

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Articles

Colorado Law Faculty Scholarship

---

2018

### Preclusion Law as a Model for National Injunctions

Suzette M. Malveaux

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Legal Remedies Commons](#), and the [Supreme Court of the United States Commons](#)

---

#### Citation Information

Suzette M. Malveaux, Preclusion Law as a Model for National Injunctions, JOTWELL, Dec. 5, 2018 (reviewing Alan M. Trammell, Demystifying Nationwide Injunctions, SSRN, Nov. 26, 2018), <https://courtslaw.jotwell.com/preclusion-law-as-a-model-for-national-injunctions/>, available at <https://scholar.law.colorado.edu/articles/1206/>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [lauren.seney@colorado.edu](mailto:lauren.seney@colorado.edu).

## Preclusion Law as a Model for National Injunctions

**Author :** Suzette M. Malveaux

**Date :** December 5, 2018

Alan M. Trammell, *Demystifying Nationwide Injunctions* (Nov. 26, 2018), available at [SSRN](#).

One of the hottest topics on the current legal landscape is the propriety of national injunctions. Federal district court judges are increasingly enjoining the federal government from enforcing statutes, regulations or policies nationwide—fashioning remedies far beyond the parties and the court’s geographic purview. While this practice initially took hold in the 1960s, it escalated during the Obama Administration and has intensified under the Trump Administration.

For example, a district judge in Texas barred enforcement of Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—applying the bar not only to the twenty-six states who complained, but to the entire nation. Similarly, a district judge in Hawaii barred enforcement of Trump’s travel ban, which excluded travelers from seven countries—most predominantly Muslim—on alleged religious discrimination grounds; the court forbid the Administration from applying the ban not only to the parties in the case, but to non-parties across the country.

This has led many people to ask themselves, “Hey, wait a minute! Can they do that?” They are not alone. The recent uptick in judgments rebuking executive action and issuing sweeping reforms at the hand of singular judges has invigorated a robust debate over the propriety of this practice in particular and the power of federal judges in general. Just recently, former Attorney General Jeff Sessions expressed skepticism over the legitimacy of national injunctions, joining Justice Clarence Thomas’s assessment of them, in *Trump v. Hawaii*, as “legally and historically dubious.” A number of scholars have expressed similar doubt and concerns.

But a burgeoning view among academics is challenging this narrative. The latest entry is Alan Trammell’s *Demystifying Nationwide Injunctions*, which takes on the challenge of addressing the constitutional and structural arguments made by national injunction opponents, persuasively explaining how national injunctions do not violate Due Process, contravene judicial hierarchy, or eclipse the “judicial power” of Article III courts.

First, Trammell contends that core Due Process concerns are not threatened by national injunctions. For example, one such concern is that a non-party should not be bound by an adverse judgment because that person has not had his or her proverbial “day in court.” However, this concern is inapt in the case of national injunctions against the enforcement of an unconstitutional law, where a non-party benefits from the universal ruling. Similarly, preclusion law used to require “mutuality”—only parties to a prior lawsuit could get the preclusive effect of a beneficial ruling in a subsequent lawsuit. Courts, however, have relaxed this requirement, allowing non-parties to benefit as well because the defendant had its “full and fair” opportunity to defend itself in the initial action.

Trammell takes the same position even where non-parties do not actually want the national injunction, but are bound nonetheless. This is not a Due Process violation either, given the circumscribed right an individual has to challenge public rights. Like the Rule 23(b)(2) context, which provides no individual notice and “opt-out” rights for a class seeking primarily equitable relief (including injunctions), the national injunction fairly binds non-parties in cases involving public rights and indivisible relief.

Second, Trammell argues that national injunctions are not foreclosed on the grounds that the remedy crosses vertical and horizontal boundaries that usually cabin the effect of district court decisions. On the vertical axis, a district judge who issues a national injunction may bind a higher court, in contravention of judicial hierarchy. On the horizontal axis,

that same judge may bind its sister district courts and even those outside the judicial circuit, in contravention of normal geographical limits.

But preclusion law allows such exceptions. And a court's remedial power in one case is distinct from supervisory authority and geographic jurisdiction. Trammell correctly recognizes the risk of inconsistent rulings that could result from national injunctions issued by different district courts, but concludes that is a prudential problem for comity to solve. To the extent that one believes the courts are likely to respect comity and self-regulate accordingly, Trammell's position is satisfying, even as others bristle at the indeterminacy of such a laissez-faire approach.

Third, Trammell pushes back on the notion that national injunctions are beyond the scope of Article III. National injunctions meet the case-or-controversy requirement because they are brought by plaintiffs with proper standing—a concrete and particularized injury caused by the defendant that is legally redressable. Lest you think Trammell's arguments are motivated by the current political climate, he uses the Texas district court's national injunction against Obama's DAPA to illustrate how the state of Texas had standing. While one may disagree with the ultimate ruling on the merits of the case, the issue of Article III standing seems clear.

Finally, Trammell makes a broader point about the push back against national injunctions. The criticism of district judges' expansive remedial reach reflects a larger and familiar debate about the proper role of judges. Are they really just umpires calling balls and strikes? Trammell situates the propriety of the national injunctions issue in the debate over two models of adjudication: dispute resolution and law declaration. While this tension may ring true for Supreme Court jurisprudence, the same cannot be said for district courts, whose mandate as trial courts is far different.

After this brush-clearing (establishing the court's *power* to issue national injunctions), Trammell offers a compelling context in which to rest his position—the parallel development of preclusion law. Trammell analogizes the evolution of the national injunction to the evolution of preclusion, illustrating how the underlying premises of the latter support the former. This insight, made concurrently by Zachary D. Clopton in [National Injunctions and Preclusion](#), \_\_ Mich. L. Rev. \_\_ (forthcoming 2019), situates national injunctions in a wider frame that helps the reader understand why a singular judge issuing relief far beyond its participants or geography isn't so fantastical after all.

Trammell relies on the principles underlying preclusion for determining normatively when a national injunction is appropriate. As a starting point, Trammell analogizes nonmutual offensive issue preclusion to a national injunction, noting that in both instances an individual gets the benefit of an adverse judgment against a government defendant in a lawsuit in which he was not a party. Because the defendant had a full and fair opportunity to be heard, due process has been met.

He identifies a number of problems with offensive nonmutual collateral estoppel: it encourages a “wait and see” approach by individual plaintiffs bringing litigation seriatim; exacerbates inconsistent rulings; and promotes preclusive asymmetry. But these pitfalls have not justified a complete bar to such preclusion, so neither should they bar national injunctions—which can pose similar concerns. To the contrary, preclusion law models the circumstances under which a court should refrain from issuing a national injunction. Drawing on the majority rule permitting offensive non-mutual issue preclusion so long as there is not evidence of inherent unfairness, Trammell endorses the existence of national injunctions.

This endorsement, however, is tempered by the Supreme Court's holding in [United States v. Mendoza](#), where the Court held that a private party could not use non-mutual issue preclusion against the government. But Trammell rejects *Mendoza* as a categorical ban on such preclusion, arguing that the Court's conclusion is cabined to the particular case and is merely a guidepost that identifies circumstances that should militate against preclusion.

Trammell then pivots to a different doctrinal and theoretical hook for discerning when national injunctions affirmatively are appropriate: non-acquiescence. This practice involves the government (usually an administrative agency) prospectively refusing to follow a judicial interpretation of the law. This practice is generally accepted when limited to a

particular circuit among many but frowned upon when done within a circuit in flagrant disregard of its precedent. Non-acquiescence, he argues, is justifiable when the law is unsettled and the government genuinely seeks to promote its position. But national injunctions are justifiable when the government flagrantly rebukes settled law, thereby demonstrating bad faith.

Trammell ends his article by concluding that although courts have the power to issue national injunctions and can justify them prudentially for many of the same reasons that justify preclusion, courts should only issue them under certain limited circumstances. Borrowing from preclusion law, Trammell proposes a standard for when national injunctions are appropriate, with a set of limiting principles as a power check. There is a presumption against national injunctions as the go-to response, giving the government an opportunity to make a course correction and courts a chance to develop law. But a national injunction is proper when plaintiffs can demonstrate the government is acting in bad faith, as evidenced by rebuking settled law or failing to sincerely vindicate its position in the courts; this exception vindicates equality and promotes rule-of-law norms.

Trammell's proposal offers much food for thought. The default rule puts Trammell squarely in the camp of those who reject an outright ban on national injunctions but are nonetheless concerned about prudential problems they pose and the frequency with which courts are ordering them. He uses the policy considerations raised by preclusion law and *Mendoza* as a proxy for determining when law is settled. This is inexact, but addresses some of the most common complaints about national injunctions—inconsistent rulings, “one-and-done” rulings by a singular judge, forum shopping, lack of law percolation, and asymmetric preclusion. His proposal covers much ground.

With “settled law” being so central, much rides on how it is defined. Trammell emphasizes flexibility, arguing that the law need only be “settled enough,” with the burden on the government to defend its decision to depart. The national injunction against the first travel ban offers a perfect example—with every court to consider the matter, and eventually the White House, all agreeing on the illegality of certain provisions, the law was sufficiently settled to warrant a national injunction.

Similarly, nothing says “settled” more than a definitive ruling by the Supreme Court. A perfect example of this was [Obergefell v. Hodges](#), holding that same-sex couples have a fundamental right to marry in all states. When Kim Davis, a local Kentucky clerk, refused to issue marriage licenses to same-sex couples post-*Obergefell*, this provides “the quintessential scenario of when a broad injunction is most appropriate.” The alternative is to require every same-sex couple seeking to marry in the United States to sue to enforce their Constitutional rights under *Obergefell* whenever they face a clerk who defies the rule of law. This not only encourages lawlessness by government officials, but “essentially leads to government by litigation”—an untenable, impractical and immoral outcome “antithetical to the entire governance structure.”

Although Trammell's proposal offers a way to promote national injunctions while erecting guardrails that cabin their proliferation, it raises some questions and concerns. For example Trammell suggests a “rule of three” for when law is settled—conditioning a national injunction on three consistent adverse lower court rulings. While not new, this is arbitrary and malleable. Moreover, there is no reason that the plaintiff should bear the burden of proving settled law or for making bad faith the primary justification for national injunctions. [Other policies may justify such expansive relief](#), including the need to address national crises, promote efficiency, prevent irreparable harm, check executive abuse of power, provide complete relief, and account for access to justice problems.

There are no easy answers. But Trammell has made an important contribution to the debate with an analogy to preclusion law that is groundbreaking and insightful.

Cite as: Suzette M. Malveaux, *Preclusion Law as a Model for National Injunctions*, JOTWELL (December 5, 2018) (reviewing Alan M. Trammell, *Demystifying Nationwide Injunctions* (Nov. 26, 2018), available at SSRN), <https://courtslaw.jotwell.com/preclusion-law-as-a-model-for-national-injunctions/>.