

Rethinking National Injunctions

Author : Marco Jimenez

Tagged as : [Remedies](#)

Date : October 14, 2020

Russell L. Weaver, [Nationwide Injunctions](#), 14 *FIU L. Rev.* 103 (2020).

In a delightful article recently published in the *Florida International Law Review*, Professor Russell Weaver has done a great service to us all by helpfully summarizing the current state of the law concerning nationwide injunctions, drawing on and summarizing recent scholarship and numerous cases in the field. His article should prove to be of great value to the practitioner and the professor alike and, given its length and clarity (at seventeen pages, Prof. Weaver's article packs quite a punch), those teaching in the area may even consider assigning it to their students. I probably will, because although many of my students seem to grasp the logic of compensatory damages due to some exposure in their first-year contracts and torts classes, they often seem mystified, at least initially, when it comes to injunctions, which is to say nothing of nationwide injunctions!

Part of this mystery, it seems, stems from the fact that injunctions grew up in courts of equity, whereas damages (primarily) grew up in common law courts, and the first-year curriculum (outside of a few contracts cases on specific performance) largely focuses on the latter at the expense of the former. This means that although students are familiar with the idea that compensatory damages should generally try to return an injured party to the position it would have occupied but for the wrongful harm inflicted by the wrongdoer, they have a harder time understanding why an injunction should be issued before a wrongful harm has ever come to pass. But the difficulties do not stop here. Unlike damages, which can be measured in dollars, they also find measuring the "amount" of an injunction to be counterintuitive. In theory, a court should award the "amount" of injunction needed to prevent the plaintiff from suffering from a potential future wrongful harm. But even talking about injunctions in this way seems odd, for injunctions cannot be "counted" in the same way that dollars can, and therefore determining the proper scope of an injunctive remedy is incredibly difficult.

Which brings us to another point: in theory, the scope of an injunction should not exceed the scope of the threatened harm, so that (for example) a company-wide injunction would only be appropriate where a company-wide wrong is taking place. In practice, however, it is easy to game the system, especially in the area of national injunctions, which has seen tremendous growth over the past several decades. This is so because plaintiffs can (and frequently do) seek, for example, a nationwide injunction in one jurisdiction, fail to obtain it, and then bring suit in another jurisdiction several years later. Then, in this new jurisdiction, plaintiffs win, and have their "win" extended throughout the United States (including, it should be noted, the jurisdiction in which their original suit previously failed). Although these cases are extremely interesting, productive, and fun to talk about in class, they are difficult to summarize (much less make sense of) for the students, not to say anything of the professor's ability to understand them!

Enter Professor Weaver. Not only does his article do a fabulous job summarizing the current state of the law, but he helpfully spends a good deal of space discussing the policy implications of nationwide injunctions, canvassing the pros and cons of allowing district and circuit courts to set policy on the national legal stage.

So, for instance, against the argument that nationwide injunctions might be necessary to promote uniform laws designed to protect large numbers of otherwise powerless individuals from "unconstitutional" government policies, Prof. Weaver balances the argument that these lower-court decisions are sometimes found to have been "wrong," in that the actions deemed "unconstitutional" by a district or circuit court is found to have been, according to the Supreme

Court, perfectly legal, with the result that the uniformity that was imposed by lower courts was, in point of fact, without a legal basis. Similarly, Prof. Weaver discusses how, on the one hand, allowing a lower court to make a decision for the entire nation may promote “judicial economy” by having a “single judge hear and decide the issue” before it, which, in turn, can save the judicial resources of all the other courts around the country who no longer need to “consider and decide the same issue.” (P. 111.) On the other hand, however, Prof. Weaver points out that such judicial economy comes at a price: specifically, allowing the precipitous review of important national issues without adequately developing the issue in other districts and circuits. Sometimes, as where a more complete and thorough understanding of the issues can be developed in multiple district and circuit courts, a little inefficiency can be a good thing!

Prof. Weaver discusses a number of other important issues created by nationwide injunctions as well (the potential for nationwide injunctions to politicize courts, encourage forum shopping by litigants, and over-empowering individual district and circuit judges), and I would encourage any interested readers to check out and read his entire article. Not only is it a quick and delightful read, but it is one that I your remedies students will likely enjoy as well. It is probably the most accessible summary of these issues I have seen in a single place.

Cite as: Marco Jimenez, *Rethinking National Injunctions*, JOTWELL (October 14, 2020) (reviewing Russell L. Weaver, *Nationwide Injunctions*, 14 **FIU L. Rev.** 103 (2020)), <https://lex.jotwell.com/rethinking-national-injunctions/>.