

# THE CONSTITUTIONALITY OF NATIONWIDE INJUNCTIONS

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*Opponents of nationwide injunctions have advanced cogent reasons why courts should be skeptical of this sweeping remedy, but one of the arguments is a red herring: the constitutional objection. This Essay focuses on the narrow question of whether the Article III judicial power prohibits nationwide injunctions. It doesn't.*

*This Essay confronts and dispels the two most plausible arguments that nationwide injunctions run afoul of Article III. First, it shows that standing jurisprudence does not actually speak to the scope-of-remedy questions that nationwide injunctions present. Second, it demonstrates that the Article III judicial power is not narrowly defined in terms of according relief only to the actual parties to a lawsuit. Thereafter, the Essay situates nationwide injunctions within several twentieth century remedial innovations that fundamentally altered how citizens hold government accountable. In short, nationwide injunctions are not remedial anomalies and are consistent with constitutional limits on judicial power.*

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## INTRODUCTION

Not every bad idea is unconstitutional.<sup>1</sup> Those of us in the academy who have defended nationwide injunctions recognize that they are usually inadvisable.<sup>2</sup> Scholars can debate (as we do) whether the game is worth the candle—that is, whether situations calling for nationwide injunctions are so vanishingly few that the prudent course is to reject them altogether.<sup>3</sup> But whatever else one might say about them, nationwide injunctions are not unconstitutional.

The constitutional debate about nationwide injunctions has trained on a specific problem: whether, in the absence of a properly certified class action, a federal court may issue an injunction against the government that expressly—and not just incidentally—benefits *nonparties*. Consider one of the most conspicuous recent examples. Two weeks after President Trump’s inauguration, a court prevented his administration from enforcing certain aspects of the so-called “travel ban”<sup>4</sup> against anyone, not just the plaintiffs in the lawsuit.<sup>5</sup> Therein lies the crux of the current debate. Those who maintain that nationwide injunctions are unconstitutional argue that while a court has power to issue judgments that bind the parties to a lawsuit, it has no such power with respect to nonparties.

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1. See, e.g., *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (declining to invalidate laws that “may be unwise, improvident, or out of harmony with a particular school of thought”).

2. See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (“Nationwide injunctions come with significant costs and should never be the default remedy in cases challenging federal executive action.”); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 64 (2017) (“It is true that a national injunction . . . is hardly the ideal way to establish law and bind nonparties.”); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 105 (2019) (arguing that “courts presumptively should not issue nationwide injunctions”); see also Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 42 (2019) (arguing that courts should decline to issue nationwide injunctions when nonparties would not ordinarily be able to take advantage of nonmutual preclusion).

3. Compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 477–81 (2017) (making this argument), with Frost, *supra* note 2, at 1115–18 (arguing that the game is sometimes worth the candle); Malveaux, *supra* note 2, at 61–64 (same); Trammell, *supra* note 2, at 105–11 (same).

4. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), *revoked by* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

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

My goal here is to demonstrate that nationwide injunctions are consistent with the federal “judicial Power”<sup>6</sup> and fit within the modern structure of adjudicating public rights. Until recently, these conclusions might have seemed uncontroversial and perhaps even obvious, but the constitutional objections to nationwide injunctions have gained considerable traction. Several scholars now contend that such injunctions are not simply a bad idea but that they also violate Article III of the Constitution.<sup>7</sup> Since September 2018, the Department of Justice has adopted the same position and has directed its civil litigators to advocate that view in each case presenting even the possibility of a nationwide injunction.<sup>8</sup> And Justice Thomas has endorsed this restrictive vision of Article III.<sup>9</sup> Against that backdrop, this Essay confronts and dispels several interrelated arguments.

Part I considers two versions of the argument that judges who issue nationwide injunctions trench on the federal judicial power. The first version contends that in the absence of a properly certified class action, plaintiffs do not have standing to pursue a nationwide injunction. I argue that although a plaintiff indeed must demonstrate standing—both with regard to the injury complained of and the kind of remedy sought—the proper *scope* of that remedy is a separate question. The Supreme Court has recognized the distinction in an array of cases.<sup>10</sup>

The second version is more amorphous. It insists that federal courts may bind persons to the results of a judgment only when adjudicating those persons’ actual disputes. Conversely, goes the argument, a federal court has no power to bind non-parties because, by definition, it is no longer resolving a

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6. See U.S. CONST. art. III.

7. See, e.g., Bray, *supra* note 3, at 471–72; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 523–27 (2016); Howard W. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 359–63 (2018).

8. See Memorandum from the Att’y Gen. to Heads of Civil Litigating Components and U.S. Attorneys, *Litigation Guidelines for Cases Presenting the Possibility for Nationwide Injunctions* (Sept. 13, 2018).

9. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (“[Universal injunctions] appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.”).

10. See discussion *infra* Section I.A.

judicially cognizable dispute. This contention misses the mark, however, because judicial power has never been defined solely in terms of dispute resolution. Thus, even when a court issues a nationwide injunction that benefits nonparties, it still operates within the bounds of Article III.

In Part II, this Essay addresses a contention that, strictly speaking, doesn't purport to prove that nationwide injunctions are unconstitutional but nonetheless suggests that something is amiss. Specifically, several scholars argue that nationwide injunctions are a modern phenomenon,<sup>11</sup> a claim that other scholars have shown is deeply misleading and possibly just wrong.<sup>12</sup> But even if nationwide injunctions in their current form don't have a long pedigree, their novelty is hardly evidence of their unconstitutionality. Rather, they are part of a broader reordering of the relationship between citizens and their government, including citizens' power to vindicate public rights in court.

Few would doubt that nationwide injunctions raise a host of difficulties. Scholars are right to be concerned that courts might render inconsistent judgments, freeze the law prematurely, thwart percolation of important legal questions, or incentivize enterprising plaintiffs to engage in forum shopping.<sup>13</sup> Those and other prudential issues merit a robust debate.<sup>14</sup> But manufacturing a constitutional home for the objections to nationwide injunctions distorts and impoverishes Article III.

## I. NATIONWIDE INJUNCTIONS AND THE JUDICIAL POWER

The core constitutional objection to nationwide injunctions is that they benefit nonparties. Proponents of this idea contend

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11. See, e.g., Bray, *supra* note 3, at 437–38 (arguing that *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963), was the first case in which a nationwide injunction was issued); Wasserman, *supra* note 7, at 353 (arguing that “the practice traces to the 1960s and 1970s”).

12. See *infra* notes 66–70 and accompanying text.

13. See, e.g., Bray, *supra* note 3, at 457–64 (raising these objections); see also Clopton, *supra* note 2, at 37–44 (acknowledging these potential problems); Frost, *supra* note 2, at 1085–93 (same); Trammell, *supra* note 2, at 107–09 (same).

14. In fact, the prudential realm is where most of the debate has been taking place, as the sources in the immediately preceding footnote suggest. My own thoughts on how to navigate the prudential concerns with nationwide injunctions borrow largely from the theory and doctrine of issue preclusion. Principally, though, I concentrate here on debunking the constitutional objections.

that the federal “judicial Power”<sup>15</sup> confers authority to adjudicate the parties’ rights and obligations but, conversely, no authority to bind or benefit nonparties directly.<sup>16</sup> Where does this definition of judicial power come from? Certainly not from historical practice, as the next Section demonstrates.<sup>17</sup> Although understanding judicial power in terms of a crisp distinction between parties and nonparties has an alluring elegance, it’s little more than an article of faith—and misplaced faith at that.

### A. *Standing*

The judicial power argument basically comes in two versions. The first and most plausible variation is rooted in the Supreme Court’s standing jurisprudence, which the Court has long said derives from Article III. In essence, the argument contends that while a party to a lawsuit may seek a remedy on her own behalf, she lacks standing to pursue a remedy that directly and intentionally benefits nonparties.<sup>18</sup> Although several scholars have eloquently defended this idea,<sup>19</sup> it ultimately fails on both doctrinal and conceptual levels. Standing presents a quintessential threshold question, whereas the appropriate scope of remedy—including whether a remedy may directly benefit a nonparty—is a logically distinct matter.

To see how scholars construct this argument, consider the basic doctrinal architecture that the Supreme Court has crafted and reiterated over the last generation. In order to establish standing, a party to a lawsuit must allege (1) that she has suf-

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15. See U.S. CONST. art. III, §§ 1, 2.

16. See Bray, *supra* note 3, at 471 (“The court has no constitutional basis to decide disputes and issue remedies for those who are not parties.”); *id.* at 472 (“Article III gives the judiciary authority to resolve the disputes of the litigants, not the disputes of others.”); Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L.J. 481, 519 (2017) (arguing that courts properly exercise judicial power only when according relief to actual parties).

17. See Brief for Legal Historians as Amici Curiae Supporting Plaintiff and Appellee the City of Chicago, *City of Chicago v. Whitaker*, No. 18-2885 (7th Cir. Nov. 15, 2018) [hereinafter Brief for Legal Historians].

18. See, e.g., Morley, *supra* note 7, at 516 (arguing that “individual plaintiffs in non-class cases in federal court generally lack Article III standing to seek relief for anyone other than themselves”); see also Bruhl, *supra* note 15, at 519 (“Given that judgments operate for and against specific people, it follows that each person invoking this judgment-issuing power must have standing.”).

19. See Andrew Coan & David Marcus, *Article III, Remedies, and Representation*, 9 CONLAWNOW 97 (2018); Morley, *supra* note 7.

ferred an “injury in fact,” which is “concrete and particularized” as well as “actual or imminent” in nature;<sup>20</sup> (2) that the alleged injury is “fairly traceable” to the defendant’s conduct;<sup>21</sup> and (3) that a favorable decision can redress that injury.<sup>22</sup> Furthermore, the Supreme Court has insisted that a plaintiff must demonstrate “remedial standing”<sup>23</sup> for each form of relief that she seeks. So, someone who has alleged *past* harm—for example, having been placed in an unlawful chokehold or been subject to discriminatory enforcement of the criminal law—has standing to pursue a backward-looking remedy, such as money damages. Unless the plaintiff can show a likelihood of *future* harm, however, that person lacks standing to seek a forward-looking remedy, such as an injunction.<sup>24</sup>

This much is fairly standard fare, but even this increasingly demanding framework doesn’t speak to the propriety (or impropriety) of nationwide injunctions. To see how, consider the recent kerfuffle over whether a nationwide injunction against the enforcement of a new asylum regulation was appropriate. On July 16, 2019, the Departments of Justice and Homeland Security issued a joint interim final rule that effectively denies asylum to anyone trying to cross the United States’ southern border if that person did not first apply for asylum in Mexico (or another “third country”).<sup>25</sup> Initially, the district court granted a nationwide preliminary injunction,<sup>26</sup> which the Ninth Circuit narrowed in geographic scope.<sup>27</sup> On September 9, 2019, the district court reinstated the nationwide

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20. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

21. *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560–61).

22. *Id.*

23. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 11 (1984); see also David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 809 (2016) (similarly describing the “right plaintiff principle” as requiring that “[t]he remedy sought determines a plaintiff’s standing, not just the harm alleged”).

24. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–10 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 495–99 (1974).

25. See *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208); see also *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 929–30 (N.D. Cal. 2019).

26. *E. Bay Sanctuary Covenant*, 385 F. Supp. at 960.

27. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019) (concluding that “we must grant the motion for stay pending appeal insofar as the injunction applies outside the Ninth Circuit”).

injunction,<sup>28</sup> and two days later the Supreme Court stayed that injunction pending the appeal.<sup>29</sup> So far, the entire debate has centered on how broadly the preliminary relief may extend.

Amidst the whipsawing decisions about the propriety of the injunction's scope, the various courts have treated standing and scope-of-remedy questions as logically independent of one another.<sup>30</sup> The district court carefully elucidated why the advocacy groups challenging the new asylum rule have standing,<sup>31</sup> and thus far no other court has even remarked on that conclusion. In this case, there are proper plaintiffs, who have alleged injury and demonstrated standing to pursue a prospective equitable remedy, and they are doing so in the context of a live case or controversy. So, what's the problem? And, more specifically, what does standing have to do with it?

For those who argue that nationwide injunctions present a standing problem, the doctrinal hook is *Summers v. Earth Island Institute*.<sup>32</sup> In that case, a plaintiff who had visited a particular forest (and planned to do so in the future) had standing to seek an injunction against a regulation that authorized salvage timber sales within various forests.<sup>33</sup> The parties eventually settled their dispute regarding the forest that the plaintiff had actually visited. Accordingly, the Supreme Court concluded that the plaintiff's injury had been redressed, such that he no longer had standing to challenge the regulation as it might apply to other timber sales in other forests.<sup>34</sup>

Some scholars have inferred that the standing-conferring injury determines not just the *kind* of remedy that a plaintiff may pursue but also the *scope* of that remedy.<sup>35</sup> And indeed, Justice Scalia, who authored *Summers*, later contended that

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28. *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019) (holding that "the Court grants the Organizations' motion to restore the nationwide scope of the injunction").

29. *See Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (mem.) (2019).

30. Notably, the Solicitor General has argued that standing presents a major problem in this litigation and has suggested a link between standing and the appropriate scope of remedy. Application for a Stay Pending Appeal at 20–21, *Barr v. E. Bay Sanctuary Covenant*, No. 19A230 (Aug. 26, 2019). So far, though, the courts consistently have refused to go down that path.

31. *See E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 937, 960 (N.D. Cal. 2019).

32. 555 U.S. 488, 494 (2009).

33. *Id.*

34. *Id.*

35. *See Coan & Marcus, supra* note 19, at 101–02; *Morley, supra* note 7, at 523–24.

this is precisely what the Court meant in that case. In a later opinion joined by Justice Thomas, he cited *Summers* and argued that “[a] plaintiff cannot sidestep Article III’s requirements by combining a request for injunctive relief for which he *has* standing with a request for injunctive relief for which he *lacks* standing.”<sup>36</sup> On this view, standing directly pertains to the scope-of-remedy question. Yoking those concepts could thus sound the death knell for nationwide injunctions, which (in their most problematic variant) extend relief to non-parties whose standing a court has never verified.

From a doctrinal perspective, though, the Supreme Court steadfastly decouples *standing* and *scope of remedy*. While the Scalia view of *Summers* might have an analytical elegance, it has never commanded more than two votes on the Supreme Court.<sup>37</sup> Moreover, his view is exceedingly difficult (if not impossible) to reconcile with the traditional rule—which the Court has long embraced—that a “court’s equitable powers to remedy past wrongs [are] broad, for breadth and flexibility are inherent in equitable remedies.”<sup>38</sup> This includes remedies that extend far beyond the actual plaintiffs to a lawsuit.<sup>39</sup> There is a certain uneasiness in how the Court has navigated these doctrines, but even though it has tightened the standing requirements with respect to the kind of injury that a plaintiff must allege<sup>40</sup> and the kind of remedy he may seek,<sup>41</sup> it consistently has treated the appropriate *scope* of remedy as a distinct question.<sup>42</sup> All of this is to say that the Supreme Court’s cur-

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36. *Salazar v. Buono*, 559 U.S. 700, 731 (2010) (Scalia, J., concurring in the judgment) (emphasis in original).

37. Only Justice Thomas joined in Justice Scalia’s concurring opinion. *Id.*

38. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)); see also *Brown v. Plata*, 563 U.S. 493, 538 (2011) (noting that “[c]ourts have substantial flexibility” in determining appropriate remedies).

39. The most obvious example is a prophylactic injunction. See *infra* notes 80–88 and accompanying text.

40. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016) (insisting that alleged injury must be not only particular to the plaintiff but also sufficiently concrete in order to confer Article III standing).

41. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–10 (1983); *Rizzo v. Goode*, 423 U.S. 362, 371–73 (1976); *O’Shea v. Littleton*, 414 U.S. 488, 495–99 (1974).

42. See, e.g., *Salazar v. Buono*, 559 U.S. 700, 713 (2010) (plurality opinion) (arguing that extent of relief concerned the merits, not standing); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (reaffirming that “the nature of the violation determines the scope of the remedy”).



rent doctrine strongly suggests that standing has no bearing on the basic problem of nationwide injunctions—that is, how broadly a remedy may sweep and, specifically, whether it may benefit people who were not actual parties to a lawsuit.

On a conceptual level, the Court's approach to scope-of-remedy questions makes good sense. Standing is a threshold matter; it concerns the front-end of litigation—specifically, whether *this* plaintiff is the right person to challenge particular conduct and thus whether she is even allowed into federal court. By contrast, courts determine the appropriate scope of remedy, almost of necessity, on the back end of a lawsuit—after a plaintiff has proved that a defendant behaved unlawfully and, critically, shown the extent of the defendant's violations. True, “a federal court is required to tailor ‘the scope of the remedy’ to fit ‘the nature and extent of the . . . violation.’”<sup>43</sup> But if a court issues a remedy that is too broad, the court has abused its equitable discretion—at the back end of litigation—in light of the violations shown.<sup>44</sup> Any such mistake has nothing to do with the threshold question of standing. It's just reversible error.

To the extent that a conceptual oddity lurks in all of this, it doesn't concern how the Supreme Court has treated the scope-of-remedy question. Rather, it lies in the Court's insistence—expressed most famously in *City of Los Angeles v. Lyons*<sup>45</sup>—that a plaintiff must show standing to pursue a particular kind of remedy, such as an injunction.<sup>46</sup> Like the question of remedial *scope*, the appropriate *kind* of remedy would seem to belong to the questions that a court can answer only after a fact finder has weighed the evidence, determined whether violations occurred, and assessed the extent of those violations. To put the point charitably, kind-of-remedy questions (as in *Ly-*

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43. *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976) (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)).

44. Admittedly, a court doesn't issue a preliminary nationwide injunction at the end of litigation. However, determining a provisional remedy's scope still comes after a court decides whether provisional relief is appropriate at all. In other words, scope-of-remedy determinations come at the conclusion of that specific issue.

45. 461 U.S. at 101–03.

46. See Fallon, *supra* note 23, at 11. Professor Fallon termed this latter doctrine “remedial standing.” It very clearly refers to the kind, rather than the scope, of the remedy.

ons) fit uncomfortably with standing.<sup>47</sup> Even if courts allow this conceptual error to persist, though, they should not permit it to metastasize. Indeed, courts correctly recognize that scope-of-remedy questions—such as those concerning the propriety of nationwide injunctions—are important and often vexing, but they are *not* threshold justiciability questions and thus are distinct from standing.

### B. Dispute Resolution

The second way that scholars have argued that nationwide injunctions run afoul of Article III is to suggest that the federal judicial power includes only the “power to decide a case for a particular claimant.”<sup>48</sup> This implicitly invokes the dichotomy that scholars have long discussed between two models of adjudication—the dispute resolution model and the law declaration model. The dispute resolution model, which undergirds this particular constitutional argument against nationwide injunctions, posits that a court’s proper role is to resolve the parties’ concrete disputes and answer larger legal questions only if necessary. By contrast, the law declaration model views the Supreme Court’s primary role as an expositor of legal principles for society writ large.<sup>49</sup> The models, of course, are constructs. Although the Supreme Court never explicitly invokes or endorses them, they offer a useful way to understand and critique the Court’s practices.

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47. See *id.* at 7 (arguing that *Lyons’s* treatment of kind-of-remedy questions as part of standing is “unnecessary and unfortunate” and that “the effectiveness of a particular remedy should play no part in article III standing analysis”). Professor Fallon suggests that the doctrinal mismatch—drawing certain remedial questions into the standing inquiry—was one of the only ways that the Supreme Court and other appellate courts could rein in trial courts that traditionally enjoy exceedingly broad discretion to order appropriate remedies.

48. See Bray, *supra* note 3, at 471; see also Bruhl, *supra* note 16, at 519 (similarly arguing that “judicial power” connotes power to render a judgment in favor of an actual party).

49. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–75 (7th ed. 2015); see also, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 499–508 (2009); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 53–68 (2011); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1952–53 (2016); Henry Paul Monaghan, *On Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

Those who subscribe to the constitutional argument against nationwide injunctions begin with the axiom that the judicial power, by definition, entails only the power to resolve the actual parties' actual disputes.<sup>50</sup> More concretely, this axiom supposedly means that a court's ultimate power rests in its authority to bind the parties through a judgment, which necessarily is specific to those parties properly before the court.<sup>51</sup> Conversely, a court lacks power to bind anyone who isn't actually before it.<sup>52</sup> In this telling, nationwide injunctions violate the Article III judicial power precisely because they directly and intentionally, rather than just incidentally, accord relief to persons who are not parties to the lawsuit.

This argument fails as a historical and descriptive matter. Since the inception of the Republic, federal courts have never understood their power solely in terms of resolving the parties' specific disputes. Put somewhat differently, dispute resolution is not the *definition* of judicial power but instead is merely an *attribute* of judicial power, albeit the single most important attribute.<sup>53</sup>

Think back to *Marbury v. Madison*.<sup>54</sup> The Supreme Court expounded upon judicial review and the duties of the highest officers in the federal government,<sup>55</sup> all in a case over which it lacked jurisdiction. Perhaps more relevant for present purpos-

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50. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) ("American courts' tradition of providing equitable relief only to the parties was consistent with their view of the nature of judicial power.").

51. See Bruhl, *supra* note 16, at 519 (arguing that Article III judicial power is the "judgment-issuing power" and that judgments "operate for and against specific people"); see also Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 244 (2016) (arguing that a "court's judgment and injunction compel conduct by the named defendants as to the named plaintiffs").

52. See, e.g., Bray, *supra* note 3, at 472 ("Article III gives the judiciary authority to resolve the disputes of litigants, not the disputes of others. Article III gives the judiciary authority to remedy the wrongs done to those litigants, not the wrongs done to others."); Wasserman, *supra* note 7, at 359 (arguing that Article III judicial power "means power to decide cases or controversies for particular parties to a particular legal dispute" rather than to "decide general or abstract legal issues to provide remedies for people not before the court").

53. The majority in *United States v. Windsor*, 570 U.S. 744, 756–59 (2013), hinted at this when it declared that adverseness is a prudential element of standing rather than a truly jurisdictional element of federal courts' power. Justice Scalia, one should note, was apoplectic. *Id.* at 784 (Scalia, J., dissenting) ("[The majority] proceeds to call the requirement of adverseness a 'prudential' aspect of standing. *Of standing*. That is incomprehensible.").

54. 5 U.S. (1 Cranch) 137 (1803).

55. *Id.* at 166–71, 176–80.

es, federal courts often have answered pressing legal questions that arose in a friendly (that is, collusive) lawsuit in which the supposed dispute was a contrivance. Consider one of the earliest and most prominent examples, *Fletcher v. Peck*, in which the Court found that the Contract Clause prevented Georgia from voiding earlier land sales to private parties.<sup>56</sup> The parties had arranged a nominal sale of land to get the case into federal court on diversity and secure a definitive ruling about whether the Georgia legislature had acted lawfully. Critically, they both wanted the same result: validation of their land titles.<sup>57</sup> Despite the Supreme Court's protestations to the contrary,<sup>58</sup> federal courts have entertained many of these friendly lawsuits over the centuries—lawsuits in which there is no genuine dispute for a court to resolve.<sup>59</sup>

More recent practices confirm that dispute resolution has never been the definition of judicial power. The Supreme Court increasingly directs parties to brief new issues that the Court itself has added and appoints amici curiae to argue points that the parties do not actually contest.<sup>60</sup>

Nothing refutes the dispute resolution view of judicial power as much as section 1983, one of the most important civil rights statutes, which the next Part explores more thoroughly. Those who subscribe to the dispute resolution view emphasize

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56. 10 U.S. (6 Cranch) 87 (1810).

57. See 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 583–93 (1919). Admittedly, everyone from the parties to the Supreme Court Justices had to pretend that the lawsuit presented a live, non-collusive controversy. But that was all pretense. *Id.*

58. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (“The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding . . .”); *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (“It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”).

59. Among the most infamous decisions ever rendered, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), likely was a friendly case in which the parties colluded to create jurisdiction and in which “Dred Scott was simply a pawn in a jurisdictional game.” PAUL A. FREUND, *ON UNDERSTANDING THE SUPREME COURT* 83–84 (1949). One commentator identified a particular variety of friendly lawsuit—intragovernmental test cases—from the early to mid-twentieth century in which the parties had only a “superficial appearance of adverseness” but shared a primary goal of securing a declaration that a statute or ordinance was valid. Note, *Judicial Determinations in Nonadversary Proceedings*, 72 HARV. L. REV. 723, 733–35 (1959).

60. See Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1953 (2016); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 680 (2012).

a critical difference between a *judgment*, which definitively resolves the parties' rights and obligations, and *precedent*, which supposedly never binds nonparties directly.<sup>61</sup> Professors Blackman and Wasserman articulate the point nicely: “[P]recedent, whether binding or persuasive, does not directly control real-world conduct. It instead must be put into effect by a Court issuing a new judgment . . . .”<sup>62</sup> At least in the context of civil rights litigation, this is untrue. Section 1983 creates a cause of action when a state official violates a person’s federal civil rights.<sup>63</sup> Although the official is usually entitled to qualified immunity,<sup>64</sup> a plaintiff may overcome that immunity by showing that the official violated law that was “clearly established” under “cases of controlling authority” or even through a “consensus of persuasive authority.”<sup>65</sup> In other words, section 1983 imbues precedents with binding significance in the real world. More concretely, precedents create affirmative legal obligations for state officials, even if those officials were not parties to the precedent-making lawsuits.

To be clear, I do not necessarily endorse all of these developments. The point is simply that the Article III judicial power has never been synonymous with the narrowly conceived notion of dispute resolution that underpins several scholars’ constitutional arguments. Once that core predicate evaporates, the entire façade of the constitutional case against nationwide injunctions likewise collapses. What remains are cogent and often persuasive arguments that nationwide injunctions are fraught with serious concerns.<sup>66</sup> But those arguments have nothing to do with the Constitution. Whether courts should exercise greater restraint in ordering remedies that benefit nonparties is not about enforcing the strictures of Article III so much as demonstrating prudence and good judgment.

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61. See, e.g., Bruhl, *supra* note 16, at 506 (“Everyone gets the decision’s precedential value . . . but only the parties get the judgment that definitively decides their rights and liabilities.”); see also Blackman & Wasserman, *supra* note 51, at 244 (arguing that a “court’s judgment and injunction compel conduct by the named defendants as to the named plaintiffs”).

62. Blackman & Wasserman, *supra* note 51, at 244.

63. 42 U.S.C. § 1983 (2018).

64. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

65. Wilson v. Layne, 526 U.S. 603, 617 (1999); see also D.C. v. Wesby, 138 S. Ct. 577, 589–90 (2018); Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011).

66. See Trammell, *supra* note 2, at 107–09.

## II. LITIGATING PUBLIC RIGHTS

Although law “has been called the government of the living by the dead,” Oliver Wendell Holmes wrote, “the present has a right to govern itself so far as it can.”<sup>67</sup> Federal courts took up that challenge in the middle of twentieth century. They became increasingly receptive to lawsuits that sought to vindicate public rights and concomitantly developed several remedial innovations that were, and to an extent remain, controversial. Moreover, those developments laid the intellectual groundwork for modern nationwide injunctions.

In recent years, a narrative has taken hold that (1) nationwide injunctions are a modern phenomenon and (2) the paucity of such injunctions over the centuries points to their inconsistency with traditional equitable principles as well as the federal judicial power.<sup>68</sup> Other scholars have pushed back against the first contention quite persuasively, and I will only summarize their excellent work, which I commend to the interested reader. As to the second point, I want to historicize nationwide injunctions by focusing on various procedural and remedial mechanisms that developed in the 1960s. Specifically, I situate nationwide injunctions within a broader jurisprudential movement that has empowered citizens to enforce rights against the government.

On the first point, the supposed novelty of nationwide injunctions, Professor Bray has asserted that the first nationwide injunction dates back to 1963.<sup>69</sup> That claim is at best incomplete and possibly flat-out wrong. For centuries, courts of equity recognized a “bill of peace,” which Professor Bray contends was not a precursor to the modern nationwide injunction but rather a “proto-class action” in which a discrete group of people with essentially identical claims were actually made parties to a single lawsuit.<sup>70</sup> A number of historians have challenged Bray’s contention. A bill of peace, they argue, was

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67. Oliver Wendell Holmes, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 138–39 (1920). Cf. DAVID MARANISS, *FIRST IN HIS CLASS: A BIOGRAPHY OF BILL CLINTON* 237 (1995) (describing an exchange in which then-Professor Robert Bork told a student: “Just because you quote Oliver Wendell Holmes, don’t think it’s checkmate!”).

68. See Bray, *supra* note 3, at 425–44, 471–72; Wasserman, *supra* note 7, at 353–63.

69. See Bray, *supra* note 3, at 437–38.

70. See *id.* at 426.

actually far closer to a nationwide injunction than a class action precisely because all similarly situated persons were *not* necessarily joined as actual parties. Chancellors had broad discretion to order relief that benefited nonparties and, far more controversially, that commanded nonparties to take certain actions.<sup>71</sup> In other words, equity countenanced exactly what makes nationwide injunctions controversial: ordering relief that directly applies to people who were not parties to the lawsuit.

Further challenging the Bray argument, Professor Sohoni has demonstrated that as early as the 1890s, courts in the United States began to issue injunctions against both federal and state law, including for the benefit of nonparties.<sup>72</sup> Now, an injunction against state law technically isn't "nationwide" in scope, but that is really beside the point, as nearly everyone who writes about this topic recognizes.<sup>73</sup> Rather, the critical insight is that courts issued injunctions that consciously and directly affected nonparties. This summary doesn't do justice to the careful and sophisticated work by these and other scholars, but their work makes clear that nationwide injunctions are neither unprecedented nor completely novel.

Regarding the second point—the supposed constitutional dubiousness of a relatively new remedy—I want to take a slightly different tack by situating the modern nationwide injunction, and specifically the power to restrain executive action, within several other innovations. My concern here is several inflection points that redefined the role of courts in vindicating individual rights. The 1960s witnessed a fundamental structural shift as courts opened their doors to civil rights claims under section 1983,<sup>74</sup> oversaw institutional re-

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71. See Brief for Legal Historians, *supra* note 17.

72. See Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 937–41 (2020). Professor Sohoni cites, for example, *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), Transcript of Record, at 276, and *Smyth v. Ames*, 169 U.S. 466, 517–18 (1898), as among the earliest examples of cases in which the Supreme Court explicitly countenanced relief that extended far beyond the actual parties to those cases.

73. For other work recognizing this point, see, for example, Bray, *supra* note 3, at 419 n.5; Clopton, *supra* note 2, at 8; Frost, *supra* note 2, at 1071; Sohoni, *supra* note 72, at 929; Trammell, *supra* note 2, at 72; Wasserman, *supra* note 7, at 338.

74. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).

form from school systems to prisons,<sup>75</sup> and aggregated claims (including school desegregation claims) through the advent of the modern class action.<sup>76</sup> This historical moment—when courts assumed a more robust role in allowing citizens to hold their governments accountable for unlawful behavior—laid the intellectual groundwork for the nationwide injunction. Many of these developments remain controversial, but viewing them in context, one can see nationwide injunctions' structural role and bona fides more clearly. In short, nationwide injunctions are not aberrant. They fit within a number of innovations that are consistent with the Article III judicial power.

First, consider the Supreme Court's seminal 1961 decision in *Monroe v. Pape*, which breathed life into what had been a dormant civil rights statute and transformed it into one of the most effective tools for combating violations of federally guaranteed rights.<sup>77</sup> What is now codified as 42 U.S.C. § 1983 makes state officials liable when they act “under color of” state law and infringe someone's federal civil rights. For nearly a century, courts had assumed that section 1983 was available only when state law explicitly authorized official conduct that resulted in a violation of federal rights. The theory was that an officer who was *not* in compliance with state law was acting *ultra vires* and thus no longer “under color of” state law.<sup>78</sup> Given the restrictiveness of this interpretation, the statute had been “remarkable for its insignificance.”<sup>79</sup>

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75. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (busing to ameliorate segregation); *Hutto v. Finney*, 437 U.S. 678 (1978) (prison reform).

76. See FED. R. CIV. P. 23(b)(2) (injunctive class action); see also, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

77. 365 U.S. 167.

78. See, e.g., *Civil Rights Cases*, 109 U.S. 3, 13 (1883) (“[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority.”); see also JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 37 (4th ed. 2018) (observing that the Court did not “explicitly say that the acts of a state officer in violation of state law could not constitute the required state action” but that the *Civil Rights Cases* and other cases “seemed to imply as much”).

79. JEFFRIES, JR. ET AL., *supra* note 78, at 42. Between 1871 and 1920, plaintiffs had filed a total of only twenty-one lawsuits based on section 1983. See Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). In 1961, the year *Monroe* was decided, only 296 such



*Monroe*'s singular innovation was bringing official *misconduct* within the purview of section 1983.<sup>80</sup> That interpretive move is critical for present purposes because the Court recognized that section 1983 was a necessary tool in fully vindicating rights that historically were underenforced, and it gave citizens a way to invoke courts' assistance in achieving that goal. By way of illustration, think about a police officer who kicks down your front door, violating both state law and the Fourth Amendment. Before *Monroe*, you could not have used section 1983 to sue the officer for money damages. Your remedies were limited to seeking a prospective injunction against the officer through an *Ex parte Young* lawsuit (demanding that the officer respect your Fourth Amendment rights in the *future*) or bringing a garden-variety tort suit against the officer (say, for the cost of replacing the door). As *Monroe* observed, however, such remedies gave short shrift to the real value of the rights at stake.<sup>81</sup> An injunction regarding future conduct can't rectify the harm that you've already suffered. Most importantly, there is a fundamental difference, however ineffable it might be, between a burglar who kicks down your door and a police officer—someone charged with protecting your rights—who does the same thing.<sup>82</sup>

In short, *Monroe* squarely addressed the problem of underenforcement and expressly gave federal courts a role in more completely vindicating civil rights. Moreover, in reconceiving the sweep of section 1983, *Monroe* interpreted the statute in a way that lower courts for decades had assumed was unconstitutional.<sup>83</sup>

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lawsuits had been brought. *See, e.g.*, Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 662 (1987).

80. Specifically, *Monroe* held that section 1983's requirement that an officer have been acting "under color of" state law did not require that state law explicitly permit the offending activity. Rather, an officer acting in violation of state law also became suable under section 1983. 365 U.S. at 183–87.

81. *See id.* at 183 (arguing that section 1983 is "supplementary to the state remedy," regardless of whether a state remedy is available in theory or practice).

82. *See id.* at 196 (Harlan, J., concurring) (arguing that "a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right").

83. *See* JEFFRIES, JR. ET AL., *supra* note 78, at 37–38 (noting that in light of the *Civil Rights Cases* and other Supreme Court pronouncements, "a nineteenth-century observer might reasonably have thought . . . that § 1983 would be unconstitutional unless it were limited to acts explicitly or impliedly authorized by state law").

The second example of this structural reorientation is the emergence of prophylactic injunctions. Such injunctions seek to prevent future harm by regulating not just a defendant's core illegal behavior, but also conduct that, while technically lawful on its own, contributes to the violations.<sup>84</sup> Courts first issued this particular type of injunction in the 1960s.<sup>85</sup>

The most conspicuous and controversial prophylactic injunctions often involve structural reform of school systems, prisons, and mental hospitals. A few high-profile examples illustrate the point. In the wake of massive resistance to public school integration, federal courts issued detailed injunctions that included several prophylactic measures, such as busing, ratios, and redrawn attendance zones.<sup>86</sup> A lack of busing had not caused the constitutional violation, but busing was a way to ameliorate the violation after school systems had persistently failed to cure it through other means. Similarly, the Supreme Court affirmed a detailed injunction concerning the unconstitutionally deplorable conditions in the Arkansas prison system.<sup>87</sup> And in one of the clearest examples of regulating affiliated lawful conduct, the Court in 2011 affirmed an injunction that potentially required California to reduce its prison population in order to remedy constitutionally deficient medical care.<sup>88</sup> The Court didn't simply direct that injured prisoners receive appropriate care. Instead, with remarkable candor, it acknowledged that it was attempting more broadly to reform conditions that had created an "extensive and ongoing constitutional violation."<sup>89</sup>

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84. See Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 936–37 (1999); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 678 (1988); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 314–15 (2004).

85. See Thomas, *supra* note 84, at 302 n.2 (identifying *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), as the "first example of the imposition of a remedy of prophylactic character").

86. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–31 (1971).

87. See *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (affirming injunction, including a firm thirty-day limit on "punitive isolation").

88. See *Brown v. Plata*, 563 U.S. 493, 502 (2011).

89. *Id.* at 545.

Prophylactic injunctions have attracted a bevy of criticism over the years,<sup>90</sup> in part because they raise serious concerns about the proper judicial role and the separation of powers.<sup>91</sup> On a conceptual level, though, they are consistent with the move toward vindicating underenforced rights and are arguably appropriate in certain situations. This is particularly true when officials consistently and willfully flout their constitutional obligations, such as during the massive resistance to school integration when certain officials did everything in their power *not* to comply with the Supreme Court's directives.<sup>92</sup> Extraordinary lawlessness arguably warranted a new and extraordinary remedy. Regardless of the wisdom of any particular prophylactic injunction, such injunctions are part of the panoply of remedial innovations that arose in the last half century.

Finally, consider the birth of the modern class action in 1966 and its role in desegregation lawsuits. Chief among the new rule's defining attributes was a robust preclusion rule<sup>93</sup>—a newly devised power to bind all similarly situated persons,

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90. See *id.* 557–58 (2011) (Scalia, J., dissenting) (criticizing structural injunctions as “the dressing-up of policy judgments as factual findings” and “invit[ing] judges to indulge *incompetent* policy preferences”) (emphasis in original); *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring) (criticizing structural injunctions as “extravagant uses of judicial power” that are “at odds with the history and tradition of the equity power and the Framers’ design”); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) (arguing that structural injunctions “must be regarded as presumptively illegitimate”); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1303–07 (1983) (criticizing unintended consequences of structural injunctions).

91. See, e.g., Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 712–18 (1978).

92. See, e.g., Fletcher, *supra* note 90, at 637 (arguing that “the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default”); *id.* at 683 (describing “lawless resistance” and courts’ actions “in the face of strenuous political opposition”); Thomas, *supra* note 84, at 380 (arguing that prophylactic injunctions are appropriate and effective to combat defendants’ resistance); see also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587–88 (1983).

93. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 609 (2011) (describing the modern Rule 23 as “first and foremost a *res judicata* device”); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 355 (arguing that “the very essence of the class action device is its capacity to bring closure to claims that stretch beyond the named parties”).

including absent class members, to the results of a single lawsuit. This naturally raised due process concerns.<sup>94</sup> So, to address the problem that a judgment might be binding on an absent class member who did not have a genuine opportunity to participate in the lawsuit, the drafters of the modern class action rule crafted several protections. These included notice and opt-out rights for individual claimholders in class actions that sought to aggregate individual damages claims.<sup>95</sup>

But in the context of classes seeking injunctive relief, those vital protections are conspicuously and curiously absent.<sup>96</sup> Scholars have defended this absence on various grounds, including the idea that lawsuits seeking injunctive relief are, in fact, group rights that are often indivisible.<sup>97</sup> In an illuminating piece about the origins of the modern injunctive class action, though, Professor David Marcus persuasively argues that the lack of notice or opt-out rights in these lawsuits owes far less to grand theory than to the drafters' singular focus on desegregation cases.<sup>98</sup> Even though the parties to those lawsuits often had very different preferences about the means and ultimate goals of the litigation, the drafters wanted to overcome resistance to desegregation by school boards and judges alike.<sup>99</sup> Opponents of desegregation had embraced a strategy of piecemeal litigation, recognizing that a single judgment on be-

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94. See Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 204 (1992) (noting that historically the right to participate in a lawsuit required that a litigant have "actual control over the lawsuit" and "all significant litigation decisions"); Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 578 (2017) (noting that "before preclusion may attach, each person presumptively is entitled to her own day in court as part of the due process right to be heard").

95. See FED. R. CIV. P. 23(b)(3); see also David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 659, 708 (2011) (arguing that the drafters of the modern Rule 23 regarded notice and opt-out rights as essential to ensure the constitutionality of Rule 23(b)(3)).

96. See Marcus, *supra* note 95, at 707 (noting that drafters did not seriously consider whether injunctive classes merited opt-out rights or similar protections).

97. See, e.g., Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058–59 (2002) (describing certain injunctive claims as belonging to the group as such rather than individual litigants); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918–34 (1998) (articulating and defending an "entity model" of class actions, in part because of the indivisibility of the relief sought).

98. See Marcus, *supra* note 95, at 706–08.

99. See *id.* at 664 (noting potential for conflicts within an injunctive class); *id.* at 702–08 (describing the desegregation motivation of Rule 23(b)(2)).

half of one student was virtually worthless. So, the only way to break the logjam of resistance was to channel the cases into class actions and, critically, prevent students and their parents from opting out.<sup>100</sup> The architecture of the modern injunctive class was heavy-handed and perhaps even pedantic. Moreover, it arguably played fast and loose with litigants' due process rights.<sup>101</sup> Even though this innovation came dangerously close to a constitutional boundary, it has become entrenched as an essential tool of public rights litigation.

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What does all of this have to do with nationwide injunctions? First, this discussion suggests that the nationwide injunction isn't a remedial anomaly. In the middle of the twentieth century, a no-longer-toothless section 1983, prophylactic injunctions, and the modern class action all developed to confront the problem of underenforced civil rights. They are all part of a movement toward granting citizens greater power to vindicate rights vis-à-vis the government and entrusting federal courts with a critical role in navigating that relationship. The modern nationwide injunction makes conceptual and doctrinal sense alongside these other innovations.

Second, each innovation departed from received wisdom about what the Constitution required—whether it's what counts as state action in constitutional torts or what due process requires in aggregate litigation. So, it is hardly surprising that nationwide injunctions have also spawned constitutional objections based simply on the fact that they don't conform to the way litigation looked decades or centuries ago. Each of these developments arguably pushed constitutional boundaries, but the mere fact that they had not previously existed in their modern forms is hardly proof that they are unconstitutional. Far from it.

Finally, all of the innovations, including nationwide injunctions, present a similar cautionary tale. They are powerful devices that in critical circumstances can hold recalcitrant officials to account. To varying degrees, though, they all embody a risk that judges might deploy the devices reflexively and intrude into the political branches' domain or disrespect the rights and interests of people who disagree with the aims of a

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100. *See id.* at 706–08.

101. *See id.* at 709–11.

particular lawsuit. As I've argued elsewhere, courts and scholars are right to worry that nationwide injunctions could run afoul of sensible prudential constraints on courts' power.<sup>102</sup> But in all of these situations, that's where the conversation should take place—in the realm of prudence. Simply because courts *might* abuse these devices (perhaps even in a way that is unconstitutional) does not mean that the devices themselves are unconstitutional. It means that courts and scholars are wise to think carefully about the circumstances in which they are most appropriate.

#### CONCLUSION

The elephant in the room is Donald Trump. Courts had issued nationwide injunctions before he became President in 2017, but this particular remedy took center stage within weeks of his inauguration. It has become intertwined with some of the most visceral debates in the current political age, from immigration and asylum to environmental protection and the rights of transgender service members. The substantive debates obviously matter. So, too, does the debate about the judiciary's proper role.

Most of us have a tendency to cheer the results that correspond with our substantive moral commitments. But what goes around comes around. Amidst the vociferous debates about substantive policies, we should be clear about what's at stake when a court issues a nationwide injunction. There are myriad potential problems, as I and others have discussed. Courts should remain vigilant in guarding against those problems. At the same time, nationwide injunctions do not present a constitutional problem, and courts and scholars do a disservice to federal courts when they wrap their policy disagreements in ill-fitting constitutional garb.

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102. See Trammell, *supra* note 2, at 105–09.