Essay

The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions

*Frank Chang**

Abstract

Federal courts draw much attention by sweepingly blocking many agency actions with preliminary injunctions. Some of these preliminary injunctions are nationwide, but others are geographically limited. This Essay diagnoses two problems associated with preliminary injunctions in administrative law cases. Nationwide preliminary injunctions, as many commentators point out, are fraught with problems: the lack of clear doctrinal guidance, the risk of conflicting injunctions, the incentive for forum shopping, and the lack of "percolation" of legal issues. The alternative is not great either. Geographically limited preliminary injunctions would allow the agency to "nonacquiesce" and commence enforcing the challenged program elsewhere while judicial review is pending. This makes it more difficult for the court to "set aside" a partially- or fully-implemented program at the end of review.

There is another way. 5 U.S.C. § 705 allows "[t]he reviewing court" to issue a stay to postpone the effective date of an agency action. Unlike an injunction, which orders a person to act or not to act, a stay postpones the effective date and suspends the enforceability or legal basis of an action. This

* J.D., 2017, The George Washington University Law School. Many thanks to the Editorial Board of *The George Washington Law Review* and my dear friends and colleagues, Daniel Brookins and Jessica Freitas, who have always been willing to offer insightful suggestions on this Essay.

Essay examines the text, the caselaw, and the usage of 5 U.S.C. § 705, and offers how it may alleviate the problems of conflicting injunctions and agency nonacquiescence at the preliminary stage of litigation.

Table of Contents

Introduction

In Homer's *Odyssey*, Odysseus embarked on an arduous, ten-year journey home from the Trojan War. Along the way, Odysseus had to sail through a narrow strait where Scylla and Charybdis, two immortal monsters, dwelled.[1] Scylla devoured sailors who traversed close to her lair. On the other side of the strait, Charybdis created inescapable whirlpools by swallowing and belching a large amount of water.[2] There was no way to escape Charybdis while also avoiding Scylla.[3] In Odysseus's first passage through the strait, Circe, a witch-goddess, advised him to sail close to and take a chance with Scylla,

---

1 Homer, The Odyssey of Homer 197–99 (Ennis Rees trans., Random House, Inc. 1960).

2 *Id.*

3 *Id.*

rather than risk losing his ship to Charybdis.[4] Odysseus heeded this advice but lost six of his men to Scylla.[5] Scylla and Charybdis symbolize the choice between two evils, and Circe's advice to select the lesser evil is not completely satisfactory.

This story rings surprisingly true for federal courts when they must determine the proper scope of preliminary injunctions against administrative agencies. Federal courts have two options regarding the scope of preliminary injunctions: nationwide or geographically limited. Courts have been liberal with the use of nationwide preliminary injunctions against the Obama and Trump Administrations.[6] Commentators have correctly pointed out the multitude of problems with nationwide preliminary injunctions: the lack of doctrinal clarity, conflicting injunctions, the lack of percolation, and forum shopping.[7] They have suggested several methods or principles to follow in limiting the scope of preliminary injunctions.[8] But federal courts must beware: those commentators are offering Circe's advice, and even geographically limited preliminary injunctions can pose grave dangers. Geographically limited preliminary injunctions lead to agency nonacquiescence, in which the agency will commence implementing its challenged program where the injunction does not apply while judicial review is pending.[9] Although the commentators downplay or ignore the seriousness of agency nonacquiescence, we know from experience that permitting agency nonacquiescence can be problematic.[10] Once the agency partially or fully implements its program in the preliminary stages of the litigation, it becomes extremely difficult for the reviewing court to later "set aside" such a program, even if it finds the program to be unlawful.[11]

There is another way. The Administrative Procedure Act ("APA")[12] provides that "the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an

---

4 *Id.* at 199.

5 *Id.* at 203.

6 *See infra* Part II.

7 *See infra* Part III. *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864175; Zayn Siddique, *Nationwide Injunctions*, 118 COLUM. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801387.

8 *See infra* Part III.

9 *See infra* Part IV.

10 *See infra* Part III.

11 *See infra* Part III.

12 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

agency action."[13] This Essay argues that the APA's stay provision allows federal courts to substantially circumvent the choice between two evils created by preliminary injunctions, at least in administrative law cases where the APA applies.[14] This Essay makes three supporting claims. First, the APA's stay provision has national applicability when applied to rules, and it can eliminate agency nonacquiescence and alleviate doctrinal difficulties associated with determining the scope of injunctions.[15] Second, a stay cannot impose conflicting legal obligations on agencies like a nationwide preliminary injunction.[16] Unlike injunctions which impose commands or prohibitions on the *person*, stays merely "suspend[] the source of authority to act."[17] Third, the APA and its stay provision should be accepted as a deliberate policy choice that Congress made in favor of effectuating judicial review of, preserving the status quo from, and preventing irreparable harm against, an agency action, despite the potential defects of forum shopping and lack of percolation.[18]

This Essay proceeds in four parts. Part I explains the uses of preliminary injunctions during the Obama and Trump Administrations. Part II describes the problems that commentators have identified with nationwide preliminary injunctions and discusses their proposals to limit such injunctions. Part III describes the problems associated with geographically limited preliminary injunctions. Part IV offers the APA's stay provision as an alternative to preliminary injunctions in administrative law cases.

I. Preliminary Injunctions During the Obama and Trump Administrations

Courts and injunctions have played a significant role in the administrative state in recent years. Courts have entertained cases that involve broad agency actions regarding many important policy issues of the day and that also sparked the fundamental debate over the proper role—or even the lawfulness of—the administrative state in our lives.[19] In a series of cases involving the Obama and Trump Administrations, courts have issued preliminary injunctions to prevent

13 5 U.S.C. § 705 (2012).

14 *See infra* Part IV.

15 *See infra* Section IV.B.

16 *See infra* Section IV.C.

17 Nken v. Holder, 556 U.S. 418, 428–29 (2009).

18 *See infra* Section IV.D.

19 *See, e.g.*, Philip Hamburger, Is Administrative Law Unlawful? (2014); Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547 (2015) (reviewing Hamburger).

various agencies from implementing their programs. These cases, in turn, also created much interest, criticism, and curiosity regarding the courts' power to issue injunctions.[20]

An injunction is "[a] court order commanding or preventing an action."[21] A preliminary injunction is issued at the early stages of litigation "to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."[22] It has the force and effect of a permanent injunction, and the court can impose civil or criminal sanctions on a party for violating it.[23] Because a preliminary injunction is a temporary relief, it expires at the end of the trial on the merits.[24] Despite its temporary nature, a preliminary injunction is important, because it functions as a preview of how the court will likely rule on the merits. In the public law context, it is important because it can halt and delay a challenged government program before it goes into effect.

Preliminary injunctions have foiled many of the Obama and Trump Administrations' executive and administrative actions. It is no secret that the Obama Administration had trouble implementing its policy agenda, because the Republican Congress was not on board. Because of this deadlock, President Obama had little legislative success.[25] President Obama bypassed Congress and instead relied heavily on administrative agencies or executive actions to implement his agenda. President Obama infamously said:

---

20 *E.g.*, Josh Blackman, *Can a District Court Issue a Nationwide Injunction?*, Josh Blackman's Blog (Feb. 17, 2015), http://joshblackman.com/blog/2015/02/17/can-a-district-court-issue-a-nationwide-injunction-2/ [https://perma.cc/J7RP-AYT8]; Cong. Research Serv., *Nationwide Injunctions: Recent Rulings Raise Questions About Nationwide Reach of a Single Federal Court*, CRS Rep. & Analysis (Dec. 16, 2015, 9:28 AM), https://www.fas.org/sgp/crs/misc/nationwide.pdf; *see also* Donald J. Trump (@realDonaldTrump), Twitter (Feb. 4, 2017, 5:12 AM), https://twitter.com/realdonaldtrump/status/827867311054974976?lang=EN [https://perma.cc/852T-JYGX] ("The opinion of this so-called judge . . . is ridiculous and will be overturned!").

21 *Injunction*, Black's Law Dictionary (10th ed. 2014).

22 11A Charles Alan Wright et al., Federal Practice And Procedure § 2947 (3d ed. 1998).

23 *Id.*

24 *Id.*

25 Many would say this kind of gridlock is good. James Madison and others purposefully separated the powers to protect liberty by making "ambition . . . counteract ambition." The Federalist No. 51 (James Madison). Justice Scalia thought that "Americans . . . should learn to love the gridlock. It is there for a reason: so that the legislation that gets out will be good legislation." *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 8 (2011) (statement of Hon. Antonin Scalia, Associate J., The Supreme Court of the United States).

> We're not just going to be waiting for legislation in order to make sure that we're providing Americans the kind of help they need. I've got a pen and I've got a phone . . . . And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward . . . .[26]

President Obama, through his subordinate departments, took many sweeping executive and administrative actions: deferred actions for immigration enforcement,[27] new regulations of power plants burning fossil fuels (Clean Power Plan),[28] enlargement of federal jurisdiction over navigable waters (WOTUS Rule),[29] issuance of guidance regarding federal funds and bathrooms (Dear Colleague Letter),[30] broader disclosures regarding labor relations (Persuader Rule),[31] overtime pay,[32] and many more.[33]

Each of these actions was challenged, and federal courts blocked each one with a preliminary injunction, with the exception of the Clean Power Plan, which was blocked by the Supreme Court with a § 705 stay.[34] Various district courts in Texas blocked the Deferred Action for Parents of Americans ("DAPA"),[35] the Dear Colleague Let-

---

26 Victor Davis Hanson, *Governing by Pen and Phone*, NAT'L REV. (Jan. 28, 2014, 4:00 AM), http://www.nationalreview.com/article/369560/governing-pen-and-phone-victor-davis-hanson.

27 *E.g.*, Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo].

28 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 C.F.R. pt. 60 (2017) [hereinafter Clean Power Plan].

29 Clean Water Rule: Definition of "Waters of the United States," 33 C.F.R. pt. 328 (2017) [hereinafter WOTUS Rule].

30 Office for Civil Rights, U.S. Dep't of Educ. & Civil Rights Div., U.S. Dep't of Justice, Dear Colleague Letter on Transgender Students (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [hereinafter Dear Colleague Letter].

31 Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 29 C.F.R. pts. 405, 406 (2017) [hereinafter the Persuader Rule].

32 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. pt. 541 (2017) [hereinafter the Overtime Pay Rule].

33 *See* Bob King & Nick Juliano, *Obama's Agencies Push Flurry of 'Midnight' Actions*, POLITICO (Nov. 27, 2016, 7:23 AM), http://www.politico.com/story/2016/11/obama-regulations-231820 (including "[r]egulations on commodities speculation, air pollution from the oil industry, doctors' Medicare drug payments and high-skilled immigrant workers").

34 West Virginia v. EPA, 136 S. Ct. 1000 (2016).

35 Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015).

ter,[36] the Persuader Rule,[37] and the Overtime Pay Rule[38] with nationwide preliminary injunctions. The district court in North Dakota blocked the WOTUS Rule with a preliminary injunction limited to the thirteen plaintiff-states.[39] These cases raised concern regarding the reach of a lower federal court over national policy debates.[40] But one thing was certain: these preliminary injunctions foiled President Obama's key policy objectives. Although these preliminary injunctions were only temporary, they bought the challengers just enough time for President Obama to leave office and a new President to assume office.

Under the new Administration, it is unclear whether trials on the merits of these challenges will actually go forward, because President Donald Trump either has reversed or eliminated the challenged programs. As the saying goes: "Live by executive action, die by executive action."[41] President Trump, either through his own executive actions or the rescission mechanism under the Congressional Review Act,[42] immediately reversed many of President Obama's executive or administrative actions.[43] President Trump might also withdraw the Department of Justice from further litigation even if certain programs remain.[44] Buying just enough time to outlast the Obama Administra-

---

36 Texas v. United States, 201 F. Supp. 3d 810, 835 (N.D. Tex. 2016).

37 Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-cv-00066-C, 2016 WL 3766121, at *46 (N.D. Tex. June 27, 2016).

38 Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520, 524, 534 (E.D. Tex. 2016).

39 North Dakota v. EPA, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). Soon after the North Dakota district court issued its injunction, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the WOTUS Rule. *See In re* EPA, 803 F.3d 804, 808 (6th Cir. 2015).

40 *E.g.*, Blackman, *supra* note 20; Cong. Research Serv., *supra* note 20.

41 The Editors, *Trump's Good—and Lawful—Move to Nullify the Clean Power Plan Fantasy*, NAT'L REV. (Mar. 29, 2017, 5:21 PM), http://www.nationalreview.com/article/446240/clean-power-plan-trump-executive-order-nullify-pollution-climate-change.

42 5 U.S.C. §§ 801–808 (2012).

43 For example, the Department of Education issued another "Dear Colleague" letter, dated February 22, 2017, that rescinded the previous letter regarding Title IX and transgender students. Office for Civil Rights, U.S. Dep't of Educ. & Civil Rights Div., U.S. Dep't of Justice, Dear Colleague Letter on Transgender Students (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download. Additionally, President Trump himself signed executive orders that allow the EPA Administrator to rescind the Clean Power Plan and the WOTUS Rule. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). As of April 16, 2017, President Trump had overturned thirteen major rules using the Congressional Review Act. *See* Michael Grunwald, *Trump's Secret Weapon Against Obama's Legacy*, POLITICO (Apr. 10, 2017), http://www.politico.com/magazine/story/2017/04/donald-trump-obama-legacy-215009.

44 Before the issuance of the new "Dear Colleague" letter that reversed the Obama-DOE's transgender bathroom guidance, President Trump's DOJ withdrew the Obama Administration's challenge to the Texas district court's nationwide injunction. *See* Liam Stack, *Trump*

tion may have been the challengers' real objective behind seeking these preliminary injunctions.[45]

President Trump now stands where President Obama once stood, not just in the Oval Office, but also in federal courts defending his own executive actions from preliminary injunctions. Not long after taking office, President Trump issued two orders restricting travel from several majority-Muslim countries. Federal courts in Washington,[46] Hawai'i,[47] and Maryland[48] have all issued nationwide injunctive relief against his travel ban order.[49] At the time of publication, the Supreme Court granted the Trump Administration's petition for certiorari and stayed these injunctions.[50]

II. CHARYBDIS: NATIONWIDE PRELIMINARY INJUNCTIONS

Commentators have identified many problems with federal courts' frequent use of nationwide injunctions. They do not necessarily make the distinction between preliminary and permanent injunctions, but much of their diagnoses are still applicable, and many of the cases they reference actually involved preliminary injunctions. Two excellent and leading commentaries are from Samuel L. Bray[51] and Zayn Siddique.[52] This Part echoes much of Bray's and Siddique's ob-

---

Drops Defense of Obama Guidelines on Transgender Students, N.Y. TIMES (Feb. 11, 2017), https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-injunction.html.

45 On a panel featuring state solicitors general from Florida, Alabama, Texas, and West Virginia, West Virginia Solicitor General Elbert Lin made one important observation: "One of the things that the states have achieved in all of these cases . . . is we got stays. We got these rules put on hold until a new administration could come in, and now we can talk about rolling them back without having gallons and gallons of water under the bridge that you can't undo." The Federalist Society, *Combating Federal Overreach*, YOUTUBE (Feb. 10, 2017), https://www.youtube.com/watch?v=s-71pu5xnOA&index=6&list=PLWwcngsYgoUVVJWJa1Loi54AaSp1u95Vy (relevant remarks begin around 53:40).

46 Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017).

47 Hawai'i v. Trump, No. 17-00050 DKW-KSC, 2017 WL 1167383, at *1 (D. Haw. Mar. 29, 2017).

48 Int'l Refugee Assistance Project v. Trump, No. TDC-17-0361, 2017 WL 1018235, at *18 (D. Md. Mar. 16, 2017), *vacated in part*, 857 F.3d 554 (4th Cir. 2017).

49 In some of these cases, the challengers sought a temporary restraining order as opposed to a preliminary injunction. This Essay treats them the same. Injunctions and temporary restraining orders are both governed by Rule 65 of the Federal Rules of Civil Procedure and are "similar in their effect since they require a party either to do or to refrain from doing some act, and are enforceable by contempt." 11A WRIGHT ET AL., *supra* note 22, § 2941.

50 Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2089 (2017) (per curiam).

51 Bray, *supra* note 7.

52 Siddique, *supra* note 7.

servations regarding the problems of nationwide injunctions and examines the four problems that these commentators identified.

A. Lack of Clear Doctrinal Guidance

Bray and Siddique have each observed that federal courts do not have a clear doctrinal guide in determining whether to issue a nationwide injunction. "Crafting a preliminary injunction is an exercise of discretion and judgment,"[53] and courts generally consult four factors: (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm to plaintiff in the absence of a preliminary injunction, (3) whether the balance of equities weighs in plaintiff's favor, and (4) that a preliminary injunction is in the public interest.[54] But after the court agrees to issue a preliminary injunction, it must determine the geographical scope of the injunction.

Under Supreme Court precedent, lower federal courts possess the power to issue nationwide injunctions. In *Steele v. Bulova Watch Co.*[55] the Court held that district courts can "command persons properly before it to cease or perform acts outside [their] territorial jurisdiction."[56] This understanding is consistent with the in personam nature of injunction.[57] An injunction is an order directed against a party.[58] As long as the court can maintain jurisdiction and control over the party, such that it can impose criminal or civil sanctions for violating its order, the court can hold that party accountable for her conduct inside or outside the court's territorial limit.[59] The text of Article III seems to support to this understanding as well. As the Fifth Circuit held in the DAPA case, "the Constitution vests the District Court with 'the judicial Power of the United States.' That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction."[60]

Although there seems to be ample guidance to lower federal courts on whether they *may* issue nationwide injunctions, there is little

---

53 *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087.

54 *E.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 608 (4th Cir. 2017); 11A WRIGHT ET AL., *supra* note 22, § 2948.

55 344 U.S. 280 (1952).

56 *Id.* at 289.

57 *See* Nken v. Holder, 556 U.S. 418, 428 (2009).

58 *Id.*

59 11A WRIGHT ET AL., *supra* note 22, § 2945.

60 Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015) (quoting U.S. CONST. art. III, § 1); *see infra* Section II.B.

guidance on whether they *should*. Rule 65 of the Federal Rules of Civil Procedure, which governs injunctions, provides no guidance.[61] One source of guidance is *Califano v. Yamasaki*,[62] in which the Court recognized a general principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[63] Bray argues that the "complete relief" principle "fails as a legal principle"[64] because what constitutes "complete relief" is indeterminate and the phrase has been used "not as a constraint on national injunctions but instead as a reason to give them."[65] Specifically in the public law context arising under the APA, Siddique notes that some lower courts' interpretation of the APA has created a presumption in favor of nationwide injunctions even where they are not necessary for "complete relief."[66] The Supreme Court's broad guidance of "complete relief" leaves lower federal courts without an actual rule, standard, or limiting principle.

Some courts use comity among federal courts as a factor in deciding whether a nationwide injunction is proper.[67] This is another area in which the doctrinal guidance is unclear. Some lower courts, like the Ninth Circuit, have limited the district courts' discretion to issue nationwide injunctions where a sister circuit has already reached a different legal conclusion than the district court seeking to issue a nationwide injunction.[68] But not all federal courts follow this rule of comity.[69] It is also unclear what should happen if a district court issues a nationwide injunction before a sister circuit or district court reaches a contrary legal conclusion.

B. Conflicting Injunctions and Forum Shopping

Commentators have also observed that federal courts could potentially place the federal government under conflicting injunctions.[70] This is a serious legal problem that almost occurred during the DAPA litigations. On November 20, 2014, the Department of Homeland Se-

---

61 FED. R. CIV. P. 65; *see also* Cong. Research Serv., *supra* note 20.

62 442 U.S. 682 (1979).

63 *Id.* at 702.

64 Bray, *supra* note 7, at 18.

65 *Id.*

66 Siddique, *supra* note 7, at 39.

67 *Id.* at 36–37.

68 *Id.* at 37–38 (citing L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011)).

69 *See infra* Section II.B.

70 Bray, *supra* note 7, at 13–14; *see also* Ziddique, *supra* note 7, at 2 n.3.

curity ("DHS") announced the DAPA program.[71] DAPA was intended to defer prosecution for, and granted "lawful presence" to, approximately 4.3 million undocumented aliens.[72] President Obama and the Secretary of Homeland Security announced DAPA without going through either Congress or the APA's notice-and-comment procedure.[73] Texas and twenty-five other states challenged the validity of DAPA, and the District Court for the Southern District of Texas issued a nationwide preliminary injunction to block DAPA's implementation.[74] The U.S. Court of Appeals for the Fifth Circuit,[75] and the U.S. Supreme Court in a four-four tie,[76] subsequently upheld the nationwide preliminary injunction.

Not long after an equally divided Court affirmed without pronouncing nationally binding precedent, the U.S. District Court for the Eastern District of New York took a related case.[77] Martin Jonathan Batalla Vidal, who would have benefitted from DAPA, sought to compel the DHS to provide him with the benefits of DAPA.[78] The district judge in New York is not bound by the Fifth Circuit precedent or the injunction issued by the district court in Texas. At least according to the exchanges in court, the district court seemed sympathetic to Batalla Vidal.[79] If the district court granted an injunction, it would have created a conflict of injunctions—the Texas injunction prohibits the government from implementing DAPA, but the New York injunction compels the government to implement DAPA.[80] The government made a plea to the court regarding this potential difficulty:

> We are subject to an injunction right now . . . . And there's no way for us, based on plaintiff's complaint, to be subject to the injunction that we are subject to in the Southern District of Texas and the injunction that they are asking this court to issue. These are completely conflicting injunctions.[81]

---

71 DAPA Memo, *supra* note 27.

72 Texas v. United States, 809 F.3d 134, 147–48 (5th Cir. 2015).

73 *See* U.S. CONST. art. I, § 7; 5 U.S.C. § 553 (2012).

74 Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015).

75 Texas v. United States, 809 F.3d at 188.

76 United States v. Texas, 136 S. Ct. 2271 (2016).

77 Complaint, Batalla Vidal v. Baran, No. 1:16-cv-04756 (E.D.N.Y. Aug. 25, 2016), 2016 WL 4524062.

78 *Id.*

79 Allissa Wickham, *NY Judge Seems Open to New Path in Immigration Block Case*, LAW 360 (Sept. 26, 2016, 8:54 PM), http://www.law360.com/articles/844447/ny-judge-seems-open-to-new-path-in-immigration-block-case.

80 *Id.*

81 *Id.*

The case in New York has been stayed indefinitely.[82] And it remains to be seen what President Trump will do with DAPA.[83] Regardless, these DAPA cases show that nationwide preliminary injunctions can place the government under competing legal obligations that it cannot fulfill.

The potential for conflicting injunctions depending on the geography of the deciding court highlights an additional problem: forum shopping. Because nationwide injunctions apply across the country, such injunctions may incentivize forum shopping. For example, during the Obama Administration, challengers frequently succeeded in obtaining nationwide preliminary injunctions against federal agencies in federal courts in Texas.[84] Conversely, the challenges against the Trump Administration have taken place in federal courts in Washington, Hawai'i, and Maryland.[85] During the Bush Administration, federal courts in California frequently heard cases related to environmental regulations.[86] If it takes only *one* court to enjoin the government nationally, plaintiffs have the incentive to seek audience of a judge, or judges, who will be more receptive to their challenges.[87]

C. Lack of Percolation

Commentators have noted that nationwide injunctions, especially nationwide preliminary injunctions, hinder effective judicial decision-making by potentially limiting circuit splits and "percolation" in the law.[88] Many argue that the Supreme Court's ability to render "better" decisions increases when the courts of appeals have a disagreement, because these conflicts will highlight the strongest arguments, illuminate the nuances, and allow the law to develop and percolate before arriving to the Court.[89] The precondition to percolation is circuit splits. But the federal government's ability to create a circuit split de-

---

82 Order Granting Joint Motion to Stay Briefing Schedule, Batalla Vidal v. Baran, No. 1:16-cv-04756 (E.D.N.Y. Apr. 4, 2017).

83 *See* Tal Kopan & Laura Jarrett, *Trump Keeps DACA but Chips Away at Barriers to Deportation*, CNN (last updated Feb. 21, 2017, 3:38 PM), http://www.cnn.com/2017/02/21/politics/daca-dreamers-donald-trump-both-ways/.

84 *See supra* notes 35–38.

85 *See supra* notes 46–48.

86 *See, e.g.*, Bray, *supra* note 7, at 9–10.

87 *See id.* at 10–11 ("But if one district judge *invalidates* a statute and issues a national injunction, the injunction controls the defendant's actions with respect to everyone. Shop 'til the statute drops.").

88 Bray, *supra* note 7, at 12–13; *see also* Siddique, *supra* note 7, at 26–27.

89 *See, e.g.*, Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 864–66 (1993).

creases when one district court issues a nationwide injunction.[90] Bray argues that, especially with nationwide preliminary injunctions, the Supreme Court's ability to render a "good" decision is seriously hindered, because the Court has to rule, without a well-developed record, on the likelihood of success.[91] Bray further argues that even the trial on the merits will be affected because judges are human and likely "to accept a position and then stick to it."[92]

D. Circe's Advice: Limit the Use of Nationwide Injunctions

Bray and Siddique each conclude their observations of nationwide injunctions with proposals to systematize their use in a principled manner. Bray suggests that the injunction should "protect[] the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant's conduct vis-à-vis non-parties."[93] In using the DAPA and travel ban cases as a demonstration, Bray argues that the courts should have issued injunctions that protect the plaintiff-states only, but not injunctions that protect non-parties, such as the states or private parties that did not sue the DHS.[94] Bray's conclusion is grounded in the understanding that the "judicial [p]ower" of the United States in Article III is the power to decide cases or controversies "for a particular claimant," not a grant of power to issue a remedy for non-parties.[95] Siddique, on the other hand, suggests a clarification of the current "complete relief" principle.[96] In APA cases, Siddique argues that nationwide injunctions are appropriate where issued to address nationwide class action cases, to remedy a nationwide harm in non-class action cases, or to provide individual complete relief in non-class action cases.[97]

These two suggestions are built of solid and valid reasons and, if adopted, will lead to limiting the use of nationwide injunctions. Anything less than a nationwide injunction, i.e., a geographically limited injunction, unavoidably leads to the possibility of agency nonacquiescence. As recent cases involving the Environmental Protection Agency ("EPA") have shown, agency nonacquiescence can lead to sit-

90 *See* Siddique, *supra* note 7, at 26–27.
91 Bray, *supra* note 7, at 12.
92 *Id.*
93 *Id.* at 51.
94 *Id.* at 52–53.
95 *Id.* at 53.
96 Siddique, *supra* note 7, at 6.
97 *Id.* at 12.

uations in which the agencies effectively circumvent judicial review.[98] Therefore, at least in the administrative law context, and especially for litigants and federal courts in the preliminary stages of litigation against agencies, Bray's and Siddique's solutions are not completely satisfactory.

III. SCYLLA: GEOGRAPHICALLY LIMITED PRELIMINARY INJUNCTIONS

Geographically limited preliminary injunctions prohibit an agency from implementing its program within a particular judicial district or circuit, but leave the agency free to commence implementing the program elsewhere while judicial review is pending. In such cases, the agency can voluntarily choose to delay the program's implementation until after the case is resolved. However, it also has the right to *nonacquiesce* to the court's decision and commence implementation outside of that court's geographical boundary. In doing so, the agency is permitted and encouraged to relitigate the issue and try to win a favorable judgment. The Supreme Court in *United States v. Mendoza*[99] endorsed the government's ability to relitigate an issue in various federal courts, because circuit splits ensure that the legal issues develop and percolate before the Court can address them.[100] Similarly, "both *Mendoza* and the related literature defending an agency's prerogative to non-acquiesce explain how a rule favoring nationwide relief in administrative law cases" defeats this purpose.[101]

Agency nonacquiescence, however, is problematic because it can be more difficult for the reviewing court to "set aside" the program that they find to be unlawful where such a program has already been partially or fully implemented.[102] This is why litigants typically try to challenge agency actions before they go into effect.[103] For example, the challengers in *King v. Burwell*[104] sought to challenge the IRS Rule regarding billions of dollars of subsidies in Obamacare *before* millions

98 *See infra* Part III.

99 464 U.S. 154 (1984).

100 *See id.* at 160–62. In this case, the Court held that nonmutual collateral estoppel defeats the benefit and purpose of percolation and circuit splits. *See id.* ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.").

101 Siddique, *supra* note 7, at 27 (citation omitted).

102 5 U.S.C. § 706(2) (2012).

103 *See* JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER 332–33, 425–27 (2016).

104 135 S. Ct. 2480 (2015).

of Americans came to depend on the subsidies.[105] The challengers knew that the Court would be reticent to issue a decision that in effect took health insurance away from millions of Americans.[106] A series of cases involving the EPA further illustrates this danger.

Take *Michigan v. EPA*,[107] for example. Pursuant to the Clean Air Act ("CAA"),[108] the EPA concluded that it was "appropriate and necessary" to regulate power plants.[109] In doing so, the EPA deemed cost irrelevant to determining whether it was "appropriate and necessary" to regulate power plants.[110] The Supreme Court held that the EPA's conclusion that costs were irrelevant was unreasonable and unlawful under the CAA.[111] But there was no injunction against the EPA while judicial review made its way to the Court, so the EPA had substantially implemented its new regulation.[112] The Court remanded the case to the D.C. Circuit, but by this point, "the majority of power plants [were] already in compliance or well on their way to compliance."[113] On remand, the D.C. Circuit declined to set aside the unlawful program, noting that the program had already been implemented significantly in the country.[114]

The EPA seemed poised to take a similar approach after the district court in North Dakota issued a preliminary injunction against its WOTUS Rule.[115] The EPA's attempt to clarify the definition of "navigable waters" was very controversial.[116] Thirteen states challenged the

---

105 *Id.*

106 *Id.*

107 135 S. Ct. 2699 (2015).

108 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

109 *Michigan*, 135 S. Ct. at 2705.

110 *Id.* at 2712.

111 *Id.*

112 Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 4, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15A773).

113 *Id.* at 1–2 (quoting Janet McCabe, *In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision*, EPA Blog (June 30, 2015), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/ [https://perma.cc/SUN6-3XPT]).

114 *See* White Stallion Energy Ctr., LLC v. EPA, No. 12-1100, 2015 WL 11051103 (D.C. Cir. Dec. 15, 2015).

115 Jonathan H. Adler, *North Dakota District Court Blocks Controversial 'Waters of the United States' Rule (UPDATED)*, Wash. Post: Volokh Conspiracy (Aug. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/28/north-dakota-district-court-blocks-controversial-waters-of-the-united-states-rule/; Timothy Cama, *EPA Water Rule Takes Effect in Some States*, Hill (Aug. 28, 2015, 9:37 AM), http://thehill.com/policy/energy-environment/252165-epa-water-rule-takes-effect-in-some-states.

116 *See* Darryl Fears, *Obama Administration Just Made a Last Effort to Save a Controversial Water Rule*, Wash. Post (Jan. 13, 2017), https://www.washingtonpost.com/news/energy-environ

WOTUS Rule in the U.S. District Court for the District of North Dakota.[117] The district court issued a preliminary injunction limited to the geographical boundary of the thirteen plaintiff-states.[118] The EPA then announced its intent to commence implementing the WOTUS Rule in thirty-seven other states.[119] Doing so would have prompted businesses and farmers to begin making changes to comply with the rule, and it certainly would have made it more difficult for the court to set the rule aside. After the EPA's announcement, the plaintiff-states informed the district court about the EPA's intent to apply to Rule elsewhere, and the district court in North Dakota sought supplemental briefing to see whether the injunction should be changed to apply nationally.[120] Before the district court could make additional rulings, however, the U.S. Court of Appeals for the Sixth Circuit—in a separate challenge to the rule—issued a nationwide stay against the Rule.[121]

These developments led to the challenge against the EPA's Clean Power Plan ("CPP"). Challengers sought a stay from the Supreme Court, which would have automatically applied nationally.[122] In their stay application, challengers recounted how the EPA essentially circumvented judicial review in *Michigan*.[123] Although the Court provided no reasoning, it nonetheless granted a stay against the CPP.[124]

In sum, these cases reveal what could happen where there is no nationwide preliminary injunction. The agency will nonacquiesce and implement its program. Even if the reviewing court ultimately finds the program unlawful, as the Supreme Court did in *Michigan*, it can become very difficult to set aside the already-implemented program. It will especially be difficult to set aside a program that has already affected millions of people and cost billions of dollars.

---

ment/wp/2017/01/13/obama-administration-just-made-a-last-effort-to-save-a-controversial-water-rule/.

117 North Dakota v. EPA, 127 F. Supp. 3d 1047, 1052 (D.N.D. 2015).

118 *Id.*

119 Adler, *supra* note 115; Cama, *supra* note 115.

120 Adler, *supra* note 115.

121 *In re* EPA, 803 F.3d 804, 808 (6th Cir. 2015).

122 Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15A773).

123 *Id.* at 1–2; *see* Michigan v. EPA, 135 S. Ct. 2699 (2015).

124 West Virginia v. EPA, 136 S. Ct. 1000 (2016).

IV. The Administrative Procedure Act's Stay Provision

Determining the scope of preliminary injunctions against agencies is a troublesome task. Nationwide preliminary injunctions are issued under unclear doctrinal guidance, could place the government under conflicting injunctions, arguably negatively affect judicial decisionmaking by hindering percolation, and incentivize forum shopping.[125] On the other hand, geographically limited preliminary injunctions lead to agency nonacquiescence, which, in the worst cases, renders judicial review meaningless.[126]

The Administrative Procedure Act's stay provision could allow the courts to bypass these problems substantially. 5 U.S.C. § 705 provides:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.[127]

This Part includes general observations regarding § 705 and explains how the statute can alleviate the five problems that follow preliminary injunctions.

A. General Observations Regarding 5 U.S.C. § 705

Unlike preliminary injunctions which are governed by Rule 65 of the Federal Rules of Civil Procedure and can generally be granted in every type of case, a stay under § 705 can only be granted in cases properly arising out of the APA. The purpose of the stay provision in § 705 is "to prevent irreparable injury" and to preserve the status quo "pending conclusion of the review proceedings."[128] Subsequently, the motion for a stay must accompany a petition to review an agency action.[129] The court cannot entertain a freestanding motion to stay with-

---

125 *See supra* Part II.

126 *See infra* Part III.

127 5 U.S.C. § 705 (2012). Section 705 provides two distinct forms of temporary relief while judicial review is pending: agency stay and judicial stay. *Id.* An agency itself may postpone the effective date of its action, pending judicial review, when it "finds that justice so requires." *Id.* The main concern for this Essay is the judicial stay.

128 *See id.*

129 *In re* GTE Serv. Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985).

out a proper petition for judicial review.[130] If a case cannot be brought for judicial review under the APA, then the stay also cannot be granted under the APA. For example, if an organic statute precludes judicial review or commits an agency action to agency discretion, then the judicial review provision of the APA as a whole does not apply and neither will the stay provision.[131] Regardless, this provision can be especially relevant because many of the headline-grabbing injunctions have been issued in administrative law cases, wherein an APA stay could have been granted.[132]

Section 705 states that the court may issue a stay "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury."[133] Although the text of § 705 does not clearly articulate a standard, courts apply the four-part test used to issue a traditional stay or preliminary injunction to determine whether to issue a stay.[134] The text is vague about the conditions, in addition to irreparable injury, that must be met to warrant a stay. The courts consider the likelihood of irreparable harm, the likelihood of success on the merits, harm to others, and public interest.[135]

Conventional wisdom is that § 705 authorizes a stay. In *Sampson v. Murray*,[136] the Supreme Court relied on the APA's legislative history to observe that § 705 was intended to codify the existing power of federal courts to issue a stay.[137] While both are temporary remedies, stays are different from preliminary injunctions in one important way: preliminary injunctions act on the *person* while stays act on the *proceeding*. Although it may seem like a hyper-technical and theoretical difference without any practical distinction, the Supreme Court found this formal distinction relevant in *Nken v. Holder*.[138]

---

130 *Id.*

131 5 U.S.C. § 701(a).

132 *See supra* notes 34–39.

133 5 U.S.C. § 705.

134 *E.g.*, Nken v. Holder, 556 U.S. 418, 425–26 (2009); Sierra Club v. Jackson, 833 F. Supp. 2d 11, 30 (D.D.C. 2012); Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 562 F. Supp. 279, 280–81 (E.D. Ark. 1983).

135 Courts typically examine these four factors for stays and injunctions. Authority is split, however, regarding the weight or importance given to certain factors, or the sliding scale. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting); Eric J. Murdock & Andrew J. Turner, *How "Extraordinary" Is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10464 (2012).

136 415 U.S. 61 (1974).

137 *Id.* at 68 n.15 (citing S. REP. NO. 752, at 230 (1945)).

138 556 U.S. 418 (2009).

In *Nken*, the Court held that the traditional stay factors, not the demanding standard in the Immigration and Nationality Act,[139] governed federal courts' authority to stay an alien's removal pending judicial review.[140] The Act, at 8 U.S.C. § 1252(f)(2), states that "no court shall enjoin the removal of any alien . . . unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."[141] Nken sought a stay of his removal order while the judicial review of the Board of Immigration Appeals' decision was pending, and argued that the traditional stay factors governed the issuance of a stay.[142] The government, on the other hand, argued that the heightened standard of § 1252(f)(2) applied.[143] The Court concluded that the heightened standard of § 1252(f)(2) only applied to injunctions and not stays and held that the traditional stay factors governed.[144]

The Court's conclusion was based on the word "enjoin" in the text of § 1252(f)(2) and the formal distinction between injunction and stay.[145] The Court held that § 1252(f)(2) only applies to injunctions, because it makes no mention of "stays" but only of the courts' authority to "enjoin the removal of any alien."[146] The government argued that a stay is merely a type of an injunction and is therefore covered by § 1252(f)(2), but the Court found this argument unpersuasive given the historical and formal distinctions between a stay and an injunction.[147]

An injunction acts on the *person*.[148] When acting through an injunction, a court "tells someone what to do or not to do . . . [,] directs the conduct of a party, and does so with the backing of its full coercive powers."[149] By contrast, a stay acts on the *proceeding*. It "halt[s] or postpone[s] some portion of the proceeding" or "temporarily divest[s] an order of enforceability."[150] Both an injunction and a stay "prevent[] some action before the legality of that action has been conclusively

---

139 8 U.S.C. § 1252(f)(2) (2012).

140 *Nken*, 556 U.S. at 433–34.

141 8 U.S.C. § 1252(f)(2).

142 *Nken*, 556 U.S. at 423, 425–26.

143 *Id.* at 425–26.

144 *Id.* at 432–33.

145 *Id.* at 428.

146 *Id.* at 428–33.

147 *Id.* at 428, 432–33.

148 *Id.* at 428 ("[A]n injunction is a judicial process or mandate operating *in personam*." (quoting 1 H. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1 (1909))).

149 *Id.*

150 *Id.* (citing *Stay*, BLACK'S LAW DICTIONARY 1413 (6th ed. 1990)).

determined."[151] An injunction does so "by directing an actor's conduction."[152] On the other hand, a stay does so "by temporarily suspending the source of authority to act."[153]

Despite the conventional wisdom, the text of § 705 seems to create a choice between a stay and an injunction. Under § 705, the court can "issue all necessary and appropriate process to postpone the effective date of an agency action *or* to preserve status or rights."[154] Here, "or" creates a disjunctive list and alternative choices.[155] "Process" is simply a writing or order issued from a court.[156] A process issued to postpone something is a stay.[157] But a process issued to preserve status or rights could either be a stay or an injunction. A stay could clearly preserve status or rights, but in some cases, an injunction—a process that commands someone not to act—may be "necessary and appropriate."[158] In practice, courts have generally construed and applied § 705 as granting statutory authority to issue a *stay* that postpones the effective date of an agency action.[159] Some have stated that "when a party challenges a regulation under the Administrative Procedure Act, the appropriate relief is not a preliminary injunction but rather a stay" under § 705.[160] This Essay agrees that a stay is more appropriate for the reasons explained below, but not because the text precludes injunctions.[161]

---

151 *Id.*

152 *Id.* at 428–29.

153 *Id.*

154 5 U.S.C. § 705 (2012) (emphasis added).

155 For a discussion of the Conjunctive/Disjunctive Canon, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116–25 (2012).

156 "'Process' and 'writ' or 'writs' are synonymous, in the sense that every writ is a process, and in a narrow sense of the term 'process' is limited . . . at least to writs or writings issued from or out of a court, under the seal thereof and returnable thereto; but it is not always necessary to construe the term so strictly as to limit it to a writ issued by a court in the exercise of its ordinary jurisdiction." *Process*, BLACK'S LAW DICTIONARY (10th ed. 2014) (quoting 72 C.J.S. Process § 2 (1987)).

157 *See* 5 U.S.C. § 705; *see also Nken*, 556 U.S. at 428; *Stay*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The postponement or halting of a proceeding, judgment, or the like.").

158 *See* 5 U.S.C. § 705; *see also Nken*, 556 U.S. at 429; *Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A court order commanding or preventing an action.").

159 *E.g.*, Texas v. EPA, 829 F.3d 405, 435 (5th Cir. 2016); Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part).

160 Labnet Inc. v. U.S. Dep't of Labor, 197 F. Supp. 3d 1159, 1167 n.3 (D. Minn. 2016); *see also* Leland E. Beck, *Delicate Technicalities of Judicial Review of Final Agency Action*, FED. REG. ADVISOR (Sept. 11, 2012), http://www.fedregsadvisor.com/2012/09/11/delicate-technicalities-of-judicial-review-of-final-agency-action-2/.

161 The text and fair inferences therefrom should control over the subjective intentions of the legislators. *See* SCALIA & GARNER, *supra* note 155, at 16–17, 20.

As with all other "extraordinary" equitable remedies, the court has flexibility and enjoys significant discretion in issuing a stay under § 705. Absent express limitations that Congress may impose through organic statutes, § 705 imposes no time limit on the stay other than until the "conclusion of the review proceedings."[162] The court also has discretion to stay a part or the entirety of the content of a challenged agency action.[163]

In recent cases, litigants predominantly sought preliminary injunctions against agency actions even though § 705 allows for a stay.[164] This may be in large part because the difference between a stay and an injunction, although real and important, can easily go undetected.[165] First, the litigant must prove the same four factors to obtain either a stay or an injunction.[166] It is easy to forget their differences when the requirements are the same. But as the Supreme Court clarified, the "substantial overlap" in the standards is "not because the two are one and the same."[167] Rather, both a stay and an injunction address "similar concerns" that arise "whenever a court order may allow or disallow anticipated [agency] action" pending judicial review.[168] Moreover, the practical consequences seem to be similar as well. The litigant gets what she wants whether the agency is enjoined from acting or its rule is stayed pending judicial review. Especially after receiving a favorable ruling on the "likelihood of success on the merits" factor, the litigant is likely to win on the actual merit proceeding in either case.

B. Nationwide Applicability: Nonacquiescence and Doctrinal Clarity

An APA stay issued under § 705 presumably has automatic, nationwide applicability, and could solve the problem of nonacquiescence under geographically limited preliminary injunctions, as well as the lack of doctrinal clarity under nationwide preliminary injunctions. Section 705 authorizes the reviewing court to "postpone *the* effective date of an agency action."[169] The APA defines "agency action" to in-

---

162 5 U.S.C. § 705; *see* FBME Bank Ltd. v. Lew, 209 F. Supp. 3d 299, 310 (D.D.C. 2016) (quoting *Mexichem*, 787 F.3d at 562 (Kavanaugh, J., dissenting in part)).

163 *See* Texas v. EPA, 829 F.3d at 435.

164 *See, e.g.*, Jonathan H. Adler, *The Last Nationwide Injunction of 2016*, WASH. POST: VOLOKH CONSPIRACY (Dec. 31, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/31/the-last-nationwide-injunction-of-2016/.

165 *See* Nken v. Holder, 556 U.S. 418 (2009).

166 *See id.* at 434.

167 *Id.*

168 *Id.*

169 5 U.S.C. § 705 (2012) (emphasis added).

clude, inter alia, a rule and an order.[170] An order involves individualized adjudication and only impacts individuals who were parties to the adjudication.[171] An APA stay can postpone the effective date of such individualized orders until judicial review is complete. Recent cases involving preliminary injunctions have involved rulemaking rather than adjudication. Rules are what we colloquially associate as regulations, and they have general applicability and future effect.[172] When an agency issues a rule, it applies nationwide.[173] This is because "[a]gencies are structured hierarchically so that they can administer their statutes with national uniformity."[174] Agencies form "a single policy voice"[175] and a single effective date for the whole country. This means that when the reviewing court postpones the effective date of a rule that applies nationwide, it postpones it nationwide. It seems irreconcilable with the text of § 705 ("postpone *the* effective date") for the court to create one effective date of a regulatory program in one judicial district, but another for other districts.

If the postponement takes place nationally, then the agency will have no legal basis to implement the program anywhere in the country while the stay is in effect. This will prevent the agency from nonacquiescing elsewhere. Additionally, the presumptive nationwide applicability removes the need to engage in the complicated analyses regarding the scope of the stay that the courts would have to employ for injunctions under the "complete relief" principle.

C. Nature of Stay: No Conflicting Obligations

Although an APA stay under § 705 would have a nationwide effect, the reviewing court will not impose conflicting obligations on the government, because a stay acts on agency action by suspending its enforceability, rather than imposing legal obligations on the government. As previously discussed, the distinction between a stay and an injunction is crucial. The Supreme Court made it clear in *Nken* that stays and injunctions are not "one and the same."[176] An injunction

---

170 *Id.* § 551(13).

171 *See id.* § 551(6)–(7).

172 *See id.* § 551(4).

173 That is except for state implementation plans in issues like the Clean Air Act. Those rules only pertain to a state. *See Basic Information About Air Quality SIPs*, U.S. EPA, https://www.epa.gov/sips/basic-information-air-quality-sips [https://perma.cc/CZD3-FNHT] (last visited July 1, 2017).

174 Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1197 (1992).

175 *Id.*

176 Nken v. Holder, 556 U.S. 418, 434 (2009).

"tells someone what to do or not to do."[177] A stay, on the other hand, acts on the *proceeding*, and "halt[s] or postpone[s] some portion of the proceeding"[178] or "temporarily suspend[s] the source of authority to act."[179] An APA stay theoretically cannot impose any legal obligation. So even if it applies nationally, it will not impose conflicting legal obligations as nationwide preliminary injunctions would.

D. Congressional Policy of Judicial Review: Forum Shopping and Percolation

Admittedly, an APA stay under § 705 will not directly address the forum shopping and lack of percolation issues that Bray raises. To the extent an APA stay will halt agency action nationally (as a nationwide preliminary injunction would), much of Bray's criticisms regarding forum shopping and lack of percolation would still apply to an APA stay. However, the fact that the APA is congressionally enacted demonstrates Congress's express adoption of the policy in favor of judicial review despite these defects.

Forum shopping will never cease to exist in administrative law cases because the government is comprised of a centralized administrative state, with multiple and decentralized federal courts.[180] Section 705 seems to acknowledge the decentralization and multiplicity of federal courts, but nonetheless vests each one with the power to stay an agency action. Section 705 states that "the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court," may issue a stay.[181] "[T]he reviewing court" that can stay an agency action is not just the Supreme Court, but also the district court or court of appeals.[182] Unlike other areas of the law where the district court is the court of first instance, in administrative law the court of first review can be the district court or the circuit court. For example, judicial review of actions taken by the Consumer Financial Protection Bureau ("CFPB") first go through the district court.[183] The district court can then stay the CFPB's actions. On the other hand, "Congress has channeled to the circuit court most challenges to [EPA] decisions under the

177 *Id.* at 428.

178 *Id.* (quoting *Stay*, BLACK'S LAW DICTIONARY 1413 (6th ed. 1990)).

179 *Id.* at 428–29.

180 Bruff, *supra* note 174, at 1196–97.

181 5 U.S.C. § 705 (2012).

182 *See id.*

183 Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 16 (2015).

Clean Air Act."[184] The circuit court can stay the EPA's actions. The text of § 705, as adopted by Congress, enables lower federal courts to stay an agency action, despite the concerns of forum shopping. It is an acceptable and rational policy choice to cherish other values—such as preserving the status quo and preventing irreparable harm in the administrative law context—over the value of limiting forum shopping.

It is also true that a nationwide stay could significantly limit percolation and development of the law through circuit splits before the issues reach the Supreme Court.[185] But this is still an acceptable and rational policy choice because a federal court may be prevented from performing its duty to declare what the law is and set aside unlawful programs when it waits for the law to percolate and develop. As described above, when federal courts do not act, agencies will implement their programs, and it will be more difficult for the courts to set aside partially or fully implemented programs later. The nationwide stay is an acceptable and rational policy choice that Congress made: while it delegates certain rulemaking authority to the agencies, it does so on the premise that the judiciary will curb their excesses.

Conclusion

Judicial review of agency action is central to the administrative state in which Congress delegates authority to agencies. To facilitate an effective judicial review of agency action, and to prevent irreparable harm, litigants and courts need preliminary injunctions and stays. Recent cases involving preliminary injunctions have drawn much-needed scholarly attention. These thoughtful commentators, such as Bray and Siddique, offer insightful criticism toward the use of nationwide injunctions, and seek to propose methods by which to limit the uses of nationwide injunctions. But, as this Essay points out, the alternative is not perfect. Geographically limited preliminary injunctions would allow the agencies to implement their programs elsewhere while judicial review is pending. Even if the reviewing court finds the program unlawful, it can be difficult to actually set aside programs that involve billions of dollars and impact millions of people.

An APA stay issued under 5 U.S.C. § 705 will solve many problems associated with preliminary injunctions. The APA's stay provision has national applicability when applied to rules, and it can eliminate agency nonacquiescence and alleviate doctrinal difficulties

184 *Id.*

185 Siddique, *supra* note 7, at 27.

associated with determining the scope of injunctions. APA stays cannot impose conflicting legal obligations on the agencies like nationwide preliminary injunctions can. Unlike injunctions which impose commands or prohibitions on the *person*, stays merely "suspend[] the source of authority to act."[186] The APA and its stay provision should be accepted as a deliberate policy choice that Congress made in favor of effectuating judicial review of, preserving the status quo from, and preventing irreparable harm against, an agency action, despite the potential defects of forum shopping and lack of percolation.

186 Nken v. Holder, 556 U.S. 418, 428–29 (2009).