Professors uncover ‘lost history’ of nationwide decrees

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Ongoing battles about the validity of using “nationwide injunctions” to protect third parties from allegedly unlawful conduct by the government — in appeals from decrees that blocked the Department of Justice from withholding congressionally budgeted funds as part of the Trump administration’s attempt to muscle municipalities into cooperating with its deportation program — inspired professors across the country to examine the “lost history” of decrees that were so extensive they used to be referred to as “omnibus” and “Gatling-gun” injunctions.

In cases filed by the city of Chicago, a district judge ruled that the conditions Attorney General William P. Barr imposed on payments under the Edward Byrne Memorial Justice Assistance Grant Program were unlawful and unconstitutional. And the judge issued nationwide injunctions that protected all of the grant recipients for fiscal years 2017 and 2018.

Barr appealed and the 7th U.S. Circuit Court of Appeals — relying on this new scholarship and an amicus brief from historians at Stanford, Columbia and Princeton Universities — concluded that “there is a substantial historical basis for the concept of injunctive relief that extends to the benefit of non-parties,” and that “universal injunctions” are not inconsistent with U.S. Supreme Court precedent that bars use of nonmutual offensive collateral estoppel against the government. Chicago v. Barr, No. 18-2885 (April 30, 2020).

Here are brief highlight of Judge Ilana Diamond Rovner’s opinion on nationwide injunctions (with light editing and omissions not noted):

Authority of the Court

Courts and commentators, particularly recently, have recognized serious concerns with imposing injunctive relief that extends beyond the parties before the court to include third parties. In fact, the question as to the authority of a court to issue such nationwide, or universal, injunctions, as well as the propriety of such injunctions, has spawned a veritable cottage industry of scholarly articles in the past few years.

Some urge that injunctions extending beyond the parties before the court are a recent invention, first appearing in the 1960s, and that the absence of such equitable relief before that time should cause us to question the legitimacy of that remedy. But recent scholarship casts doubt on that constricted window of universal injunctions, exhaustively documenting
the use of injunctions that extend beyond the plaintiff going back over a century, from a Supreme Court decision in 1913 to the present.

Mila Sohoni, a Herzog Endowed Scholar and law professor at University of San Diego School of Law, meticulously examines equitable remedies in the past century, documenting the equitable relief that extended to non-parties throughout that history, and reaching the conclusion that universal injunctions are consistent with those traditional equitable remedies. Sohoni, The Lost History of the “Universal” Injunction, 133 Harv. L. Rev. 920 (2020).

That conclusion has found support as well in an amicus brief submitted by a group of legal historians, professors at Stanford and Columbia Law Schools and Princeton University, who concluded that “not only did equity courts have the equitable power to grant injunctions that look like modern nationwide injunctions (save they did not run against the federal government itself), but they in fact issued injunctions of astonishing scope.” That wide scope included even exercising “their equity powers at nationwide scale in the 19th and early 20th centuries, to enjoin the activities of hundreds of thousands of individuals, including thousands of non-parties.”

Those historians examined the relief provided in equity from the 18th century onward, such as bills of peace as well as ordinary bills for injunctions including injunctions to abate nuisances, and concluded that “equity courts had the equitable powers to issue nationwide injunctions in the early republic,” and “have long issued injunctions that protect the interests of non-parties.”

In fact, the historians noted periods of time in which the equitable remedies were much more drastic, extending as far as enjoining non-parties (which it noted would not be accepted today) and including a period of time in which injunctions were so broad they were called “omnibus injunctions” and “Gatling-gun injunctions.”

They noted that those omnibus injunctions were repeatedly upheld by the Supreme Court, and ultimately Congress used its power to restrain their issuance.

Although concluding that nationwide injunctions are historically grounded, the legal historians cautioned against an approach that would anchor equitable remedies too closely to the “notoriously difficult subject” of history, noting that the continuity of some traditional equity practices should not foreclose adapting equitable remedies to modern circumstances.

Consistency with Supreme Court law
Therefore, there is a substantial historical basis for the concept of injunctive relief that extends to the benefit of non-parties. The attorney general and the dissent in this case nevertheless argue that universal injunctions are inconsistent with *United States v. Mendoza*, 464 U.S. 154 (1984).

The Mendoza court held that the government in that case should not be subjected to nonmutual offensive collateral estoppel because the “economy interests underlying a broad application of nonmutual collateral estoppel are outweighed by the constraints which peculiarly affect the government.”

The court was concerned with the impact on the government if one decision could bind the government as to that legal issue in any subsequent cases brought by other litigants. The attorney general and the dissent argue that the same danger is presented in a universal injunction.

There are, however, important distinctions between nonmutual offensive collateral estoppel and a universal injunction. First, the legal concepts at issue here are not identical, so the court’s decision as to an estoppel issue is in no way dispositive of the question as to the availability of universal injunctions.

The significance of *Mendoza* must come from its reasoning. But the very different contexts make Mendoza of less relevance to this question.

As to collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. The principle would apply to litigation remote in time, involving different underlying causes of actions, and regardless of whether the litigant in the subsequent suit was similarly situated to the one in the past case.

That expansive reach presented issues uniquely problematic for the government. Whereas in disputes over private rights between private litigants, there was “no sound reason for burdening the courts with repetitive litigation,” the position of the government is not identical to that of the private litigant. Id. at 159-60. The government is more likely to be involved in cases with significant legal issues and is likely to be sued more often than a private party, thus increasing the potential for estoppel to be invoked.

In addition to depriving the government of the benefit of multiple courts of appeal weighing in on the issue, the application of estoppel would force the government to appeal every time it disagreed with a legal issue regardless of the significance of the case in which it was presented, or risk being bound by that holding in a later case of more importance to the government.

Finally, the use of estoppel would prevent subsequent administrations from altering the government’s position on a legal issue, thus upsetting the ability of the executive branch to
adapt to the changing philosophies of subsequent political leaders.

In light of those concerns unique to the government as a litigant, the court held that “the conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government.”

The concerns expressed by the court as to the use of estoppel against the government are not equally present in the context of the universal injunction.

Of course, both situations present the concern with one court’s decision preventing the percolation of the issue in different courts. But unlike the collateral estoppel context, the universal injunction by its nature will concern an issue that is common to all parties bound by it who will be similarly situated, will involve an issue of obvious and significant impact (thus not presenting the government with the need to appeal every adverse legal decision in even minor cases), and will not interfere with the ability of future administrations to change policies (because the impact of the universal injunction will be felt in one ongoing case that would be appealed, not in unlimited, unforeseeable cases in the future).

Its restriction on the government’s ability to relitigate an issue will be limited to that case and will not raise the prospect of impacting future unforeseeable situations remote in time. Therefore, the reasoning of Mendoza counsels an outcome as applied to universal injunctions.

To the extent that Mendoza identifies factors relevant to both estoppel and universal injunctions, the weighing of the factors should occur, as it routinely does, in the district court’s discretionary determination as to the appropriate equitable relief. The situations are not similar enough to support a blanket prohibition of universal injunctions under the reasoning of Mendoza.

And the decisions of numerous courts post-Mendoza, including the Supreme Court itself, support that conclusion. The historical underpinning for the argument that courts have the power to issue universal injunctions is complemented by the actual allowance of injunctions benefiting non-parties more recently.

The Supreme Court in Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017) (“IRAP”), allowed an injunction to remain in place that applied to non-parties.

The IRAP court’s refusal to stay the injunction as to similarly situated individuals should put to rest any argument that the courts lack the authority to provide injunctive relief that extends to non-parties.