-Oriented Injunctions.

D. The Law of Judgments and Rule 23

Yet another concern about the issuance of Defendant-Oriented Injunctions in individual-plaintiff cases is that they undermine the policy concerns that drive the law of judgments and Rule 23. In general, judgments settle the legal rights and obligations of the parties to a case against each other, and do not extend to third parties who are not before the court.[232] The Court applied a variation of this principle in the punitive damages context in *Philip Morris USA v. Williams*: "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[233]

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228. *See, e.g.*, Idaho Potato Comm'n v. G&T Terminal Packaging, Inc., 425 F.3d 708, 713–14 (9th Cir. 2005); Hercules Carriers, Inc. v. Florida, 768 F.2d 1558, 1577–79 (11th Cir. 1985).

229. *See, e.g.*, Robinson v. City of Chicago, 868 F.2d 959, 968 (7th Cir. 1989).

230. *Mendoza*, 464 U.S. at 158.

231. *Id*. at 161.

232. Hansberry v. Lee, 311 U.S. 32, 40–41 (1940); Fiss, *supra* note 158, at 21–22; Chayes, *supra* note 150, at 1285.

233. 549 U.S. 346, 353 (2007).

Rule 23 provides an exception to this principle, allowing one party to litigate on behalf of a class of rightholders when, among other things, a court determines that the rule's numerosity, commonality, typicality, and adequacy of representation requirements are satisfied.[234] By issuing a Defendant-Oriented Injunction in a non-class case, a court effectively grants classwide relief without determining whether Rule 23's requirements are satisfied, thereby circumventing and undermining Rule 23.[235]

As discussed in the previous Section, Defendant-Oriented Injunctions also allow rightholders to potentially reap the benefit of a favorable ruling without subjecting them to the res judicata effect of an unfavorable ruling. Rule 23 was amended in 1966 to eliminate the possibility of such asymmetric claim preclusion by eliminating "spurious" class actions.[236] Defendant-Oriented Injunctions are therefore contrary to the policies underlying Rule 23.

E. Geographic Limitations of Lower Courts

A final difficulty with Defendant-Oriented Injunctions is that they allow a court to give legal effect to its rulings beyond the scope of its territorial jurisdiction. When a court decides a case, it may issue two different types of documents: a judgment, which only specifies the ultimate outcome,[237] and a written opinion, which explains the legal reasoning that led to the judgment. The judgment, by definition, has what can be called

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

235. Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) (holding that the district court erred in "treat[ing] the suit as a class action" because, "[w]ithout such certification and identification of the class, the action is not properly a class action"); Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154, 171 (3d Cir. 2011) ("Once decertification became effective, the District Court had no jurisdiction over any of the claims of the putative class members and therefore no ability to order that any relief be granted to any claimant other than [the individual plaintiff]."); Brown v. Trs. of Brown Univ., 891 F.2d 337, 361 (1st Cir. 1989) ("Ordinarily, classwide relief, such as the injunction here which prohibits sex discrimination against the class of Boston University faculty, is appropriate only where there is a properly certified class."); Zepeda v. INS, 753 F.2d 719, 727–28 & n.1 (9th Cir. 1983) ("We understand concerns that rule 23 may present a significant hurdle for those seeking broad, class-based relief. But we assume that that was precisely the intent of its drafters.").

236. *See supra* note 46 and accompanying text.

237. *See* FED. R. CIV. P. 58(a).

"adjudicative effects": it resolves the dispute between the parties and specifies their respective legal rights and obligations toward each other. A judgment is generally binding and enforceable anywhere; its effects are national, and potentially even global, in scope. A monetary judgment can typically be domesticated in any state and executed through levies and garnishment, as permitted by state law.[238] Similarly, a defendant may be enjoined from violating a law anywhere in the state or nation.[239] The res judicata and collateral estoppel effects of a valid judgment also generally apply in all state and federal courts throughout the nation. Thus, in a variety of ways, the adjudicative effects of a court's ruling—in other words, the effects of the judgment itself—can reverberate far beyond the county or judicial district in which the court exercises territorial jurisdiction.

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

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

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238. *See* FED. R. CIV. P. 69(a)(1).

239. Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979).

240. *See* Girardeau Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 593 (1983) ("Given the importance of the courts' expository role in the federal legislative process and of their role as the guardians and interpreters of fundamental rights, exposition rather than dispute resolution should be viewed as the primary function of the courts."). For a critical analysis of the conflicts that can arise between a court's law-exposition and dispute-resolution functions, see Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 326–33 (2014).

241. *See supra* notes 53–55 and accompanying text.

plaintiffs, for example, by allowing them to remain on the voter registration rolls, vote early, vote without showing identification, have their facially invalid ballots be counted, or be excused from some other statutory or regulatory requirement. Although fairness or other constitutional concerns may arise, it is indisputably possible to extend such entitlements to individual plaintiffs without doing so for the rest of the electorate.[242]

When a trial or appellate court nevertheless enters a Defendant-Oriented Injunction, it is effectively giving its legal opinion the force of law on a statewide or nationwide basis, beyond where its opinions have any expositive effect. The court is preemptively resolving potential disputes between the government defendants and other rightholders who are not before the court, including those living in other counties or judicial districts, concerning events, transactions, or conduct outside the court's territorial jurisdiction.[243]

Such "extraterritorial" application of legal determinations happens, of course, in statewide or nationwide class actions. Even though a court's territorial jurisdiction is limited, it has the power to certify classes to include putative members out-

242. *See, e.g.*, Lowery v. Circuit City Stores, 158 F.3d 742, 766 (4th Cir. 1998) ("The injunction's provisions . . . relating to [the individual plaintiff], on the other hand, are broad enough to provide her with complete relief without being overly burdensome or expansive."), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999); Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (holding that the plaintiff would receive "[e]ffective relief" with an injunction barring the Navy from enforcing the challenged policy only against him); Zepeda v. INS, 753 F.2d 719, 727–28 & n.1 (9th Cir. 1983) ("The individual plaintiffs challenge INS enforcement policies with respect to aliens of Hispanic background. . . . The injunctive relief requested can be granted to the individual plaintiffs without the relief inevitably affecting the entire class."); *see also* Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist., 730 F.2d 258, 274 (5th Cir. 1984) ("[W]e cannot infer why protecting [an organization's] other members was necessary to relieve [the individual plaintiff]."); Zelotes v. Adams, 363 B.R. 660, 667 (Bankr. D. Conn. 2007) ("An injunction applying only to Plaintiff—i.e., barring Defendant from enforcing [the challenged statute] against him—will provide Plaintiff with complete relief. It is not necessary to make the injunction any broader."), *rev'd on other grounds*, 606 F.3d 34 (2d Cir. 2010).

243. *See, e.g.*, Meyer v. CUNA Mut. Ins. Soc'y, 648 F.3d 154, 169–71 (3d Cir. 2011) (overturning a Defendant-Oriented Injunction awarded to an individual plaintiff because "the District Court had no jurisdiction over any of the claims of the putative class members and therefore no ability to order that any relief be granted to any claimant other than [the individual plaintiff]"); Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003) ("The injunction issued by the district court is overly broad in that the class wide focus is completely unnecessary to provide the named plaintiffs the relief to which they are entitled as prevailing parties.").

side that jurisdiction when Rule 23's requirements are met.[244] The Supreme Court has held, however, that it is generally "preferable" for district courts to refrain from certifying classes that extend beyond their geographic limits.[245]

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

III. SOME POTENTIAL SOLUTIONS

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

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

244. *See* FED. R. CIV. P. 23; Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979) (recognizing the power of district courts to grant nationwide injunctions).

245. *Califano*, 442 U.S. at 702.

246. *See supra* notes 160–61 and accompanying text.

247. *See generally supra* Part II.

248. FED. R. CIV. P. 23(b)(2).

relief in individual-plaintiff, non-class cases.[249] On its own, however, the rule is insufficient to resolve remedial concerns in such cases.

Section B explores the remedies available in non-class lawsuits brought by institutional plaintiffs. When an entity relies on associational standing,[250] it is simply standing in for its members who are adversely affected by the challenged provision. A suit based on associational standing is, in effect, a suit brought on behalf of a substantial number of individual plaintiffs (that is, all of the organization's members who are affected by the challenged provision), but does not include all rightholders within the jurisdiction. Thus, associational standing neither avoids nor resolves the fundamental challenges raised by individual-plaintiff cases.

When an entity asserts organizational standing,[251] in contrast, it may seek a Defendant-Oriented Injunction completely barring enforcement of a legal provision. The gravamen of such a suit is that enforcement of the challenged provision against any members of the public harms the organization itself by interfering with the organization's mission—which is typically ideological or policy-related—and requiring the diversion of the organization's resources. Current doctrine greatly limits the ability of entities to assert organizational standing, however. Moreover, that alternative will be unavailable in cases where no appropriate organization exists or wishes to challenge a particular provision. Additionally, the concept of organizational standing fits somewhat uncomfortably with Article III's limitations on standing.

Section C discusses the possibility of centralizing adjudication of election-related disputes in a particular court. Such "unity of forum" proposals,[252] which already are included in Section 5 of the Voting Rights Act[253] and the Bipartisan Campaign Reform Act,[254] would eliminate concerns stemming from

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249. *See infra* Part IV.

250. *See infra* notes 278–79 and accompanying text.

251. *See infra* notes 280–86 and accompanying text.

252. Nagareda, *Embedded Aggregation*, *supra* note 163, at 1114.

253. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (Aug. 6, 1965) (codified as amended in scattered sections of 52 U.S.C.).

254. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 403(a)(1), (a)(3), 116 Stat. 81, 113 (Mar. 27, 2002) (codified at 52 U.S.C. § 30110).

geographic limits on the scope of a lower court's power.[255] Such an approach is vulnerable to the objections typically raised against specialized courts, however, and provides no assistance in resolving public law disputes that fall outside the jurisdiction of any such court.

Finally, Section D examines the possibility that Equal Protection principles might require courts to issue broad Defendant-Oriented Injunctions that protect all rightholders equally as the remedy for constitutional rights violations.

A. Rule 23(b)(2) Class Actions

Class actions seeking classwide injunctive relief are one obvious means of avoiding both the deficiencies of Plaintiff-Oriented Injunctions and the concerns about Defendant-Oriented Injunctions that arise in cases brought by individual plaintiffs.[256] One of the main objections to Plaintiff-Oriented Injunctions is that they underenforce rights by allowing government defendants to continue enforcing invalidated legal provisions against non-parties. Class actions under Rule 23(b)(2) alleviate this concern.

Rule 23(b)(2) allows a court to certify a class if Rule 23(a)'s general requirements of numerosity, commonality, typicality, and adequacy of representation are satisfied,[257] and the defendant has acted or refused to act "on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[258] Unlike with most other types of class actions, putative class members are not entitled to receive notice of the suit or an opportunity to opt out before the class is certified.[259]

Rule 23(b)(2) was crafted specifically to facilitate civil rights litigation.[260] It allows rights to be enforced on an "aggregate"

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255. *See supra* Part II.E.

256. *See generally* Carroll, *supra* note 20 (advocating Rule 23(b)(2) class actions as a means of resolving remedial issues in suits for injunctive relief).

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

258. *Id.* R. 23(b)(2).

259. *Id.* R. 23(c)(2)(A) (specifying that the court has discretion over whether to order pre-certification notice to putative members of proposed classes under Rule 23(b)(2)).

260. FED. R. CIV. P. 23, Advisory Committee's Note (1966), *available at* 39 F.R.D. 73, 102; Garrett, *supra* note 15, at 603, 608–09; Carroll, *supra* note 20, at 2025.

basis by permitting all rightholders to be included as part of the plaintiff class.[261] Thus, all similarly situated people stand to benefit equally from a favorable ruling, preventing disparities in the enforcement of rights.[262]

The breadth of the plaintiff class in a Rule 23(b)(2) case makes a Plaintiff-Oriented Injunction effectively equivalent to a Defendant-Oriented one. Many of the concerns about Defendant-Oriented Injunctions[263] are therefore alleviated. All rightholders in the class are bound by the outcome of the suit[264] whereas, in an individual suit, no one other than the plaintiff is precluded from bringing a subsequent challenge.[265] Thus, class-based challenges to the validity of laws and regulations prevent individual plaintiffs from bringing a succession of lawsuits against a legal provision until they inevitably find a favorable judge who might be willing to make factual findings and legal determinations in their favor.

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261. Garrett, *supra* note 15, at 598; *see also* Nagareda, *Preexistence Principle*, *supra* note 163, at 232 (advocating the use of class actions for injunctive relief where "it is not possible to ascertain the legality of the defendant's conduct as to one affected claimant without necessarily doing so as to all others").

262. Carroll, *supra* note 20, at 2022 ("Class treatment pursuant to Rule 23(b)(2) increases the likelihood that a court will issue a final decision on the merits that reaches system-wide . . . through a process designed to protect the interests of all those affected."); Lahav, *supra* note 164, at 557 ("[T]he class action furthers equality by better ensuring equal outcomes among similarly situated litigants on the same side."); Garrett, *supra* note 15, at 613 (arguing that Rule 23(b)(2) civil rights class actions "may result in greater equality of results" by alleviating the risk of "inconsistent verdicts"); Tenny, *supra* note 23, at 1019, 1034–35 (advocating Rule 23(b)(2) class actions so that people affected by an invalidated legal provision need not institute independent lawsuits to prevent its enforcement); *cf*. Slack, *supra* note 23, at 966 (recognizing that nationwide class actions lead to uniformity). Walker concludes that Defendant-Oriented Injunctions may be appropriate in certain cases, but does not explain why courts should issue them without first certifying Rule 23(b)(2) classes. Walker, *supra* note 23, at 1149–51.

263. *See supra* Part II.

264. Wilton, *supra* note 23, at 598 & n.7, 622–23; Garrett, *supra* note 15, at 597, 613; Nagareda, *Embedded Aggregation*, *supra* note 163, at 1139–40; *see also* Tenny, *supra* note 23, at 1022–23; Walker, *supra* note 23, at 1136, 1150–51; Weber, *supra* note 16, at 367–68; *see, e.g.*, Cooper v. Fed. Reserve Bank, 467 U.S. 867, 874 (1984); Bell v. Bd. of Educ., 683 F.2d 963, 966–67 (6th Cir. 1982) (holding that collateral estoppel precluded a new civil rights claim based on conduct previously adjudicated in an earlier class-action suit); Cotton v. Hutto, 577 F.2d 453, 454–55 (8th Cir. 1978) (same).

265. Wilton, *supra* note 23, at 598 n.7, 622–23; *see also* Garrett, *supra* note 15, at 613 (noting that Rule 23(b)(2) class actions against government defendants allow them to avoid piecemeal litigation).

In *Califano v. Yamasaki*, the Supreme Court held that district courts considering challenges to federal legal provisions may certify nationwide classes.[266] It emphasized that, when a court certifies an injunction-only class under Rule 23(b)(2), the limits restricting damages class actions under Rule 23(b)(3)[267] are inapplicable.[268] At least one circuit has held that *Califano* authorizes certification of class actions that include not only all people subject to a legal provision, but also anyone who might be subject to it in the future.[269] The *Califano* Court recognized that nationwide class actions prevent issues from percolating through the lower courts and may foreclose courts in different parts of the country from reaching different conclusions.[270] It concluded that such considerations should not preclude nationwide class actions, but rather counsel district courts to be cautious in certifying them.[271]

Despite the appeal of Rule 23(b)(2) class actions, as currently crafted they cannot completely resolve problems concerning the proper remedy in lawsuits challenging the validity of legal provisions. First, most basically, plaintiffs are not required to bring suits as class actions. Even when a plaintiff's claim involves embedded aggregation, in the sense that many people's rights are allegedly being violated in the same way by the same legal provision, a plaintiff may choose to bring an individual suit to enforce only his own rights without seeking class certification.[272] Second, a court cannot certify a class under Rule

266. 442 U.S. 682, 702–03 (1979).

267. FED. R. CIV. P. 23(b)(3) (providing that a district court may certify a class for damages if a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy"); *cf.* Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746202 [http://perma.cc/ZJN5-HYRM] (critiquing the "superiority" standard).

268. *Califano*, 442 U.S. at 702. *But see* Slack, *supra* note 23, at 944, 968, 977–78, 987 (arguing against nationwide injunctions on the grounds that they interfere with the natural development of the law, as well as dialogue between the political branches and judiciary); Walker, *supra* note 23, at 1121 (arguing that nationwide injunctions against government defendants seem "legislative").

269. Tataranowicz v. Sullivan, 959 F.2d 268, 272–73 (D.C. Cir. 1992) (affirming "the practice of defining classes to include persons who in the future fit the class criteria").

270. *Califano*, 442 U.S. at 702.

271. *Id.*

272. *Newberg on Class Actions* contends that, "[i]n rare cases, [a] defendant may move for certification of a plaintiff class." WILLIAM B. RUBENSTEIN, NEWBERG ON

23(b)(2) unless the class satisfies all of Rule 23(a)'s requirements. In some cases, plaintiffs may have trouble meeting that standard, particularly if the court finds the nature of the plaintiffs' challenge to be fact-specific.[273]

Third, as currently crafted, Rule 23(b)(2) classes are problematic because members of putative classes are not entitled to notice and an opportunity to be heard before the class is certified or the case is adjudicated on the merits. In other words, under Rule 23 as currently drafted, class members may be bound by a judgment in a case about which they were never informed, and from which they never had an opportunity to opt out.[274] Fairness concerns counsel against allowing people's legal rights and claims to be involuntarily extinguished by a class action that they did not know about and from which they were unable to extricate themselves.[275] Weber points out, however, that due process might not require notice and an opportunity to opt out of Rule 23(b)(2) lawsuits, because the cost and burden of such measures could be prohibitive, undermining the ability of most putative class representatives to invoke Rule 23(b)(2) at all.[276] Thus, while courts' remedial decisions are much easier in cases where a plaintiff class is certified under Rule 23(b)(2), that

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CLASS ACTIONS § 7:1 (5th ed. 2013); *see also* Wilton, *supra* note 23, at 626 n.155. It does not cite any examples of individual-plaintiff suits in which the court certified a class at the defendant's behest. NEWBERG, *supra*, at § 7:1 n.4.

273. Garrett, *supra* note 15, at 595.

274. FED. R. CIV. P. 23(c)(3) ("The judgment in an action maintained as a class action . . . whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class."); FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class.") (emphasis added).

275. Williams, *supra* note 15, at 651–53 ("Where a lead plaintiff seeks an equitable remedy that is divisible, mandatory class actions certified under Rule 23(b)(2) . . . present . . . [a] risk that nonconsenting class members will be erroneously deprived of their control entitlement . . . . [O]pt-out rights should be recognized . . . ."); Weber, *supra* note 16, at 400–01; *cf.* Nagareda, *Embedded Aggregation*, *supra* note 163, at 1108.

276. Weber, *supra* note 16, at 394; *cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 & n.3 (1985) (leaving open the question of whether due process requires that class members have the power to opt out of injunction-only class-actions under Rule 23(b)(2)). Richard Nagareda argues that opt-outs should be prohibited when a plaintiff seeks classwide injunctive relief, because a defendant's interest in being able to rely on a favorable ruling outweighs putative class members' interest in "sit[ting] on the sidelines" of the lawsuit without being subject to adverse res judicata effects. Nagareda, *Preexistence Principle*, *supra* note 163, at 232–33.

rule does not enable courts to avoid the difficulties involved in determining the proper scope of relief in non-class, individual-plaintiff cases.

B. Organizational Standing

Distinctions between Plaintiff- and Defendant-Oriented Injunctions also are minimized in cases where a civil rights or other similar group asserts its own organizational standing to seek broad injunctive relief against any enforcement or application of an allegedly invalid legal provision.[277] When an organization demonstrates that enforcement of a law against any members of the public directly harms its own institutional interests, it may seek an injunction barring the government defendants from enforcing it against anyone. Thus, as with Rule 23(b)(2) class actions, a Plaintiff-Oriented Injunction effectively becomes a Defendant-Oriented Injunction, without violating many of the restrictions discussed in Part II.

Organizational standing must be distinguished from the closely related concept of associational standing. When a group asserts associational standing, it is essentially standing in for one or more of its members, asserting their rights on their behalf.[278] When an association's standing rests on this basis, a Plaintiff-Oriented Injunction running in favor of the association bars the government defendant from enforcing the challenged legal provision against any of the association's members. Such an injunction is effectively equivalent to the Plaintiff-Oriented Injunction the court could have issued if the members themselves had been named as individual plaintiffs in the case.[279] It leaves the government defendant free to continue enforcing the law against non-members. Bringing a suit based on associational standing therefore does not change the analysis in Part II

277. Garrett, *supra* note 15, at 638.

278. Summers v. Earth Island Inst., 555 U.S. 488, 498 (2009); *see also* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343–44 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975). The organization's members generally would be bound by res judicata and consequently barred from bringing their own subsequent claims. Int'l Union v. Brock, 477 U.S. 274, 290 (1986); *see also* Taylor v. Sturgell, 553 U.S. 880, 889–90 (2008).

279. *See Warth*, 422 U.S. at 515 ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.").

concerning the choice between Plaintiff- and Defendant-Oriented Injunctions. Courts still must decide whether to enjoin enforcement of the challenged provision against only the plaintiff association's members, or instead against all similarly situated rightholders.

With organizational standing, in contrast, a group sues to assert its own institutional interests. *Havens Realty Corp. v. Coleman* is the quintessential example of this theory in action.[280] In *Havens Realty*, a group called Housing Opportunities Made Equal ("HOME") sought damages from the defendant landlord for violating the Fair Housing Act of 1968[281] by discriminating against blacks seeking to rent apartments.[282] HOME alleged that its purpose was to "assist equal access to housing through counseling and other referral services."[283] Because of the defendant's illegal conduct, HOME "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices."[284]

The Supreme Court affirmed HOME's standing, explaining:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.[285]

Thus, an organization that engages in voter education and outreach, voter registration drives, or get-out-the-vote campaigns may have organizational standing to challenge certain types of election-related provisions. Such a group can argue that some allegedly unconstitutional or otherwise invalid measures compel it to devote additional resources to achieving

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280. 455 U.S. 363, 379 (1982).

281. 42 U.S.C. § 3604 (1976).

282. *Havens Realty*, 455 U.S. at 367, 379.

283. *Id*. at 379.

284. *Id.*

285. *Id*. (citation omitted); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262 (1977) (affirming organizational standing where allegedly illegal conduct frustrated an organization's "interest in making suitable low-cost housing available in areas where such housing is scarce").

its goals.[286] A complete prohibition on enforcement of the challenged provision—effectively, a Defendant-Oriented Injunction—is the only way of completely protecting the group's organizational interests.

The possibility of organizational standing is insufficient, however, to alleviate remedial difficulties in non-class cases. First, the concept has come under heavy scrutiny, and courts have frequently rejected attempts to assert such standing, including in election law cases.[287] The Supreme Court itself has emphasized that a group's mere ideological opposition to a legal provision or desire to promote the public interest is insufficient to give it organizational standing.[288]

Second, fairness concerns may arise in allowing groups to seek Defendant-Oriented Injunctions (or Plaintiff-Oriented Injunctions that are so broad that they effectively serve as Defendant-Oriented Injunctions) when individual plaintiffs—including actual rightholders—raising the same claims would be unable to obtain such relief. Third, perhaps most importantly, individual plaintiffs may challenge the validity of legal provisions without including an entity as a plaintiff. Even when a group is included as a plaintiff, it often will be able to assert only associational, rather than organizational, standing. Thus, the concept of organizational standing cannot resolve difficulties concerning the proper scope of relief in individual-plaintiff cases.

C. Unity of Forum Proposals

Richard Nagareda points out that "unity of forum" proposals are another way of addressing embedded aggregation.[289] Congress or a state could designate a certain trial court to hear cases of a certain nature (such as constitutional claims in general, or election-related claims specifically), or require that a single appellate court hear all appeals from such cases. The Bipartisan Campaign Reform Act, for example, contains a special

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286. *See, e.g.*, Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1040–41 (9th Cir. 2015); Arcia v. Sec'y of State of Fla., 772 F.3d 1335, 1341–42 (11th Cir. 2014).

287. *See* Kichline v. Consol. Rail Corp., 800 F.2d 356, 360 (3d Cir. 1986) (holding that *Havens Realty* used "careful language in its narrow holding . . . indicating that the Court did not intend that the case have broad application"); *see, e.g.*, Fair Elections Ohio v. Husted, 770 F.3d 456, 460–61 & n.1 (6th Cir. 2014).

288. Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

289. Nagareda, *Embedded Aggregation*, *supra* note 163, at 1114.

judicial review provision specifying that any constitutional challenges must be filed in the U.S. District Court for the District of Columbia and adjudicated by a three-judge panel, with direct appeal to the U.S. Supreme Court.[290] Similarly, the Federal Circuit has jurisdiction over appeals in patent cases from any district court in the country.[291]

If certain types of cases were consolidated before a single court, particularly at the appellate level, the significance of the distinction between Plaintiff- and Defendant-Oriented Injunctions would largely evaporate. When a specialized appellate court affirms a Plaintiff-Oriented Injunction, its opinion would be binding as a matter of stare decisis in all future cases (since it would be the only court authorized to hear cases of that nature). While an injunction provides stronger protection for rights than a mere judicial opinion,[292] the government defendant would risk violating clearly established law and face a series of lawsuits it was virtually guaranteed to lose (with the prospect of liability for attorneys' fees[293]) if it persisted in ignoring the ruling.

This approach is subject to the standard objections against specialized courts. In particular, if a single court had jurisdiction over all cases or appeals dealing with constitutional issues in general, or election law disputes in particular, it increases the likelihood that partisans would be nominated or rejected for the court based primarily on their views on those particular types of cases.[294] Because generalist courts, by definition, adjudicate a wide range of issues, judges are unlikely to be appointed to them based on their views on a single type of case or even range of cases. Judges on a specialist court also might tend to have more extreme views on issues within their jurisdiction than generalist judges, precisely because they specialize in that area.[295] The substantive and political problems posed by

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290. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 403(a)(1), (a)(3), 116 Stat. 81, 113 (Mar. 27, 2002) (codified at 52 U.S.C. § 30110).

291. 28 U.S.C. § 1295(a)(1) (2012).

292. *See* Morley, *Public Law at the Cathedral*, *supra* note 30, at 2481–83.

293. *See* 28 U.S.C. §§ 1988(b), 2412(d)(1)(A) (2012).

294. RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 268 (1996); Michael T. Morley, *The Case Against a Specialized Court for Federal Benefits Appeals*, 17 FED. CIR. B.J. 379, 386–87 (2008).

295. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 168 (1974); Daniel J. Meador, *Reducing Court Costs and Delay: An Appellate Court Dilemma and a Solution*

vesting responsibility for all constitutional or election law cases in a particular court seem to far outweigh whatever benefits such an arrangement might offer at the remedial stage of litigation.

D. Equal Protection Approach

One final approach would be to claim that, once a plaintiff has demonstrated that a legal provision is unconstitutional, either facially or as applied under certain circumstances, the court must issue a Defendant-Oriented Injunction to avoid creating Equal Protection problems.[296] Under this view, prohibiting a government defendant from enforcing a law against an individual plaintiff on the grounds that it violates her constitutional rights, while allowing it to continue enforcing the same provision against other people (particularly other people within the court's geographic jurisdiction), would constitute arbitrary and discriminatory enforcement of constitutional rights. Once a constitutional violation has been established, there is no basis for discriminating among rightholders by limiting an injunction only to the individual plaintiffs in a case.

If Equal Protection principles were as robust as this approach suggests, the class action mechanism would be wholly unnecessary in constitutional cases. An individual plaintiff could litigate her own rights, and the Equal Protection Clause would require the court to issue injunctive relief in favor of all rightholders throughout the court's geographic jurisdiction, or perhaps even in the state or nation. This approach effectively advocates that substantive constitutional law should trump procedural, jurisdictional, and other conventional restrictions on litigation, at least at the remedial stage.

District court rulings do not give rise to binding precedents, however, even within the same jurisdiction. The only real function of a district court ruling is to adjudicate the claims and de-

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Through Subject Matter Organization, 16 U. MICH. J.L. REFORM 471, 481 (1983); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURAL AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (June 20, 1975) ("Hruska Commission Report"), *reprinted in* 67 F.R.D. 195, 235 (1975).

296. The Fourteenth Amendment imposes Equal Protection restrictions on the states, U.S. CONST. amend. XIV, § 1, while the Fifth Amendment's Due Process Clause, *see* U.S. CONST. amend. V, imposes identical restrictions on the federal government, Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

fenses of the litigants in the case before it. It seems odd to contend that, by granting a particular plaintiff relief, even in a constitutional case, a court thereby violates the Equal Protection rights of other rightholders not before the court. As Tom Merrill asks rhetorically, "X (whether rich or poor) had to sue the government to win, and now Y (whether rich or poor) also has to sue the government to win. In what respect are they being treated differently?"[297] Thus, while the Equal Protection approach seems facially compelling, it likely fails precisely because it ignores the restrictions imposed by the posture of the case in which the court articulated or enforced the substantive right.

IV. A NEW APPROACH TO INJUNCTIVE RELIEF

This Part presents a new approach for determining the proper scope of injunctive relief in non-class, individual-plaintiff cases where a court determines that a legal provision is unconstitutional, invalid, or otherwise unenforceable. Section A explains the proposed two-step standard. A court should begin by assessing whether Equal Protection principles prohibit it from issuing a Plaintiff-Oriented Injunction that protects only the rights of the individual plaintiffs in the case. Assuming that a Plaintiff-Oriented Injunction would be a constitutionally valid remedy—which it usually should be—the court should go on to apply traditional severability principles to determine whether to issue a Plaintiff- or Defendant-Oriented Injunction. In other words, the court should assess whether the legal provision's invalid applications against the individual plaintiffs may be "severed" from its application to third parties not before the court.

Section B contends that a court can alleviate most of the objections that Part II of this Article raises against Defendant-Oriented Injunctions by conducting this two-step analysis at the outset of the case. If the court determines that a Defendant-Oriented Injunction is the proper remedy, as a result of either Equal

297. Merrill, *supra* note 49, at 54; *see also* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1352–53 (1991); Zepeda v. INS, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (rejecting the argument that "it would be fundamentally unfair for the government to be able to treat one group of individuals differently from another group that is similarly situated except for the fact that they have successfully challenged the government's actions").

Protection principles or its severability analysis, it should require the plaintiffs to proceed with the case, if at all, as a Rule 23(b)(2) class action. If, on the other hand, the court determines that a Plaintiff-Oriented Injunction is the proper remedy, then the case may proceed on a non-class basis. This Section concludes by offering additional recommendations to protect the rights of members of Rule 23(b)(2) classes certified under this framework.

A. Choosing Between Plaintiff- and Defendant-Oriented Injunctions

In a non-class, individual-plaintiff case, when a court determines that a legal provision is unconstitutional, invalid, or otherwise unenforceable (either facially or as applied), and justiciability and other such requirements are satisfied, the plaintiffs generally are entitled, at a minimum, to a Plaintiff-Oriented Injunction barring the government defendants from enforcing the provision against them. At that point, the trial court, at the very least, must modify the statutory or regulatory scheme by essentially carving out an exception to the challenged provision to prevent its application to the plaintiffs. The question then arises whether the court should go further by issuing a Defendant-Oriented Injunction to prohibit the government defendants from enforcing the legal provision against other people, as well. The court should resolve this issue through a two-step analysis, applying constitutional law and traditional severability principles.

First, the court must determine whether granting the requested relief solely to the individual plaintiffs would violate Equal Protection principles by authorizing disparate enforcement of fundamental rights.[298] Such potential Equal Protection concerns likely would arise only in cases where the court held a legal provision unconstitutional, rather than invalid on statutory grounds. As discussed above, some scholars have rejected the notion that granting injunctive relief only to individual plaintiffs who have requested it would violate Equal Protection principles.[299] Under their view, Equal Protection principles seldom, if ever, require a court to issue Defendant-Oriented Injunctions. A person who has filed a lawsuit to enforce his or her rights, by definition, cannot be deemed similarly situated

298. *See supra* note 296.
299. *See supra* note 297.

with a person who has not done so.[300] That interpretation seems to be the most accurate understanding of the Equal Protection Clause. Courts and other commentators, however, reasonably might take a different view. If the court concludes that granting only a Plaintiff-Oriented Injunction would be unconstitutional, then it necessarily must grant a Defendant-Oriented Injunction.

Second, assuming that Equal Protection principles do not compel the court to issue a Defendant-Oriented Injunction, the court should determine whether the challenged legal provision itself requires such relief by applying traditional severability principles. Severability questions arise when a court determines that a particular provision of a statute or regulation is invalid, and it must decide whether the remainder is still enforceable. Generally, a court severs the invalid provision and continues to enforce the remaining sections unless: (i) the remaining sections cannot operate coherently as a law, or (ii) the court concludes that the entity that enacted the statute or regulation would not have intended for its remaining sections to be enforced without the invalidated portions.[301] Courts should apply a variation of this approach in determining the proper scope of injunctive relief in individual-plaintiff cases.[302]

First, the court should determine whether the provision could function coherently without being applied to the plaintiffs in the case. The answer, in many cases, is that the law would remain functional. For example, although some fairness issues might arise, procedural requirements for voting and campaign finance restrictions could be applied coherently even if a few people were exempted from them. For certain types of provisions, in contrast, such as legislative redistricting, it would be incoherent and impossible to grant relief solely to individual plaintiffs without likewise extending it to everyone else.

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300. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 660 (1981) ("[T]he Fourteenth Amendment . . . introduced the constitutional requirement of equal protection, prohibiting the States from acting arbitrarily or treating similarly situated persons differently . . . ."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.").

301. *See supra* note 25.

302. *Cf.* Dorf, *supra* note 10, at 265 (discussing severability analysis for determining whether a statute should be held facially unconstitutional, or instead unconstitutional as applied).

Second, the court should consider whether the entity that promulgated the challenged provision—that is, Congress, a state legislature, or an administrative agency—still would have enacted the provision if it knew that the individual plaintiffs would have to be exempted from it. In many cases, a legislature or agency would want a provision to be applied as broadly as possible, even if some people must be exempt from it, at least until a state supreme court or the U.S. Supreme Court finally adjudicates its constitutionality. For example, based on legislative history and other contextual clues, a court reasonably may conclude that a legislature would prefer to persist in shortening an early voting period, even if the individual plaintiffs in a case must be given extra time to vote. A legislature might likewise prefer to retain a voter identification requirement, even if certain plaintiffs must be permitted to vote without such identification. Or a legislature might wish to maintain political contribution limits, even if a lower court has deemed them invalid and held that they cannot be enforced against a particular plaintiff.

Thus, if the challenged provision can coherently be applied to everyone other than the plaintiffs, and the court determines that the entity that enacted the provision would have wanted to "save" as much of it as possible, then a Plaintiff-Oriented Injunction would be the proper remedy. If, in contrast, the court determines that the entity that enacted the legal provision would not have wanted to have two conflicting sets of rules simultaneously enforced on different segments of the public, or that it would be impossible as a practical matter to apply different rules to different people, then a Defendant-Oriented Injunction would be required.

It might be objected, of course, that if the court determines that the provision is severable and issues only a Plaintiff-Oriented Injunction, then it is allowing the government defendant to continue enforcing a purportedly invalid or even unconstitutional law against other members of the public. It would be severing an invalid application of the legal provision from other invalid applications, rather than from admittedly valid ones.

This response, though facially compelling, overlooks limits on the trial court's power. A trial court has the authority to make legal determinations necessary to adjudicate the rights of the parties before it. But those rulings generally lack stare deci-

sis or other precedential effect. In the context of litigation against the federal government or a state, such rulings generally cannot even give rise to non-mutual offensive collateral estoppel. Thus, a trial court's decision that a legal provision is invalid has no legal effect beyond the immediate parties to a case. Any invalidation of a legal provision as it applies to third parties cannot be a direct or inherent consequence of the court's ruling concerning its invalidity, but rather must be based on Equal Protection or inseverability grounds.

B. Determining the Proper Scope of Relief at the Outset of the Case

In cases where the framework set forth above requires a court to issue a Defendant-Oriented Injunction, the concerns identified in Part II still arise. Applying that framework at the outset of the case, however, would largely alleviate most of those concerns. In non-class cases in which the plaintiffs seek an injunction against a legal provision, the court could begin by reviewing the complaint to determine whether the claims are frivolous or squarely foreclosed by binding precedent,[303] which would alleviate the need to consider the proper scope of relief. Assuming the complaint cannot be dismissed out of hand, the court should go on to apply the framework above, at the outset of the case, to determine whether either Equal Protection or severability principles would require it to issue a Defendant-Oriented Injunction if the plaintiffs ultimately prevail.

If the court concludes that a Defendant-Oriented Injunction would be the appropriate remedy, it should require the plaintiffs to re-file the case as a Rule 23(b)(2) class action, on the grounds that indispensable parties—the third parties whose rights would be protected by the injunction—are missing.[304] If, in contrast, the court determines that a Defendant-Oriented Injunction would not be the proper remedy, then the case may proceed on a non-class basis. If the plaintiffs prevail, they would receive a Plaintiff-Oriented Injunction. Thus, the court is able to ensure at the outset that, in cases where it must grant relief to people other than the plaintiffs, they are included as

303. *Cf.* Shapiro v. McManus, 136 S. Ct. 450, 455–56 (2015).

304. *Cf.* FED R. CIV. P. 19(a)(1)(A) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . in that person's absence, the court cannot accord complete relief among existing parties . . . .").

parties. This step alleviates problems arising from individual plaintiffs' lack of standing to seek Defendant-Oriented Injunctions, due process limitations on litigating the rights of third parties, and policy concerns about circumventing Rule 23's limits. This approach also prevents asymmetric claim preclusion. In any case where the court would have to grant relief to people other than the individual plaintiffs, they would be included in the case as class members and bound by the court's judgment, whether favorable or not.

The class could be restricted in geographic scope to limit the impact of the trial court's legal rulings. At the extreme, the class could be limited to people living within the trial court's geographic jurisdiction. For a federal lawsuit, that would mean limiting the class to rightholders within the judicial district in which the suit was filed. This would ensure that the court does not adjudicate claims of people living outside its jurisdiction concerning alleged rights violations outside that jurisdiction.

A more reasonable compromise would be to define the class based on the geographic jurisdiction of the appellate court for the region in which the trial court is located.[305] Because trial court rulings generally do not constitute binding precedent for stare decisis purposes, when a trial court adjudicates a case, it is interpreting and applying the law based primarily on decisions of the Supreme Court and the intermediate appellate court for its region.[306] If a trial court certifies a class that extends beyond the geographic jurisdiction of its appellate court, it is giving the force of law to that appellate court's precedents outside of its jurisdiction, where its rulings lack stare decisis effect. Residents of other appellate regions, however, have an interest in having their rights be adjudicated by courts with personal jurisdiction over them, applying precedents that are legally binding upon them.

Conversely, all trial judges within an appellate jurisdiction must apply the same body of precedents. When a trial judge certifies a class encompassing all rightholders within the applicable appellate region, rightholders from other judicial districts within that region are not adversely affected, because their

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305. Some states, of course, have intermediate appellate courts of statewide jurisdiction, in which case the scope of the class for a case filed in state court would be statewide.

306. State trial courts are also bound by their state supreme court.

claims are still being adjudicated based on the same binding precedents. Thus, a Rule 23(b)(2) class should encompass rightholders within the appellate jurisdiction in which the trial court sits. This approach ensures that each rightholder's claim is adjudicated based on the correct body of precedent, respects limits on trial courts' authority and the powers and prerogatives of coordinate appellate courts, and prevents the unnecessary multiplicity of suits that would result from limiting classes to the bounds of a trial court's geographic jurisdiction.

Putative members of Rule 23(b)(2) classes generally are not entitled to notice before class certification.[307] When rightholders reasonably can be identified and the cost is not prohibitive, however, the court should apply a strong presumption in favor of requiring such notice. Notice would give interested rightholders an opportunity to object prior to class certification; seek to intervene as separate parties, represented by independent counsel; or file amicus briefs to raise additional points that the parties have overlooked.

Because the ability of members of Rule 23(b)(2) classes to opt out is, at a minimum, severely constrained,[308] the traditional rules of res judicata should apply much more loosely to them. Class members should be barred from relitigating only specific issues and arguments that were actually raised in the earlier case, rather than the full range of issues and arguments that could have been asserted.[309] The court also should exercise care to ensure the adequacy of class counsel.[310] Due to the classwide res judicata effect of an adverse ruling, if class counsel declines to appeal, the court should appoint alternate counsel to prevent the claims of class members throughout the region from being extinguished without full judicial consideration.

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307. *See* FED. R. CIV. P. 23(c)(2)(A).

308. *See id*. Of course, if the court concludes that a Defendant-Oriented Injunction is the required remedy for the plaintiffs' claims, whether as a matter of constitutional law or a severability analysis, and the plaintiffs prevail, then even putative class members who purported to opt out still would be covered by the injunction.

309. *Cf*. Allen v. McCurry, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." (citing Cromwell v. Cty. of Sac, 94 U.S. 351, 352 (1877))).

310. *See* FED. R. CIV. P. 23(a)(4).

Thus, by determining the need for classwide relief at the outset of a case, and tweaking some of the rules governing class actions, courts can position themselves to grant appropriate injunctive relief when plaintiffs prevail while minimizing constitutional and fairness-related problems.

V. CONCLUSION

While both courts and academics have spent a substantial amount of time discussing the distinction between facial and as-applied challenges to legal provisions, they have generally overlooked the jurisdictional, constitutional, policy-based, and other limits on a court's ability to enjoin invalid provisions. In particular, very little attention has been paid to the question of whether courts should issue Plaintiff- or Defendant-Oriented Injunctions in non-class cases. Courts have applied a variety of inconsistent approaches, often without recognizing the numerous important considerations in play.

A trial court generally should issue a Plaintiff-Oriented Injunction against an invalid legal provision unless it determines that either Equal Protection or traditional severability principles would not permit it to enjoin application of the provision solely against the individual plaintiffs. The court should conduct this analysis at the outset of the case, so that if it determines that a Defendant-Oriented Injunction would be the proper remedy, it can require that the case be brought as a Rule 23(b)(2) class action. The geographic scope of the class should be limited to the boundaries of the appellate jurisdiction in which the trial court is located. Res judicata principles should be applied loosely to allow class members to bring subsequent challenges based on issues and arguments that were not actually litigated in the original case. Such an approach to injunctive relief would lead to results that are more predictable and consistent, better reasoned, and fairer. It appropriately balances the duty of courts to resolve only the immediate disputes before them with their responsibility to articulate and enforce public values.