
THE LOST HISTORY OF THE “UNIVERSAL” INJUNCTION

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The issuance of injunctions that reach beyond just the plaintiffs has recently become the subject of a mounting wave of censorious commentary, including by members of Congress, a Supreme Court Justice, the Solicitor General, the Attorney General, and the President. Critics of these “universal” injunctions have claimed that such injunctions are a recent invention and that they exceed the power conferred by Article III to decide “Cases[] in . . . Equity.” This Article rebuts the proposition that the universal injunction is a recent invention and that it violates Article III or the traditional limits of equity as practiced in the federal courts. As far back as 1913, the Supreme Court itself enjoined federal officers from enforcing a federal statute not just against the plaintiff, but against anyone, until the Court had decided the case. If the Supreme Court can issue a universal injunction against enforcement of a federal law, then — as an Article III matter — so can a lower federal court. Moreover, lower federal courts have been issuing injunctions that reach beyond the plaintiffs as to state laws in cases that date back more than a century, and the Supreme Court has repeatedly approved of these injunctions. If Article III allows such injunctions as to state laws, it a fortiori allows such injunctions as to federal laws. Mapping these and other pieces of the lost history of the universal injunction, this Article demonstrates that the Article III objection to the universal injunction should be retired and that the unfolding efforts to outright strip the federal courts of the tool of the universal injunction — whether by statutory fiat or by a judicial redefinition of Article III — should halt.

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But I would speak to the consciences of honorable men, and ask, how they can venture . . . to recommend changes, which may cut deep into the quick of remedial justice Surely, they need not be told, how slow every good system of laws must be in consolidating; and how easily the rashness of an hour may destroy, what ages have scarcely cemented in a solid form.

— Joseph Story, Justice of the U.S. Supreme Court (1812–1845)¹

INTRODUCTION

The Trump Administration and the Obama Administration do not seem to have much in common. But they have had one shared foe: the “universal” injunction. Across both administrations, federal district courts have issued a slew of injunctions blocking the executive branch from enforcing federal laws, regulations, or policies “*not only against the plaintiff, but also against anyone*,”² even in cases not certified as class actions.

The federal courts’ power to issue such injunctions — which are variously called “national,”³ “nationwide,”⁴ “universal,”⁵ and even “cosmic”⁶ — is now under fire. In *Trump v. Hawaii*,⁷ Justice Thomas concurred separately to urge the Court to take up the question of the legality of such injunctions, suggesting that they are a modern innovation and that they might fall outside the judicial power of Article III courts.⁸ In 2018, the House Judiciary Committee of the 115th Congress released a markup of the Injunctive Authority Clarification Act,⁹ which would curtail the authority of federal courts to issue such injunctions.¹⁰

¹ Joseph Story, Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University (Aug. 25, 1829), in *THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL, OF JOSEPH STORY* 440, 450 (Boston, James Munroe & Co. 1835).

² Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 *HARV. L. REV.* 417, 419 (2017).

³ *Id.*

⁴ *Id.* at 419 n.5.

⁵ *Id.*

⁶ Transcript of Oral Argument at 72, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-965_l5gm.pdf [<https://perma.cc/KM6E-HLEJ>].

⁷ 138 S. Ct. 2392.

⁸ *Id.* at 2425, 2427–29 (Thomas, J., concurring) (“Even if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts.” *Id.* at 2425 n.2.).

⁹ H.R. 6730, 115th Cong. (2018).

¹⁰ *See id.* § 2(a). If enacted, the bill would amend Title 28 of the U.S. Code to provide the following: “No court of the United States . . . shall issue an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of

In December 2018, the Solicitor General’s Office called for the Court to “arrest” this “disturbing but accelerating trend,”¹¹ which it cast as a “rapidly expanding threat to the respect that each coordinate Branch of our Nation’s government owes the others.”¹² In guidelines to Department of Justice civil litigators, former Attorney General Jeff Sessions referred to such injunctions as “abuses of judicial power,” a “threat[]” to “the rule of law,” a “danger to our constitutional order,” and a “kind of judicial activism [that] did not happen a single time in our first 175 years as a nation.”¹³ Several states — including states that earlier sought and *won* such injunctions — now contend that “universal injunctions contradict the rest of Anglo-American jurisprudence.”¹⁴ The Trump White House, in its characteristically measured tones, has hinted that the practice is perhaps not beyond criticism.¹⁵ A growing vein of scholarship concerning such injunctions has also developed.¹⁶

Civil Procedure.” *Id.* The same bill was reintroduced in the 116th Congress. See Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019).

¹¹ Application for a Stay in the Alternative to a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit at 21, *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (No. 18-676) [hereinafter *Karnoski* Stay Application].

¹² *Id.* at 27.

¹³ Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Attorney General Sessions Releases Memorandum on Litigation Guidelines of Nationwide Injunctions Cases (Sept. 13, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions> [<https://perma.cc/48A9-7NFA>] [hereinafter Sessions Press Release]; see also Memorandum from Att’y Gen. Jeff Sessions on Litigation Guidelines for Cases Presenting the Possibility for Nationwide Injunctions to Heads of Civil Litigating Components, U.S. Att’y’s (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/6ZE7-Q3N9>] [hereinafter Sessions Memorandum].

¹⁴ Brief of Amici Curiae Ohio et al. in Support of Defendants-Appellants and Reversal at 29, *Washington v. Azar*, No. 19-35394 (9th Cir. June 7, 2019), 2019 WL 2489123, at *29 [hereinafter Brief of Amici Curiae Ohio et al.]. This brief was signed by the State of Texas, see *id.* at 32, which has been a plaintiff in a number of cases that resulted in universal injunctions, see, e.g., *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 533–34 (E.D. Tex. 2016); *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

¹⁵ See Press Release, White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017), <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling> [<https://perma.cc/9DFC-MLPU>] [hereinafter Statement on Sanctuary Cities Ruling] (“Today, the rule of law suffered another blow, as an unelected judge unilaterally rewrote immigration policy for our Nation. . . . This case is yet one more example of egregious overreach by a single, unelected district judge. Today’s ruling undermines faith in our legal system. . . .”).

¹⁶ See, e.g., Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Bray, *supra* note 2; Zachary D. Clopton, *Nationwide Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); 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 (2016) [hereinafter Morley, *De Facto Class Actions?*]; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017) [hereinafter Morley, *Nationwide Injunctions*];

This Article demonstrates that the universal injunction is a tool with a more venerable lineage than heretofore recognized.¹⁷ Surveying cases involving both state and federal law and drawing on decisions by courts at all three levels of the federal judicial hierarchy, this Article shows that Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century. Building on this lost history, this Article argues that the Article III objection to the universal injunction should be retired and that legislative efforts to outright strip the federal courts of the substantive power to grant such injunctions should halt.

Let us begin with the history. The universal injunction against federal law did not “emerg[e] for the first time in the 1960s,”¹⁸ as many critics of the universal injunction have claimed. The Court itself issued a universal injunction in 1913, in the months preceding its opinion in *Lewis Publishing Co. v. Morgan*,¹⁹ when it temporarily enjoined a federal statute from being enforced not just against the plaintiffs but also

Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018); see also Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem> [<https://perma.cc/5TKN-GPPD>].

¹⁷ The proper term for such injunctions is in flux; “[n]o term is perfect.” Bray, *supra* note 2, at 419 n.5. I use *universal* because the term “universal” foregrounds “the real point of distinction,” which is that “the injunction protects nonparties,” rather than the geographic scope of the injunction. *Id.*; see *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (“[Universal] injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties — not because they have wide geographic breadth.”); Frost, *supra* note 16, at 1071 (“[T]he dispute is about *who* can be included in the scope of the injunction, not *where* the injunction applies or is enforced.”); see also sources cited *infra* note 23. I take care to specify throughout when I am speaking of universal injunctions against *federal* laws or regulations rather than against *state* or *local* laws or regulations; similarly, I take care to distinguish when I am speaking of injunctions that bar enforcement against *anyone* from injunctions that do *reach beyond the plaintiff* but do *not* shield every potential enforcement target. The term “nationwide injunction” is often used to refer to an injunction against federal law that shields nonparties nationwide, even when the injunction stops short of shielding “everyone.” See, e.g., *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (per curiam) (ordering a nationwide injunction that shielded a subset of nonplaintiff foreign nationals from an executive order concerning immigration from several Muslim-majority countries), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.) (per curiam). Professor Samuel Bray defines the term “national injunction” as an injunction issued by a federal court “in [a] non-class action[]” that “prohibit[s] the enforcement of a federal statute, regulation, or order *not only against the plaintiff, but also against anyone.*” Bray, *supra* note 2, at 419; see also *id.* at 438 (citing as a “national injunction” the decree in *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963), which was a suit brought by the plaintiffs “on behalf of themselves and all other United States manufacturers of electric motors and generators similarly situated,” *id.* at 533).

¹⁸ *Trump v. Hawaii*, 138 S. Ct. at 2426 (Thomas, J., concurring) (“These injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently.”); see also Sessions Memorandum, *supra* note 13, at 4 (“Scholars have not found a single example of any judge issuing this type of extreme remedy in the first 175 years of the Republic.”).

¹⁹ 229 U.S. 288 (1913).

against “other newspaper publishers.”²⁰ In the following decade, the Court issued two other preliminary injunctions that barred a federal law’s enforcement beyond the plaintiffs within a single judicial district, and in one of those cases it specified that similarly broad final relief should issue.²¹ Moreover, at least as far back as 1916, three-judge federal courts issued injunctions against the enforcement of laws that reached beyond the plaintiffs in those suits.²² The laws thereby enjoined were *state* laws, not federal laws, but the injunctions possessed the characteristic that matters most to the Article III debate over the injunctive power²³: those injunctions gave sweeping protection to nonplaintiffs who would otherwise have been vulnerable to the law’s enforcement. When the state defendants in those suits appealed directly to the Supreme Court — as procedural law at the time allowed them to do²⁴ — the Court on several occasions affirmed the lower courts’ injunctions, and sometimes did so in single-sentence, unanimous, per curiam decisions. In one important (though not unique) instance — *Pierce v. Society of Sisters*²⁵ — the Court affirmed a universal injunction barring the enforcement of Oregon’s compulsory public-schooling law in a landmark precedent that remains good law to this day.²⁶

Not long thereafter, the universal injunction was brought to bear upon federal agency action. In 1939, the D.C. Circuit issued a universal injunction against federal agency action in *Lukens Steel Co. v. Perkins*.²⁷ That highly consequential decree altered the federal government’s purchasing activities with respect to the iron and steel industries for a whole year in the run-up to America’s entry into World War II.²⁸ When the Supreme Court took up the case in *Perkins v. Lukens Steel Co.*,²⁹ the

²⁰ *Journal of Commerce & Commercial Bulletin v. Burlison*, 229 U.S. 600, 600 (1913) (per curiam). A copy of the original opinion has been made available here: <https://perma.cc/4KDR-J4HA>.

²¹ See *infra* sections III.B–C, pp. 947–54.

²² See *infra* section IV.A, pp. 959–73.

²³ See *Trump v. Hawaii*, 138 S. Ct. at 2425 n.1 (Thomas, J., concurring); *id.* at 2427 (“[A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. . . . American courts’ tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power.”); see also *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Samuel L. Bray, Professor, UCLA School of Law) [hereinafter Bray Testimony] (“What makes the national injunction distinctive is not its breadth. It is not about spatial extent or being nationwide. . . . What makes this remedy novel and dangerous is that a court is controlling how the government defendant acts toward people who are not parties in the case. . . . The point . . . is that courts are giving remedies to nonparties.”).

²⁴ See *Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 13–16 (1930); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 444–46 (1930).

²⁵ 268 U.S. 510 (1925).

²⁶ See *id.* at 534–36.

²⁷ 107 F.2d 627 (D.C. Cir. 1939) (per curiam), *rev’d*, 310 U.S. 113 (1940).

²⁸ *Perkins*, 310 U.S. at 131.

²⁹ 310 U.S. 113; see *infra* section V.A, pp. 983–91.

Court held that the plaintiffs lacked standing and were thus not entitled to seek *any* kind of relief;³⁰ the steel companies' suit, the Court held, "contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept."³¹ Crucially, *Perkins* left intact the propriety of injunctions reaching beyond the plaintiffs as remedies in cases brought by plaintiffs *with* standing;³² indeed, *Perkins* is bookended by decisions in which the Court continued to approve that practice. In *Hague v. CIO*,³³ less than a year before *Perkins*, the Court affirmed an injunction that protected those who acted in sympathy with *the plaintiffs* from enforcement of a city law;³⁴ in *West Virginia State Board of Education v. Barnette*,³⁵ shortly after *Perkins*, the Court affirmed an injunction that reached beyond both the plaintiffs' children and the alleged plaintiff class to shield "any other children having religious scruples" from a state law requiring students to salute the American flag.³⁶

This history has important implications for how we should understand Article III.³⁷ Today, critics of the universal injunction contend that Article III courts should adhere — or, as they sometimes frame it, revert³⁸ — to

³⁰ *Perkins*, 310 U.S. at 123 ("[T]he Government has challenged the right of the judiciary to take such action . . . at the instance of parties whose rights the Government has not invaded and who have no standing in court to attack the Secretary's determination." (emphasis added)); *id.* at 125 ("[N]o legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based."); *id.* at 132.

³¹ *Id.* at 127.

³² *See id.* at 129–30, 129 n.21 (distinguishing, inter alia, *Pierce* as one of the cases that "relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies," *id.* at 129–30).

³³ 307 U.S. 496 (1939).

³⁴ *Id.* at 517 (opinion of Roberts, J.) (calling the relevant provision of the decree "unassailable"); *see infra* pp. 987–89 (discussing *Hague*).

³⁵ 319 U.S. 624 (1943).

³⁶ Transcript of Record at 46, *Barnette*, 319 U.S. 624 (No. 591); *see Barnette*, 319 U.S. at 642; *infra* pp. 990–91 (discussing *Barnette*).

³⁷ The Court has long relied upon historical practice by the federal courts to lend meaning to the notoriously terse phrases of Article III. *See, e.g.,* *Tutun v. United States*, 270 U.S. 568, 576 (1926); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); *see also* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."). *See generally* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1759–1802 (2015) (using cases from the federal courts canon to elaborate on the relevance of historical practice to constitutional meaning).

³⁸ *See, e.g.,* Letter from Samuel Bray, Professor of Law, UCLA Sch. of Law, to Advisory Committee on Rules of Civil Procedure (Mar. 1, 2017), http://www.uscourts.gov/sites/default/files/17-cv-e-suggestion_bray_o.pdf [<https://perma.cc/7EAQ-FEVE>] [hereinafter Bray Letter]. Bray has proposed the following amendment to Federal Rule of Civil Procedure 65(d): "Every order granting an injunction and every restraining order must accord with the historical practice in federal courts in acting only for the protection of parties to the litigation and not otherwise enjoining or restraining conduct by the persons bound with respect to nonparties." *Id.* at 1; *see* FED. R. CIV. P. 65(d).

the rule that injunctions must be solely “plaintiff-protective.”³⁹ They have urged the Advisory Committee on Federal Rules to create such a rule by amending the Federal Rules of Civil Procedure.⁴⁰ They have pressed Congress to institute such a rule by statute — and indeed, the 115th Congress lately considered doing just that, holding hearings on whether it should forbid what the bill at issue styled as “orders purporting to restrain enforcement against non-parties”⁴¹ in cases not certified as Rule 23 class actions. Justice Thomas, as noted, has suggested that Article III may forbid injunctions that reach beyond the plaintiffs.⁴²

We must be clear about one thing: it would be a sharp departure from precedent and practice to treat Article III as requiring the equitable remedial powers of federal courts to be cabined in that manner.⁴³ Article III confers a singular power upon all federal courts to decide “Cases[] in . . . Equity.”⁴⁴ It does not allocate different types of equitable remedial power to courts at different levels of the federal judicial hierarchy, and it draws no line between state and federal government defendants. That singular judicial power must be uniformly interpreted, and its scope cannot sensibly be regarded as hinging on the surmounting of hurdles to class certification that were not created until 1966. If the Supreme Court can issue a universal injunction against enforcement of a federal law in a suit by a single plaintiff, then so can a federal district court *as an Article III matter*. If a federal district court can

³⁹ Bray, *supra* note 2, at 420 (“A federal court should give a plaintiff-protective injunction, enjoining the defendant’s conduct only with respect to the plaintiff.”); *id.* at 471 (“Article III . . . confers . . . a power to decide a case for a particular claimant. . . . The court has no constitutional basis to decide disputes and issue remedies for those who are not parties.”); *id.* at 473 (defending proposed rule that injunctions be only plaintiff-protective as “a close translation of traditional equity into the present, with sensitivity to institutional and ideological changes”). Bray’s article was focused on injunctions against federal law; as he noted, however, his rule would “logically apply” to injunctions against state law. *Id.* at 424 (“[F]ederal courts should issue injunctions that control a state defendant’s conduct vis-à-vis the plaintiff, not vis-à-vis nonparties.”).

⁴⁰ See Bray Letter, *supra* note 38.

⁴¹ Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2(a) (2018).

⁴² See *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring).

⁴³ Throughout, this Article draws a firm line between arguments concerning Article III’s meaning, on the one hand, and policy arguments, on the other. This is not because, as a general matter, one must think of disputes over constitutional meaning as hermetically sealed off from questions of sensible policy. It is because a critically important piece of the case against the universal injunction is the claim that *solely as a matter of positive law* Article III does not allow such injunctions. See *id.* at 2429 (dismissing defenses of the universal injunction because they “do not explain how these injunctions are consistent with the historical limits on equity and judicial power” and instead “at best ‘boi[] down to a policy judgment’ about how powers ought to be allocated among our three branches” (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring in judgment))). This Article addresses that proposition on its own terms — as a claim concerning constitutional power that is strictly distinct from, and lexically prior to, whether such injunctions are good or bad as a policy matter.

⁴⁴ U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . .”).

issue a universal injunction against enforcement of a state law in a suit by a single plaintiff, a federal district court must also have the power to issue such an injunction against enforcement of a federal law *as an Article III matter*. There is only one “judicial Power,”⁴⁵ and that power includes the power to issue injunctions that protect those who are not plaintiffs.

Finally, some critics of the universal injunction have invoked a strict form of originalism in support of their case against that remedy.⁴⁶ But the logic of that argument would extend well beyond the *universal* injunction. At the time of the Founding, English officers were kept to heel not with injunctions issued by the Chancellor in equity, but instead with common law damages suits or “prerogative” writs (mandamus, quo warranto, and so on) issued by the King’s Bench — a common law court.⁴⁷ And American federal courts did not issue “*Young*-type”⁴⁸ injunctions against enforcement suits brought by state and federal officers until well after the Founding.⁴⁹ A strictly originalist approach to the judicial power in equity would therefore jettison not just the *universal* injunction — it would equally undercut the propriety of an injunction that protected *just a single plaintiff* from enforcement of even an egregiously unconstitutional law by a government officer. Such a straitened conception of the equitable power of Article III courts cannot be squared with either a century-plus of practice or with “the implicit policies embodied in Article III” itself.⁵⁰ Nor, fortunately, is that result demanded by *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*,⁵¹ for that decision rested not only on the meaning of equity in England in 1789, but also on how American federal courts treated that concept in decisions extending through the twentieth century.⁵² Measured by that yardstick, the universal injunction against federal law is constitutionally legitimate.

⁴⁵ U.S. CONST. art. III, §§ 1–2.

⁴⁶ See, e.g., Sessions Memorandum, *supra* note 13, at 2; see also Brief of Amici Curiae Ohio et al., *supra* note 14, at 27 (“[B]ecause this form of equitable relief was unavailable in the English Court of Chancery [of] the 18th century, it is similarly unavailable in federal courts today.”).

⁴⁷ See RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 939–40 (5th ed. 2003); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–18 (1963); George Jarvis Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 9, 40–41 (1932).

⁴⁸ See *Ex parte Young*, 209 U.S. 123 (1908).

⁴⁹ See *id.* at 149–56 (upholding a federal court injunction barring a state attorney general from suing to enforce an unconstitutional state statute); see also FALLON ET AL., *supra* note 47, at 958–59 (noting that in *Young* “the threatened conduct of the defendant would not have been an actionable wrong at common law,” *id.* at 958–59, and that the “principle [in *Young*] has been easily absorbed in suits challenging federal official action,” *id.* at 959); *infra* pp. 997–99.

⁵⁰ John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56 n.228 (2001) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

⁵¹ 527 U.S. 308 (1999).

⁵² See *id.* at 318–19, 322–33; see also *infra* note 554.

At bottom, the current debate over the universal injunction is as much a debate over the proper role of the federal courts as it is a debate over the arcana of equitable remedies. May courts decide disputes only for the parties before them, or may they declare the law for nonparties, too?⁵³ This Article’s contribution to that evergreen debate is to show how, in the period from 1890 to 1943, the law-declaration model animated and guided the actions of federal courts as they issued decrees on myriad questions of public law.⁵⁴ Expanding the frame of our inquiry even by this much reveals that the injunction reaching beyond the plaintiffs — and the law-declaration model of the judicial power that this remedy implies — is not some late-blooming efflorescence of post-Warren Court judicial hubris. Rather, it is a tool that developed in tandem with, and in support of, the regime of routinized judicial review of state and federal official action that we continue to live under today. Our government is not a monarchy, and our federal judges are not Westminster chancellors;⁵⁵ in no small part, the one has followed from the other.

The Article proceeds in six Parts. Part I maps how the current discourse concerning universal injunctions has gerrymandered the analysis of judicial power and has thereby cast undue doubt on the propriety of this remedy. Part II explores how the Supreme Court in the 1890s endorsed an expansive view of the powers of federal courts to control the rights of nonparties through injunctive decrees. Part III describes injunctions against enforcement of federal statutes issued by the Court itself in the 1910s and 1920s and examines their implications for the Article III analysis. Part IV describes injunctions against enforcement of state law issued by lower federal courts from the 1910s through the 1930s and then similarly outlines their implications for the Article III analysis. Part V turns to federal agency action, focusing specifically on *Perkins* and two cases involving state and local laws that are important for understanding *Perkins*; this Part spans the 1939–1943 period. Part VI

⁵³ See Frost, *supra* note 16, at 1086–87 (“Are courts primarily intended to resolve disputes between the parties, or do they also declare the meaning of federal law for everyone?”); Trammell, *supra* note 16, at 89–90.

⁵⁴ The law-declaration model is one of “two basic adjudicatory models” used to describe the exercise of judicial review. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012). The dispute-resolution model “focuses upon the actual dispute between the litigants,” while the law-declaration model “focus[es] . . . on the courts, not the litigants,” and places “its emphasis on the judicial role in saying what the law is.” *Id.*

⁵⁵ Manning, *supra* note 50, at 56 n.228 (“[T]he practices prevailing at Westminster in 1789 frequently inform the meaning of Article III power. . . . Still, in many important areas, the Supreme Court has found the English model of judicial power inappropriate to the American constitutional scheme. For example, Blackstone had explained that English judges lacked the power of judicial review. . . . But in an American government established by ‘a written constitution,’ the Supreme Court of course found such authority to be implicit in the judicial power to ‘say what the law is.’” (citations omitted)).

explains why the unfolding efforts to outright strip the federal courts of the tool of the universal injunction — whether by statutory fiat or by a judicial redefinition of Article III — should halt. A brief conclusion follows.

I. GERRYMANDERING THE JUDICIAL POWER

A recurrent motif in constitutional debate is disagreement concerning the level of generality at which to describe a practice, a precedent, or a right.⁵⁶ Consider the debates over affording constitutional protections to rights that are “deeply rooted in this Nation’s history and traditions.”⁵⁷ The intrinsic problem with (or beauty of?) that test is its inescapable indeterminacy. When a given right is conceived at a high level of generality, it may seem to have deep roots and a claim to longstanding protection in our law; when framed in more specific terms, the right may seem to have shallower historical roots and a correspondingly diminished claim to constitutional solicitude. Did, for example, laws that forbade physician-assisted suicide run afoul of established constitutional jurisprudence that shielded the general principle of self-sovereignty and a broad realm of “personal liberty” — as the appellate court reasoned⁵⁸ in the litigation leading to *Washington v. Glucksberg*?⁵⁹ Or did the more specific history of laws forbidding assisted suicide foreclose the possibility that such a right could deserve constitutional protection — as the Supreme Court ultimately held?⁶⁰ Did the holding of *Griswold v. Connecticut*⁶¹ follow straightforwardly from the respect that the law had long accorded to the “private realm of family life which the state cannot enter”?⁶² Or was that holding wrong because, as Justice Stewart saw the matter, the state law forbidding the use of contraceptives had been on the books since 1879 and no previous case decided by the Court had ever shielded a “general right of privacy”?⁶³

Though such disagreements superficially appear to be disputes over whether a particular right exists and is deserving of protection, they are in actuality disputes, first, over how the universe of potentially relevant

⁵⁶ See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

⁵⁷ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

⁵⁸ *Compassion in Dying v. Washington*, 79 F.3d 790, 806, 813–814 (9th Cir. 1996) (en banc) (“[T]he decision how and when to die is one of the most intimate and personal choices a person may make in a lifetime, a choice central to personal dignity and autonomy.” *Id.* at 813–14 (internal quotation marks omitted)), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁹ 521 U.S. 702.

⁶⁰ See *id.* at 728 (“The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.”).

⁶¹ 381 U.S. 479 (1965).

⁶² *Id.* at 495 (Goldberg, J., concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); see also Tribe & Dorf, *supra* note 56, at 1058.

⁶³ *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting).

historical practice and precedent should be carved up into relevant and irrelevant chunks, and second (and perhaps secondarily), over how the Constitution should be read in light of the portion of historical practice and precedent deemed relevant. Justice White’s plaintive remark in *Moore v. City of East Cleveland*⁶⁴ nicely captures both pieces of the inquiry: “[w]hat the deeply rooted traditions of the country are is arguable” — that is, how should we understand our history? — and “which of them deserve the protection of the Due Process Clause is even more debatable” — that is, what constitutional significance should that history have?⁶⁵

Today, we see manifest in the discussion of the universal injunction that same kind of conceptual and rhetorical disagreement about the correct level of generality at which to assess historical practice and precedent — and therefore constitutional meaning. At one level of generality, the universal injunction seems irreproachable. It has long been established that the federal courts can pronounce definitively the rights of all persons — including those not parties — with respect to particular types of disputes. Consider admiralty jurisdiction or in rem jurisdiction. When a federal court adjudicates an action in admiralty or a “true” in rem suit, its decision is “good against the world,”⁶⁶ not just against the entities before the court, because the court is said to possess jurisdiction over the res.⁶⁷ Its orders can thus bind all those with any interest in the property to the extent of their interest in it, whether they are properly before the court or not.⁶⁸ An equally venerable line of cases establishes that courts can use their judicial powers to affect the interests of persons that are not parties to particular suits. In an action to abate a nuisance, for example, an order that benefits the plaintiff may cause substantial benefits to persons who are not plaintiffs without imposing any *burdens* on them at all; by halting the nuisance, the court’s order will naturally

⁶⁴ 431 U.S. 494 (1977).

⁶⁵ *Id.* at 549 (White, J., dissenting).

⁶⁶ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 784 (2001) (“[T]he ordinary case of in rem rights . . . is full ownership of property. If A owns Blackacre, then . . . there is an indefinite number of persons subject to a duty not to trespass on Blackacre. In addition, the number of persons potentially subject to such a duty will, in the ordinary case, be very large: every person who might at some future time come into physical contact with Blackacre.”); see also *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1867) (“The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world.”).

⁶⁷ See *Shaffer v. Heitner*, 433 U.S. 186, 199 & n.17 (1977) (“The effect of a judgment in [an in rem case] is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.” *Id.* at 199.).

⁶⁸ See *id.*

cause consequences that improve those persons' circumstances.⁶⁹ A third line of precedent has established that a federal court can enjoin the future commission of illegal acts and thus force a defendant to change his whole course of conduct, even when such an injunction may benefit mostly or even only parties who are not already before the court — the future potential victims of the illegal acts.⁷⁰

If we were to conceive of the powers of the federal courts at *that* level of generality, then it would seem entirely unnecessary to worry now about whether today's universal injunctions against the federal government are proper. Clearly, a federal court has the ability to issue an order that will *benefit* nonparties — as when it abates a nuisance, restrains future lawbreaking conduct, or orders restitution⁷¹ — and even one that will *bind* nonparties, as when it adjudicates ownership of a res or when it restrains those who act in “concert” with an enjoined party.⁷² If a federal court decrees that a res is owned by Mr. Smith and nobody else, including the federal government; if it orders the nuisance-maker to cease the nuisance and the nuisance-making party is the federal government; or if it orders a party committing illegal acts to refrain from committing them in future and the guilty party happens to be the federal government, then the federal court's order will certainly *bind* the federal government from taking certain actions or exerting certain powers, while also perhaps *benefitting* many nonparties to the initial suit.

Why should those remedial powers disappear or be limited in scope when the case before the court happens to concern an injunction against enforcement of an allegedly unconstitutional or illegal federal statute or rule? If an order enjoins the federal government from enforcing or

⁶⁹ See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 703 (2004) (“To be sure, when a public nuisance was threatening special injury to a private plaintiff and the plaintiff was able to win an injunction against the nuisance, the same remedy that protected the plaintiff against private harm also benefited the public as a whole. As a conceptual matter, however, this benefit to the public was ‘incidental[]’; the private plaintiff was not thought of as representing the public, but rather as protecting his own private interest.” (alteration in original) (citation omitted)).

⁷⁰ See *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435 (1941) (“A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future[,] unless enjoined, may fairly be anticipated from the defendant's conduct in the past.”); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 235 (3d ed. 2002) (“The injunction against future violations of law is the simplest use of the injunction.”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999) (“For example, a plaintiff who proves hostile environment sexual harassment in violation of Title VII might get an injunction forbidding sexual harassment of other women in the office and, additionally, ordering the employer to implement a training program and a complaint procedure — steps that are not required by Title VII, but that may be incorporated into a preventive injunction to decrease the risk of future Title VII violations.”).

⁷¹ See, e.g., *Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946) (holding that restitution of overcharged rents could be awarded to nonparty tenants).

⁷² FED. R. CIV. P. 65(d)(2)(C).

applying such a provision against anyone, the order only “abates the nuisance” or directs the cessation of illegal conduct in a way that benefits nonparties explicitly rather than incidentally. More abstractly, an order enjoining enforcement of an illegal federal law may be analogized to an order in rem that is “good against the world,” in the sense that the order pronounces that nobody — not even the federal government — may rightfully claim any power or jurisdiction “in the premises”⁷³ to apply the challenged provision. More concretely, an order enjoining enforcement of an illegal federal statute or regulation against anyone is just the kind of order that results from a successful nationwide injunctive class action; the only distinction is that in the latter case, a nationwide class has been certified — and class certification is a tool of relatively recent invention designed to enable the efficient exercise of judicial power, not to cabin that power’s scope.⁷⁴

The response from those who dispute the propriety of the universal injunction has not been to dispute these broad powers of federal courts. Rather, the response has been to drill downward, to a narrower level of generality, to a demand for something more *specific*. The critique of the universal injunction that has gained traction is one that has carved out a specific class of actions and demanded a specific line of precedent to establish the propriety of a specific form of equitable relief: a historical showing that a federal district court has granted to a plaintiff *not* certified as a Rule 23 class representative an injunction barring the federal government from enforcing a federal law or regulation against nonparties.⁷⁵ To be entirely convincing, one gathers, such a showing would have to include injunctions applicable not just to particular judicial districts or circuits, but nationwide, too.⁷⁶ It has gone without saying that federal court injunctions of state laws applicable across entire *states* would not “count.”

⁷³ This phrase, used here as evocative of in rem jurisdiction, was once used to convey power over legal matters — not just powers over physical spaces, such as plots of land. *Cf.* *S. Ry. Co. v. Tift*, 206 U.S. 428, 438 (1907) (“We think that, under the broad powers conferred upon the circuit court by [the Interstate Commerce Act] and the direction there given to the court to proceed with efficiency, but without the formality of equity proceedings, but in such manner as to do justice *in the premises*, . . . the appellants are precluded from making the objection that the court did not have jurisdiction to entertain the petition and grant the relief prayed for and decreed.” (emphasis added) (internal quotation marks omitted)).

⁷⁴ *See, e.g.,* *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) (“[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.” *Id.* at 701.).

⁷⁵ *See, e.g.,* Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT’L REV. (Mar. 10, 2018, 12:20 PM), <https://www.nationalreview.com/2018/03/nationwide-injunctions-stop-elected-branches-enforcing-law> [<https://perma.cc/4H25-ZLR7>] (“Scholars have not found a single example of any judge issuing that type of extreme remedy in the first 175 years of the Republic.”).

⁷⁶ *See, e.g., id.* (“These injunctions block the government from carrying out a law — *not just in one district* or to one person, but anywhere in America.” (emphasis added)).

It is unclear what would justify this highly particular choice of frame. Article III certainly does not. That source of law speaks of “all Cases, in Law and Equity.”⁷⁷ It does not carve up the judicial power over a case in equity depending on the particular type of plaintiff, the particular type of defendant, or the particular form or effect of the equitable relief sought. It does not distinguish between injunctions that reach a single district, a single circuit, or every circuit. It does not distinguish between injunctions affecting enforcement of state law and injunctions affecting enforcement of federal law. Nor could its meaning change based on the mechanisms set out by federal rules, such as the Federal Rules of Civil Procedure. That set of rules can guide and restrain the exercise of the legal and equitable powers of the federal courts,⁷⁸ but the rules cannot denude the courts of their Article III powers to resolve cases in law or equity, whatever those powers may be. Nor can the rules add to those powers by allowing new procedural devices, such as a procedure for certification of injunctive classes. Finally, the “judicial Power” conferred by Article III does not distinguish between the courts at the various levels of the federal judicial hierarchy; if a court with subject matter jurisdiction exercises the judicial power of the United States, it does so whether it is a district court or a court of appeals or the Supreme Court.⁷⁹ If Article III courts lack the equitable power to restrain enforcement of a statute against nonparties at the behest of a single plaintiff, then that is necessarily a power that the Supreme Court could not exercise either, any more than could a single federal district judge.⁸⁰ Conversely, if the federal courts *do* possess that power, it can be wielded as properly by a single district judge as by a unanimous Supreme Court.

⁷⁷ U.S. CONST. art. III, § 2, cl. 1; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (“[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . .”); *see also* 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 41(1) (1940) (defining the original jurisdiction of district courts to encompass “all suits of a civil nature, at common law or in equity”) (current version at 28 U.S.C. § 1331).

⁷⁸ *See, e.g.*, FED. R. CIV. P. 65; *see also* FED. R. CIV. P. 2 (establishing “one form of action — the civil action”); FED. R. CIV. P. 81(b) (abolishing common law writs of *scire facias* and *mandamus*).

⁷⁹ *See* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 333 (1816) (“As the mode is not limited, [the judicial power] may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.”).

⁸⁰ *See* Wasserman, *supra* note 16, at 364 (arguing that universal injunctions are “inappropriate” and reasoning that, as a result, such injunctions would be “improper” whether “the Supreme Court were granted original jurisdiction to issue them at the outset” or whether “all constitutional challenges to federal laws were adjudicated by three-judge district courts”). This argument assumes that the Court does not already possess the power to issue such injunctions.

Today’s debate over the legality of the universal injunction, then, as with many other debates about constitutional law, boils down to a dispute over the level of generality at which we choose to assess the history of the exercise of judicial power and the significance of that history for modern-day constitutional understandings.⁸¹ If one carves out “true” in rem cases, cases in which injunctions incidentally benefitted nonparties by enjoining nuisances, cases enjoining defendants from future illegal conduct, cases enjoining state officials from enforcing state laws against nonplaintiffs, cases restraining federal officials from enforcing federal laws against nonplaintiffs within a single judicial district, and cases in which plaintiffs obtained relief on behalf of others well before the modern-day class certification procedure came to be adopted, then it is indeed hard to trace a very robust pedigree for the recent slew of universal injunctions against the federal government.

But there is no reason to make such a selective appraisal of the judicial power. The correct level of generality is supplied by Article III, which speaks of the federal courts’ power to decide “all Cases, in Law and Equity.”⁸² Let us, however, accept some of the gerrymander arguendo. Let us treat as relevant only those cases in equity that have sought to enjoin government defendants from enforcing laws or executive branch actions beyond just the plaintiff. Even proceeding on that basis, a much longer historical tradition comes into view than existing scholarship has canvassed. The discussion that follows explores that history and unpacks its significance for today’s debate over the universal injunction.

II. INJUNCTIONS AND NONPARTIES

The 1890s were a seminal period in the development of constitutional judicial review and the equitable power.⁸³ In that decade, the Supreme Court decided two landmark cases that built upon the logic of the bill of peace — avoiding a multiplicity of suits⁸⁴ — to affirm injunctions

⁸¹ Cf. Tribe & Dorf, *supra* note 56, at 1066–71 (offering an example where “[t]he majority describe[d] the right narrowly, the dissent broadly,” *id.* at 1066, to illustrate the question of “[h]ow [we] should . . . choose between competing abstractions,” *id.* at 1068 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986))).

⁸² U.S. CONST. art. III, § 2, cl. 1.

⁸³ See KEITH E. WHITTINGTON, *THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 256–57 (2007) (“It was in [the late nineteenth century] that the power of judicial review took on its modern form. By the first decade of the twentieth century, the [Supreme] Court was voiding nearly one congressional statute and over three state statutes per year on constitutional grounds. The last time the Supreme Court completed a term without striking down at least one state law was in 1893. The political importance of the decisions of the Supreme Court increased along with their frequency.”).

⁸⁴ See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 376 (1967) (“When numerous persons stood in the same position toward an adversary so that there was potentially a large number

against enforcement of state laws with effects on nonparties equal to or even greater than those of today's universal injunctions.⁸⁵ These two cases have fallen into desuetude, likely due to their association with the development of the doctrine of economic substantive due process. By today's lights, their merits holdings are dubious. But as to remedies, these cases matter because of what they reveal about the Court's understanding of judicial review and the corresponding exercise of remedial power.

Following the Panic of 1873, the country experienced a period of grave economic depression: "[P]rices declined rapidly, and wheat, corn, hogs and cattle in the Mississippi Valley netted little to the farmer after paying freight rates . . ."⁸⁶ In response, many states enacted "Granger Laws" that reduced railroad rates.⁸⁷ Initially, those laws were sustained against challenge,⁸⁸ but gradually the Court started to shift course.

Cracks in the dike appeared by 1890, when the Court held, on opaque grounds, that a state railroad rate was unconstitutional.⁸⁹ In that case, Justice Miller filed an odd separate opinion, styled as a concurrence, in which he proffered "a few suggestions of the principles which . . . should govern this class of questions in the courts."⁹⁰ Justice Miller stated that it would be "arbitrar[y] and without regard to justice and right" for states to establish rates for railroads that were either too high or too low.⁹¹ He continued:

[T]he proper, if not the only, mode of judicial relief against the tariff of rates . . . is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.⁹²

Soon thereafter, two such "bills in chancery" made their way to the Court.⁹³ In both cases, state governments were "threatening to enforce solely by litigation in the state courts either state statutes or orders of state boards made under legislative authority fixing maximum rates for

of essentially identical lawsuits, equity might in effect allow a consolidation of the expected actions and clear up the entire situation through a bill of peace.").

⁸⁵ See *Smyth v. Ames*, 169 U.S. 466, 550 (1898); *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 413 (1894).

⁸⁶ William W. Cook, *The Legal Legislative and Economic Battle over Railroad Rates*, 35 HARV. L. REV. 30, 30 (1921).

⁸⁷ *Id.*

⁸⁸ *Id.* (citing, inter alia, *Munn v. Illinois*, 94 U.S. 113 (1876)).

⁸⁹ *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota (Milwaukee Road Case)*, 134 U.S. 418, 456–57 (1890).

⁹⁰ *Id.* at 459 (Miller, J., concurring); see *id.* at 459–61.

⁹¹ *Id.* at 459.

⁹² *Id.* at 460.

⁹³ *Smyth v. Ames*, 169 U.S. 466 (1898); *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362 (1894) (decided along with *Reagan v. Mercantile Tr. Co.*, 154 U.S. 413 (1894)).

the service of common carriers or other public service corporations.”⁹⁴ In both cases, the railroads and their shareholders argued that these rates violated the Fourteenth Amendment.⁹⁵

The first case — *Reagan v. Farmers’ Loan & Trust Co.*⁹⁶ — was a suit brought by railroad shareholders against the attorney general and railroad commissioners of Texas; the railroad was only a nominal defendant, as its interests were aligned with those of the plaintiffs.⁹⁷ The plaintiffs sought to “restrain[] the commission from enforcing [the challenged] rates . . . and also [to] restrain[] the attorney general from instituting any suits to recover penalties for failure to conform to such rates and obey such regulations.”⁹⁸ The district court entered a final decree for the plaintiffs that enjoined the state officials from enforcing the rates against the railroad and that enjoined the railroad from charging those rates.⁹⁹ It then went still further:

It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty, or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars, or any or either of them combined.¹⁰⁰

Now *this* is a decree that truly deserves the label “universal.”¹⁰¹ The decree not only enjoined the state defendants from enforcing the rates against the railroad, but also enjoined *all other persons* — *persons that*

⁹⁴ N. Matthews, Jr. & W. G. Thompson, *Public Service Company Rates and the Fourteenth Amendment* (pt. 2), 15 HARV. L. REV. 353, 363–64 (1902).

⁹⁵ *Id.* at 364.

⁹⁶ 154 U.S. 362.

⁹⁷ *Id.* at 366–67 (noting the cross-bills and that the railroad sought “substantially the same relief,” *id.* at 367).

⁹⁸ *Id.* at 367.

⁹⁹ *Id.* at 368–70; Transcript of Record at 276–79, *Reagan*, 154 U.S. 362 (No. 928).

¹⁰⁰ *Reagan*, 154 U.S. at 370.

¹⁰¹ Consider the following four hypothetical injunctions in a suit between a railroad and the state: (1) the state shall not enforce the rate against the plaintiff railroad; (2) *no person* (including the state) shall enforce the rate against *any* railroad; (3) the state shall not enforce the rate against *any* railroad; and (4) *no person* (including the state) shall enforce the rate against the plaintiff railroad. Injunctions (2), (3), and (4) all reach beyond the parties. Clearly, Injunction (1) is the narrowest or “least” in scope; Injunctions (2), (3), and (4) all subsume Injunction (1). Equally clearly, Injunction (2) is the broadest or “greatest” in scope; Injunction (2) subsumes Injunctions (1), (3), and (4). A knottier question is how to order what remains: Injunction (3) (the universal injunction) and Injunction (4) (the *Reagan* injunction). The *Reagan* injunction does not reach beyond the *plaintiff* and may in that sense be narrower than the universal injunction. On the other hand, the *Reagan* injunction *does* reach beyond the *defendant*; it is thus considerably broader than the universal injunction, in that it enjoins persons who are not within the court’s jurisdiction from enforcing the rate against the plaintiff railroad.

were not even parties to this suit — from instituting lawsuits against the railroad to seek the benefit of such rates.¹⁰² This portion of the decree was necessary because the Texas law authorized private lawsuits for charges in excess of the prescribed tariffs; moreover, those tariffs would be “held conclusive” and “deemed . . . reasonable [and] fair” in “all actions between private parties and railway companies brought under this law.”¹⁰³ But there was no contention that this whole universe of private parties was somehow acting in “concert”¹⁰⁴ with the state government defendants to deprive the railroad of its property rights.

On appeal, the Court mostly affirmed.¹⁰⁵ Not yet having the benefit of its subsequent decision in *Ex parte Young*,¹⁰⁶ the Court devoted a lengthy discussion to establishing that the suit was not one against the state (which would have barred it under the Eleventh Amendment).¹⁰⁷ And not yet having the benefit of its subsequent decision in *Lochner v. New York*,¹⁰⁸ the Court then proceeded to create the doctrine of economic substantive due process.¹⁰⁹ The *Reagan* Court upheld the state’s power to create a commission to establish such rates,¹¹⁰ but it also established the judicial power to “enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission,” which it cast as being “within the scope of judicial power and a part of judicial duty.”¹¹¹ After examining those rates de novo, it determined that the rates were unconstitutionally low.¹¹² Ultimately, the Court concluded that the decree below should be reversed “in so far as it restrains the railroad commission from discharging the duties imposed by this act[] and from proceeding to establish reasonable rates and regulations,”

¹⁰² *Reagan*, 154 U.S. at 370. In its scope, the decree is reminiscent of railroad receiver decrees. Under the doctrine of *Barton v. Barbour*, 104 U.S. 126 (1881), a court’s appointment of a railroad receiver entailed that no suit could be brought by anyone against that receiver without the appointing court’s permission. See *id.* at 136–37.

¹⁰³ *Reagan*, 154 U.S. at 364 (quoting Railroad Commission Act, 1891 Tex. Gen. Laws 55, 58). The statute provided the following: “In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof.” § 5, 1891 Tex. Gen. Laws at 58.

¹⁰⁴ FED. R. CIV. P. 65(d)(2)(C).

¹⁰⁵ See *Reagan*, 154 U.S. at 413.

¹⁰⁶ 209 U.S. 123 (1908).

¹⁰⁷ *Reagan*, 154 U.S. at 388–93.

¹⁰⁸ 198 U.S. 45 (1905).

¹⁰⁹ See *Reagan*, 154 U.S. at 394–400. *Reagan* has been identified by Professor Stephen Siegel as “the first Supreme Court substantive due process ruling.” Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 189 n.9 (1984).

¹¹⁰ *Reagan*, 154 U.S. at 393–94.

¹¹¹ *Id.* at 399.

¹¹² *Id.* at 399–413.

but that it should be “affirmed so far only as it restrains the defendants from enforcing the rates already established.”¹¹³ The most sensible reading of that language in the context of this case is that the Court had affirmed the portion of the decree restraining even nonparties from “enforcing the rates already established.”¹¹⁴ To read the opinion otherwise would have left the established rates enforceable by private parties, which the Court clearly did not intend — the averments and evidence, it held, “sustain[ed] a finding that the proposed tariff [was] unjust and unreasonable, and a decree reversing it being put in force.”¹¹⁵

Four years later, the Court considered a consolidated set of railroad cases under the caption *Smyth v. Ames*.¹¹⁶ Again, the plaintiffs were stockholders in various railroads; the real defendants were the Nebraska officials responsible for enforcing the state’s new railroad-rate law.¹¹⁷ In one of the suits, Justice Brewer had presided as Circuit Justice for the Circuit Court of the District of Nebraska, and he issued a decree enjoining the rates.¹¹⁸

For the Court, Justice Harlan reiterated the principle established in *Reagan* that the federal courts had the power to review the Nebraska law and the rates for their constitutionality.¹¹⁹ He then turned to the merits question — whether the rates were unconstitutionally low.¹²⁰ Finding that Justice Brewer had decided that question correctly, the Court affirmed the decree below.¹²¹

What was the scope of that decree? Here, in contrast to *Reagan*, the language of the decree did *not* expressly reach beyond the defendant officials to enjoin *nonparties* from bringing suits to enforce the rates.¹²² And yet, though the decree it affirmed did not reach beyond the parties, *Smyth* nonetheless sheds light on how broadly the Court understood “the equity powers” of a lower federal court.¹²³ In this case, the Court said:

[T]he plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 413; *see id.* at 412–13 (describing the “admitted facts” supporting the bill’s averment that the “tariff as established is unjust and unreasonable,” *id.* at 412).

¹¹⁶ 169 U.S. 466 (1898).

¹¹⁷ *See id.* at 469–70.

¹¹⁸ *Ames v. Union Pac. Ry. Co.*, 64 F. 165, 189 (Brewer, Circuit Justice, C.C.D. Neb. 1894), *aff’d sub nom. Smyth*, 169 U.S. 466, and *aff’d as modified*, 171 U.S. 361 (1898).

¹¹⁹ *Smyth*, 169 U.S. at 527–28.

¹²⁰ *Id.* at 528 (asking “whether . . . the Nebraska statute, if enforced, would . . . have deprived the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them”).

¹²¹ *Id.* at 550.

¹²² *See id.* at 476–78.

¹²³ *See id.* at 516.

United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, *can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute.*¹²⁴

The Court determined that the Nebraska law, by creating liability for the railroad to untold numbers of individuals, would cause a “multiplicity of suits,” creating an “emergency” that “[o]nly a court of equity is competent to meet”¹²⁵:

The carrier is made liable *not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from [\$1000 to \$5000] for the first offence, from [\$5000 to \$10,000] for the second offence, from [\$10,000 to \$20,000] for the third offence, and [\$25,000] for every subsequent offence. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained.*¹²⁶

As these passages show, the *Smyth* Court drew on its understanding of “the principles which in the Federal system distinguish cases in law from those in equity.”¹²⁷ And it conceived of those principles as authorizing a “court of equity” to give what amounted to a supercharged *bill of peace*: a “comprehensive decree covering the whole ground of controversy”¹²⁸ that would “determine[] once for all” the “interests of the entire community involved.”¹²⁹

¹²⁴ *Id.* at 517 (emphasis added).

¹²⁵ *Id.* at 518.

¹²⁶ *Id.* at 517–18 (emphasis added).

¹²⁷ *Id.* at 517.

¹²⁸ *Id.*

¹²⁹ *Id.* at 518. In describing the doctrine that equity jurisdiction exists “to prevent a multiplicity of suits,” Professor John Norton Pomeroy treated *Smyth* as an example of a case in which a plaintiff, by a “single injunction suit,” could block “interminable litigation with members of the community.”
 1 JOHN NORTON POMEROY, POMEROY’S EQUITY JURISPRUDENCE & EQUITABLE

It is hard to read *Smyth* and come away with the sense that the Court “understood judicial power as ‘fundamentally the power to render judgment in individual cases’”¹³⁰ or that it “did not view judicial review in terms of ‘striking down’ laws or regulations.”¹³¹ More to the point, it is clear that *Smyth* did not conceive of the equitable power to give a bill of peace as “limited to a small group of similarly situated plaintiffs having some right in common.”¹³² Whether or not it is correct that in traditional English equity, “[a] bill of peace was not used to resolve a question of legal interpretation for the entire realm,”¹³³ the Supreme Court of the 1890s most certainly understood the bill of peace as including the power to resolve such a question for the “entire realm”: the question of whether a state’s railroad rates were constitutional and thus enforceable by anyone.¹³⁴ Whether or not it is correct that the English chancellors confined their use of the bill of peace only to “preexisting social group[s]” that were “small and cohesive,” such as small groups of tenants or parishioners,¹³⁵ it is clear that the Supreme Court of the 1890s did not regard the equity power as so confined.

There is an interesting juxtaposition between this pair of cases: the broader decree does not go along with the broader opinion. The broader decree — the one that enjoined nonparties from filing suit — came first, in *Reagan*,¹³⁶ the *Reagan* Court’s opinion says little, however, about the scope of the equity power.¹³⁷ In contrast, in *Smyth*, the lower court’s decree did not speak directly to whether nonparties should be enjoined from enforcing the rates; instead, the decree simply recited its injunctions against the various government defendants and then closed by adding that “it is further declared, adjudged and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the [law’s] provisions . . . the said defendant railroad

REMEDIES § 250, at 367 n.(e) (Bancroft-Whitney Co., 3d ed. 1905) (1881) (“It is by no means essential that the *parties* with whom the plaintiff seeks to avoid litigation are the same as the parties to the bill; thus, it is frequently a ground of jurisdiction that the plaintiff, by a single injunction suit against state officials, may avoid interminable litigation with members of the community.”).

¹³⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring)).

¹³¹ *Id.* (citing *Murphy*, 138 S. Ct. at 1469–70 (majority opinion)).

¹³² *Id.* (citing *Bray*, *supra* note 2, at 426–27).

¹³³ *Bray*, *supra* note 2, at 426.

¹³⁴ See *Smyth v. Ames*, 171 U.S. 361, 365 (1898) (“We only adjudged that the enforcement of the schedules of rates established by the state statute, looking at such rates as a whole, would deprive the railroad companies of the compensation they were legally entitled to receive.”).

¹³⁵ *Bray*, *supra* note 2, at 426.

¹³⁶ Transcript of Record at 276–79, *Reagan v. Farmers’ Loan & Tr. Co.*, 154 U.S. 362 (1894) (No. 928).

¹³⁷ See *Reagan*, 154 U.S. at 413 (partially affirming the lower court’s decree without additional discussion of the scope of remedial power in the federal courts).

companies may not exact . . . charges which yield . . . reasonable compensation for such services.”¹³⁸ The *Smyth* opinion, however, shows that the Court understood that the lower court’s determination of the rates’ invalidity would “determine[] once for all” that the rates were unconstitutional and thus could not be enforced.¹³⁹

Now put the two cases together. Evident in the *Reagan* decree is the proposition that a decree of unconstitutionality would make the rates unenforceable against the railroad not only by the enjoined state government defendants, but also by anyone, including nonparties.¹⁴⁰ Evident in the *Smyth* opinion is exactly the same proposition.¹⁴¹ Combined, the message of the two cases is simple and consequential: when a federal court exercising its powers in equity “declare[s], adjudge[s,] and decree[s]” that an act “is repugnant to the Constitution of the United States,”¹⁴² then that means the act must not be enforced by anyone, including nonparties. This could only be so if the court’s decree of unconstitutionality has removed the act from the set of laws that could validly be enforced. A sweeping conception of an Article III court’s equitable power to enjoin an unconstitutional state law from being enforced — to make such a law “null and void,”¹⁴³ in Justice Harlan’s phrase — was thus tacitly embraced.

The significance of *Reagan* and *Smyth* has become overshadowed by a landmark case that the Supreme Court decided roughly a decade thereafter: *Ex parte Young*.¹⁴⁴ That decision has become the *locus classicus* for the proposition that a federal court enjoining an unconstitutional state law may do one thing, and one thing only: issue an antisuit injunction stopping the state’s enforcement of an invalid law against the plaintiff alone, for it is only that plaintiff who is the prospective defendant in a state enforcement action.¹⁴⁵ But the Court justified *Ex parte Young* as following in part from the principles enunciated earlier in the

¹³⁸ *Smyth v. Ames*, 169 U.S. 466, 477 (1898) (quoting the lower court’s decree).

¹³⁹ *Id.* at 518.

¹⁴⁰ See *Reagan*, 154 U.S. at 412–13; Transcript of Record at 276–79, *Reagan*, 154 U.S. 362 (No. 928).

¹⁴¹ See *Smyth*, 169 U.S. at 517–18.

¹⁴² *Id.* at 477.

¹⁴³ *Id.* at 528.

¹⁴⁴ 209 U.S. 123 (1908).

¹⁴⁵ See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 998 (2008) (“Equitable relief thus could be granted to equity plaintiffs who would be, or were, defendants at law.”). To be clear, Professor John Harrison’s article does not specifically discuss the propriety of the universal injunction. Professors Bray and Howard M. Wasserman have extended Harrison’s treatment of *Young* to the universal injunction. See Bray, *supra* note 2, at 449–50 (“[J]udges once thought of injunctions against enforcement not as challenges to the validity of a statute (something offensive) as much as *antisuit injunctions* (something defensive).” *Id.* at 449.); Wasserman, *supra* note 16, at 355 (“Conceptualizing constitutional rights and litigation this way, a court should not make the injunction universal because the point of the action is not the declaration of the law’s constitutional validity, but halting enforcement of the challenged law as to the plaintiff.”).

duo of *Reagan* and *Smyth*.¹⁴⁶ To focus solely on *Young* and the narrow proposition that a federal court may issue only an antisuit injunction that protects just the plaintiff is to ignore that *Young* was but a link in a longer chain — a piece of the Court’s more “gradual transition[] . . . to the granting of relief against the constitutional wrong of enforcing an invalid law.”¹⁴⁷ *Young*’s plaintiff-protective antisuit injunction was an iconic “step in the evolution”¹⁴⁸ of constitutional judicial review through an action for equitable relief; it should not be mistaken as its sum total. It is no joke, after all, to enjoin every person anywhere from filing a lawsuit.¹⁴⁹

In the following decades, the federal courts would draw upon this broad reservoir of equitable power to issue many injunctions that reached beyond just the plaintiffs. Part III describes injunctions against federal law, Part IV describes injunctions against state law, and Part V turns to federal agency action.

III. INJUNCTIONS AGAINST FEDERAL LAW

It is often said that the *first* universal injunction as to federal law — as opposed to the first *known* universal injunction — was issued in the 1960s.¹⁵⁰ This is not the case. In the run-up to its 1913 decision in *Lewis Publishing Co. v. Morgan*, the Court itself issued an order that, pending its disposition of the case, barred a federal law from being applied not just to the plaintiffs, but to anyone.¹⁵¹ I can make no claim that this is the *first* universal injunction against a federal law,¹⁵² but this order predates by fifty years the 1963 universal injunction that many critics have cited as the first.¹⁵³ Moreover, in 1921 and 1922, the Court issued two other orders that barred the enforcement of important new federal laws beyond the plaintiffs — though not universally — by

¹⁴⁶ *Young*, 209 U.S. at 153–54 (first citing *Reagan v. Farmers’ Loan & Tr. Co.*, 154 U.S. 362, 392–93 (1894); and then citing *Smyth*, 169 U.S. at 518).

¹⁴⁷ David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 86–87 (2011) (“The [*Young*] Court speaks not in terms of the prospective defendant bringing suit to assert an anticipated defense to an enforcement action but rather of the plaintiff’s objective of preventing a constitutional wrong analogous to a traditional trespass on, or seizure of, the plaintiff’s property.” *Id.* at 86.).

¹⁴⁸ *Id.* at 86 (treating *Young* “as a step in the evolution of an action for equitable relief based solely on the notion of remedy rooted in (or at least derived from) the Constitution”).

¹⁴⁹ See *Reagan*, 154 U.S. at 370 (quoting the portion of the decree barring any lawsuits against the railroad company).

¹⁵⁰ See sources cited *supra* note 18.

¹⁵¹ See *infra* section III.A, pp. 944–46.

¹⁵² See *infra* pp. 1002–03 (explaining why such a claim would be perilous).

¹⁵³ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (citing *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963)); Sessions Memorandum, *supra* note 13, at 3; see also *Bray*, *supra* note 2, at 438 (“*Wirtz* appears to have been the first national injunction in the United States.”).

enjoining a U.S. Attorney in one critical district from enforcing those laws pending the Court's disposition of the case.¹⁵⁴

The cases discussed in this Part all involve something relatively unusual — decrees authored by the Supreme Court. In the run-of-the-mill case, the Court does not have to say much about the *scope* of equitable relief because its own opinions are precedential; it can thus assume that those opinions will be obeyed universally, even if the case involves a single plaintiff seeking relief only for herself.¹⁵⁵ This is why it is noteworthy when, as in the three cases described here, the Court itself pens a decree: the Court is then directly expressing its own views on what kind of equitable relief is appropriate.¹⁵⁶ The Court's views on that subject may shed light on — and may have shaped — how legal actors generally viewed the equitable powers of federal courts. Relatedly, the federal government did not even contest any of these orders, a fact that similarly illuminates then-prevailing conceptions of the equitable power and that likely exerted an influence on how such power was exercised.

This Part proceeds as follows: section III.A describes *Lewis Publishing*; section III.B describes *Hill v. Wallace*;¹⁵⁷ section III.C describes *Chicago Board of Trade v. Olsen*;¹⁵⁸ and section III.D concludes by assessing what these cases add to our understanding of the universal injunction, equitable remedies, and Article III.

A. Lewis Publishing Co. v. Morgan

In 1912, the Post Office Appropriations Act¹⁵⁹ included a provision that required newspaper publishers to file with the Postmaster General twice-yearly sworn statements disclosing details about their editorial board membership, corporate ownership, and subscribership.¹⁶⁰ The law specified that a publication failing to comply with this requirement would “be denied the privileges of the mail.”¹⁶¹ The law further required that publications “plainly mark[] [as] ‘advertisement’” any published matter for which the newspaper received or would receive compensation.¹⁶² In the months following the law's enactment, the

¹⁵⁴ See *infra* sections III.B–C, pp. 947–54.

¹⁵⁵ I am grateful to Professor Amanda Frost for her thoughts on this point.

¹⁵⁶ For a modern-day instance, see *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087–89 (per curiam), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.) (per curiam).

¹⁵⁷ 254 U.S. 44 (1922).

¹⁵⁸ 246 U.S. 231 (1918).

¹⁵⁹ Pub L. No. 62-336, 37 Stat. 539 (1912).

¹⁶⁰ *Id.* § 2, 37 Stat. at 553–54; see *Lewis Publ'g Co. v. Morgan*, 229 U.S. 288, 296–97 (1913).

¹⁶¹ *Lewis Publ'g Co.*, 229 U.S. at 297 (quoting § 2, 37 Stat. at 554).

¹⁶² *Id.* (quoting § 2, 37 Stat. at 554).

Postmaster General began to send out letters to various publications demanding the required information.¹⁶³

Two newspaper publishers — the Journal of Commerce and Commercial Bulletin (JoC) and Lewis Publishing — then filed two suits in the Southern District of New York against the New York City Federal Postmaster (Edward Morgan), the Postmaster General of the United States (Albert Burleson), and the Attorney General.¹⁶⁴ The gravamen of the suits was that the Act violated the First, Fifth, and Tenth Amendments.¹⁶⁵ The JoC’s bill noted that “upwards of 25,000 newspapers, magazines[,] and periodicals are published in and throughout the United States of America” and that “each and all thereof are equally affected by the [Act],”¹⁶⁶ but it sought an injunction restraining the Act’s enforcement against itself alone.¹⁶⁷ Lewis Publishing sought a decree that the Act was void and that Morgan “ha[d] no right to act thereunder either against [the publisher] *or against any other citizen.*”¹⁶⁸ The district court dismissed both bills for want of equity and allowed a direct appeal to the Supreme Court.¹⁶⁹

After oral argument, the plaintiffs filed a motion with the Supreme Court seeking a restraining order.¹⁷⁰ The motion asserted that the Department of Justice and the Post Office Department had agreed *not* to enforce the Act against the plaintiffs “or other newspaper publishers throughout the country” pending the Court’s decision.¹⁷¹ But then, the plaintiffs said, the federal government had reneged: the Postmaster General had continued to threaten to enforce the law, and multiple newspaper publishers nationwide who had not complied with the law were receiving unpleasant demands from federal postmasters.¹⁷² The JoC thus

¹⁶³ Transcript of Record at 9–11, *Lewis Publ’g Co.*, 229 U.S. 288 (No. 819).

¹⁶⁴ See *Lewis Publ’g Co.*, 229 U.S. at 288. The JoC’s lawsuit was originally known as *Journal of Commerce and Commercial Bulletin v. Hitchcock*, No. 818 (1913), but Burleson had assumed the position of Postmaster General by the time the Court issued its initial decree, see *Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600, 600 (1913) (per curiam), and its merits opinion addressing the constitutional question in both cases, see *Lewis Publ’g Co.*, 229 U.S. at 288.

¹⁶⁵ *Lewis Publ’g Co.*, 229 U.S. at 297.

¹⁶⁶ Transcript of Record at 5, *Journal of Commerce*, 229 U.S. 600 (No. 818).

¹⁶⁷ *Id.* at 11.

¹⁶⁸ Transcript of Record at 7, *Lewis Publ’g Co.*, 229 U.S. 288 (No. 819) (emphasis added).

¹⁶⁹ *Id.* at 13–14; Transcript of Record at 16, *Journal of Commerce*, 229 U.S. 600 (No. 818).

¹⁷⁰ Motion by Appellant for Restraining Order at 5–6, *Journal of Commerce*, 229 U.S. 600 (No. 818).

¹⁷¹ *Id.* at 3; see *id.* at 2–3 (“[A]t the time of the taking of [the] appeal and during the proceedings . . . it was agreed between counsel for the appellant, the Department of Justice and the Post-Office Department that pending the decision by this court upon said appeal in this case no action would be taken by the Post-Office Department to either compel the appellant *or other newspaper publishers throughout the country* to comply with the provisions of the act of August 24, 1912, or to enforce against them the penalties for non-compliance or to deny to them the privileges of the mail upon their failure to file and publish the required statements.” (emphasis added)).

¹⁷² *Id.* at 3–4 (“[S]imilar letters were also sent by the Post Office Department to and received by all other newspaper publishers throughout the country who had not complied with said Act” *Id.* at 4.); see also *id.* at 4–5 (explaining that the Third Assistant Postmaster General and the

sought the following order from the Court, which would bar enforcement of the statute not only against the JoC but also against “other newspaper publishers”¹⁷³:

[The] appellant pray[ed] [the] Court to grant herein an order restraining the defendants or their successors in office, as the case may be, and all persons acting through or under them, until the decision of this court herein from enforcing or attempting to enforce the provisions of said statute, and *particularly restraining them from denying to appellant and other newspaper publishers* the privileges of the mail by reason of the failure or neglect of appellant and such other publishers to comply with the provisions of said law and file the statements required thereby.¹⁷⁴

The Solicitor General accepted service of the motion but made no response, though he evidently did not agree with the plaintiffs’ characterization of the facts.¹⁷⁵ The Court then granted the order in a brief per curiam opinion.¹⁷⁶

When the merits decision ultimately arrived, the federal government prevailed.¹⁷⁷ Yet despite the fact that no court ever ruled in their favor on the merits, the plaintiffs in *Lewis Publishing* were able to win an injunction barring the enforcement of the new federal law against *anyone* until the merits had been decided — much as a universal preliminary injunction does today.

B. Hill v. Wallace

In 1921, Congress enacted the Future Trading Act.¹⁷⁸ The statute imposed a heavy tax on all futures contracts for grain except for those contracts made on “boards of trade designated as contract markets by

Postmaster General had “refused to further abide by [the nonenforcement agreement] and [had] given verbal notice to counsel for appellant that they intend[ed] to fully enforce such statute,” *id.* at 5).

¹⁷³ *Id.* at 6.

¹⁷⁴ *Id.* at 5–6 (emphasis added).

¹⁷⁵ See *Newspaper Law’s Status*, N.Y. TIMES, Mar. 12, 1913, at 2 (“Solicitor General Bullitt said that the Government took cognizance of the motion, but did not agree to all the statements set forth as facts in the printed statement which [counsel for the JoC] filed with the court. Mr. Bullitt said later that his recollection was that the Post Office Department had informally agreed not to enforce the law for a reasonable time, but that it did not specifically agree not to enforce the law until the Supreme Court had passed upon it.”); see also *Burleson Enjoined: Must Not Enforce Publicity Law Until It Is Proven Constitutional*, N.Y. TIMES, Mar. 17, 1913, at 1 (“[The Taft Administration’s] Postmaster General Hitchcock was personally opposed to the provisions [of the Act], and appeared before committees of the House and Senate to protest against them. When the law was enacted he agreed not to enforce it until the courts should direct otherwise. [The Wilson Administration’s] Postmaster General Burleson, however, directed that the law should be enforced, and today’s Supreme Court order restrains him from denying the privilege of the mails to newspapers that fail to comply with the exacting provisions of that statute.”).

¹⁷⁶ *Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600, 601 (1913) (per curiam) (“On consideration of the motion for a restraining order of the appellees herein, [i]t is now here ordered by the court that the motion be, and the same is hereby, granted.”).

¹⁷⁷ See *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288, 313–16 (1913).

¹⁷⁸ Pub. L. No. 67-66, 42 Stat. 187 (1921); see *Hill v. Wallace*, 259 U.S. 44, 45 (1922).

the Secretary of Agriculture.”¹⁷⁹ To receive that designation, boards of trade had to satisfy certain requirements, such as allowing representatives of “cooperative associations” of grain producers to become members.¹⁸⁰ The Act also imposed recordkeeping requirements on futures traders and imposed criminal penalties for failure to pay the tax or to keep the required records.¹⁸¹

Eight members of the Board of Trade of the City of Chicago (CBoT) brought suit in an Illinois federal district court to challenge the Act’s constitutionality.¹⁸² The plaintiffs sued on their own behalf and “in behalf of all other members [of the CBoT] who may wish to join and share in the relief granted.”¹⁸³ The defendants were the directors of the CBoT, the Secretary of Agriculture (Henry Wallace), the Commissioner of Internal Revenue, the U.S. Attorney for the Northern District of Illinois, and the local federal revenue collector.¹⁸⁴ The bill sought an injunction forbidding Wallace from compelling the CBoT *or its members* to comply with the Act, as well as an injunction restraining the other federal officers “from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty, or fine, mentioned in, or imposed by said Act, *from any member of said Board.*”¹⁸⁵ The bill also sought an injunction against the CBoT’s board to forbid it from complying with the Act or applying for designation as a contract market.¹⁸⁶

The district court issued a temporary restraining order (TRO) against Wallace, ordering him to “refrain from designating the Board of Trade of the City of Chicago as a contract market under the Future Trading Act, and from doing any other acts to compel said Board of Trade to comply with the provisions of said Act.”¹⁸⁷ Though the district court then dismissed the bill, it kept this TRO in effect in order to preserve the status quo pending appeal to the Supreme Court.¹⁸⁸ Thus, as the case came to the Court, the Secretary of Agriculture was enjoined from designating the CBoT as a contract market. But no injunction prevented the collection of the punitive taxes from either the eight plaintiffs or the other 1600 members of the CBoT, and no injunction shielded any of these members from the Act’s recordkeeping requirements or criminal

¹⁷⁹ *Hill*, 259 U.S. at 45; see § 4(b), 42 Stat. at 187.

¹⁸⁰ *Hill*, 259 U.S. at 66; see § 5(e), 42 Stat. at 188.

¹⁸¹ *Hill*, 259 U.S. at 65; see § 5(b), 42 Stat. at 188; *id.* § 10, 42 Stat. at 191.

¹⁸² *Hill*, 259 U.S. at 45.

¹⁸³ *Id.*; see Transcript of Record at 2, *Hill*, 259 U.S. 44 (No. 616).

¹⁸⁴ *Hill*, 259 U.S. at 45.

¹⁸⁵ Transcript of Record at 15, *Hill*, 259 U.S. 44 (No. 616) (emphasis added).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 41.

¹⁸⁸ *Id.* at 49 (“[F]or the purpose of enabling [the Supreme Court] to decide said appeal . . . the temporary restraining order heretofore issued [shall] continue in force until the Supreme Court shall act upon the application of the complainants to that court for a continuance of said order, provided, however, that such application shall be made within 15 days from the date hereof.”).

penalties if they traded in futures without paying the tax. The plaintiffs therefore sought a broader order from the Court.¹⁸⁹ Noting that the federal government did not object, the Court granted the expanded order.¹⁹⁰

The Court's order continued to block the CBoT from applying to become a contract market while the case was pending and for twenty days after final judgment.¹⁹¹ But it also went further. The Court declared that until twenty days after its decision was rendered:

[Wallace and the other federal defendants were] restrained from collecting, or attempting to collect, by suit, criminal prosecution, or otherwise, *from appellants, or any other member of said board of trade*, any tax or penalty which may have accrued or been incurred under said future trading act, or from taking during said period any other steps against said board of trade *or any of its members* to enforce or compel their compliance with, or punish for noncompliance with, any of the provisions of said trading act.¹⁹²

The Court's order therefore shielded not only the "appellants," but also over 1600 members of the CBoT ("any other member") — members who were *not* parties to the suit at that time — from the tax, criminal, and recordkeeping requirements of the Act.¹⁹³

This order was thereafter vacated and superseded.¹⁹⁴ The parties had noticed a glitch: the Court's order had restrained the *collection* of accrued taxes during the pendency of the suit, but it did not bar the taxes on futures trades from *accruing* while the suit was pending — or from being collected thereafter, if the suit failed.¹⁹⁵ The plaintiffs therefore sought a modified order that fixed this problem.¹⁹⁶ Wallace,

¹⁸⁹ Motion to Advance and for an Order Preserving the Status Quo & Brief in Support Thereof at 12–13, *Hill*, 259 U.S. 44 (No. 616) ("[T]he injunction against the collection of any tax or penalty or punishment . . . is a mere incident, and a necessary incident, to an order restraining this Board of Trade from yielding to the compulsion of this statute before its constitutionality has been passed upon by this court . . . [I]f without this clause the Board of Trade shall be enjoined from becoming a 'contract market,' every member of the Board making a contract for future delivery while this case is pending in this court would be confronted with the alternative of either becoming contingently liable to pay these prohibitive taxes, or of not making any contracts for future delivery at all, during the pendency of this appeal — and the latter would be the only safe course for all members of this exchange to adopt — with the result that all future trading on this exchange — the largest grain market in the world — would be temporarily abandoned, and the grain trade of the country would be thrown into great confusion, followed doubtless by many business failures.")

¹⁹⁰ *Hill v. Wallace*, 257 U.S. 615, 615–16 (1921) (granting the requested order with "appellees not objecting," *id.* at 615).

¹⁹¹ *Id.* at 616.

¹⁹² *Id.* (emphasis added).

¹⁹³ The Court was clearly cognizant of the stakes of its order. As it explained just two years later, without this interim injunction against the tax, "the entire future grain business of the country" would have been "blocked," which "would have seriously injured, not only the members of the board, but also the producing and consuming public." *Graham v. DuPont*, 262 U.S. 234, 257 (1923).

¹⁹⁴ *Hill v. Wallace*, 257 U.S. 310, 310–11 (1921).

¹⁹⁵ See Motion to Amend an Order Entered November 21, 1921 at 2–3, *Hill v. Wallace*, 259 U.S. 44 (1922) (No. 616).

¹⁹⁶ *Id.* at 1.

through the Solicitor General, simultaneously proposed a different solution: that the Court revise its order to restrain *Wallace* from *refusing* to designate the CBoT as a “contract market” *pendente lite*.¹⁹⁷ The Court ultimately took *Wallace*’s suggestion, and entered an order that both *barred* *Wallace* from requiring the CBoT to comply with the Act and *allowed* *Wallace* to temporarily designate the CBoT as a contract market, notwithstanding the CBoT’s lack of compliance with those requirements.¹⁹⁸ The Court’s second order thus solved, if awkwardly, the problem faced by the CBoT’s members. By making the CBoT into a fictional “contract market” for the interim, the second order relieved the 1600 members of the CBoT from any accruing taxes for futures trades made on the CBoT. The futures trades of these members would be on a “contract market” — even though the CBoT would have done nothing to comply with the requirements for being a “contract market” — until twenty days after the Court’s decision.

In its merits opinion, the Court noted that eight plaintiffs had filed the bill, that the CBoT had 1600 other members on whose behalf relief was sought, and that the relief sought included an injunction against both the collection of the taxes and prosecutions.¹⁹⁹ Invoking *Ex parte Young*, the Court noted that the request for an injunction was proper and that it would prevent a “multiplicity of suits”²⁰⁰:

[A] sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable.²⁰¹

The Court ultimately held that the Future Trading Act was unconstitutional, because it was not sustainable as an exercise of either the taxing

¹⁹⁷ Motion to Vacate Order Entered November 21, 1921 & to Substitute in Lieu Thereof Order in Accordance with the Prayer of Petition Attached Hereto at 5–6, *Hill*, 259 U.S. 44 (No. 616).

¹⁹⁸ *Hill*, 257 U.S. at 310–11 (“And that during the same period the appellee, Henry C. Wallace, Secretary of Agriculture, is restrained from designating the said Chicago Board of Trade as a ‘contract market’ except temporarily for and during said period, and is restrained from requiring said board of trade during said period to comply with the conditions and requirements of section 5 of said act as to the making and filing of reports showing the details and terms of transactions entered into by the board or the members thereof, or as to the keeping by the board or its members of a record showing the details and terms of said transactions, and from requiring the governing board of said Chicago Board of Trade during said period to admit to membership and the privileges thereof any representative of a cooperative association of producers not otherwise admissible to membership under the rules of said board of trade in effect prior to the institution of this suit . . .”).

¹⁹⁹ *Hill*, 259 U.S. at 45–46; *see id.* at 48 (“The decrees prayed for are . . . [t]o enjoin the Commissioner of Internal Revenue, the Collector of Internal Revenue and the District Attorney named as parties from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, under the act . . .”).

²⁰⁰ *Id.* at 62.

²⁰¹ *Id.*

power or the Commerce Clause power.²⁰² And it closed its opinion by ordering that the injunctions be granted not only against the CBoT, but also against the local revenue collector for the federal government and the U.S. Attorney for the Northern District of Illinois.²⁰³ As no personal jurisdiction had been acquired over Wallace and the Commissioner of Internal Revenue, the Court dismissed those defendants.²⁰⁴

Hill is noteworthy on several scores. First, like *Lewis Publishing*, it is a rare instance of the Court itself writing language that temporarily enjoined the enforcement of a law beyond just the plaintiffs, rather than merely declining to stay or vacate a lower court's order shielding nonplaintiffs. Second, and unlike *Lewis Publishing*, it is an even rarer instance of the Court itself specifying that commensurately broad *final* relief should issue from the district court on remand.

Third, and finally, *Hill* demonstrates an important point in the ongoing debate over the universal injunction: that the representative suit in equity was allowable against the *federal* government with respect to enforcement of *federal* laws.²⁰⁵ Though the eight-member suit *against*

²⁰² *Id.* at 68, 69–70.

²⁰³ *Id.* at 72 (“The injunction against the Board of Trade and its officers, and the injunction against the Collector of Internal Revenue and the District Attorney, should be granted, so far as § 4 is concerned and the regulations of the act interwoven within it.”).

²⁰⁴ *Id.* (“The court below acquired no personal jurisdiction of the Secretary of Agriculture and the Commissioner of Internal Revenue by proper service and the dismissal as to them was right.”).

²⁰⁵ Bray reads *Massachusetts v. Mellon (Frothingham)*, 262 U.S. 447 (1923), as tacitly rejecting such representative suits against the federal government. See Bray, *supra* note 2, at 431. Relying on *Frothingham*, he argues that:

Equity allowed certain kinds of representative suits, and in nineteenth-century American law the prototypical examples were suits against municipal corporations and public corporations by one or more individual plaintiffs (taxpayers and stockholders, respectively). But the scale and relationship of the individual to the national government were “very different.” In a case like [*Frothingham*], Justice Sutherland wrote, “no basis is afforded for an appeal to the preventive powers of a court of equity.”

Id. (quoting *Frothingham*, 262 U.S. at 487). *Hill* undercuts that understanding of *Frothingham*; it would have been odd for the *Frothingham* Court to impliedly reject the availability of a remedy against the federal government that it had used just two years earlier in *Hill*.

Apart from the question of the representative suit, Bray reads *Frothingham* as “rebuk[ing] the very notion” that federal courts could issue a universal injunction against a federal law. *Id.* at 432. But *Frothingham* has unclear relevance to the propriety of the universal injunction. The remedy that *Frothingham* sought (and failed to get) was *indivisible*: “[A] prohibition on using *her* tax money for the Maternity Act would have been wholly ineffectual, because of the fungibility of money.” *Id.* at 431. *Frothingham* was seeking a *purely plaintiff-protective* injunction for indivisible relief — the halting of spending of *her* tax dollars, which necessarily and incidentally affected the spending of *all* tax dollars. See *id.* at 430 n.66 (quoting Transcript of Record at 6–7, *Frothingham*, 262 U.S. 447 (No. 962)). That requested relief should not be jammed into the awkward rubric of a suit for an injunction to halt the “enforcement” of a *spending* law “against ‘people generally.’” *Id.* at 433 (citation omitted). *Frothingham* is thus best understood as it always has been — as a case rejecting *Frothingham*'s standing as a taxpayer to win even for herself this (indivisible) relief, rather than as a decision that impliedly rejected the universal injunction against federal law. See *infra* note 455 (discussing *Frothingham*).

the CBoT can be (and was²⁰⁶) conceptualized as a stockholder suit, that frame is obviously inapt with respect to the federal government. On the latter score, the suit was simply an action to protect each of the 1600 members of the CBoT from the recordkeeping, tax, and criminal provisions of a bothersome new federal statute through a representative suit by some of their number.²⁰⁷ *Hill* illustrates the capaciousness and the procedural informality of this equitable remedy. The *Hill* plaintiffs merely asserted in their bill that they were seeking relief for *all* members of the CBoT²⁰⁸ — a motley crew of “brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products[,] and proprietors of elevators.”²⁰⁹ There was no probing of the plaintiffs’ typicality or the adequacy of their representation, nor did the law at the time give the federal government any firm assurance of mutuality of estoppel as to the represented nonparties in this type of representative suit.²¹⁰ Still and all, a handful of plaintiffs was able to procure temporary and then *final* injunctive relief against the enforcement of a federal law for this diverse array of nonparties.²¹¹ By the time of *Hill* — nearly a century ago — the equitable suit had already become an accepted tool for shielding from the enforcement of a federal law a disparate set of persons linked together not by the formalities of class certification, but simply by their common vulnerability to enforcement of that law.

This is a scenario that resembles many contemporary suits seeking to shield nonparties from enforcement of federal laws or executive branch actions. Of course, *Hill* differs from these modern suits, too. The *Hill* plaintiffs did not seek to bar the federal government from enforcing the Future Trading Act against *other* boards of trade or their members (why would they have?). The *Hill* suit sought relief that reached beyond the eight plaintiffs to *all* members of the CBoT, but the suit did not seek relief that protected the whole universe of potential enforcement targets throughout the United States.

²⁰⁶ See *Hill*, 259 U.S. at 75 (Brandeis, J., concurring); Bray, *supra* note 2, at 431 & n.69 (citing *Hill* as a “prototypical example[]” of a stockholder suit, *id.* at 431).

²⁰⁷ Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (“And a plaintiff could not sue to vindicate the private rights of someone else. Such claims were considered to be beyond the authority of courts.” (citation omitted)).

²⁰⁸ Transcript of Record at 2, *Hill*, 259 U.S. 44 (No. 616).

²⁰⁹ *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 235–36 (1918).

²¹⁰ The relevant procedural rule in this period was Federal Equity Rule 38. That rule allowed a plaintiff to “sue or defend for the whole” when “the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court.” EQUITY R. 38, 226 U.S. 649, 659 (1912) (superseded 1938). As explained below, the adjudication of an Equity Rule 38 suit would not always bind represented absentees. See *infra* pp. 962–64 (discussing Equity Rule 38).

²¹¹ See *Hill*, 259 U.S. at 72; *Hill v. Wallace*, 257 U.S. 310, 310–11 (1921).

As a formal matter, this fact distinguishes *Hill* from today's prototypical nationwide universal injunction suit. But what about as a practical matter? Even this narrower request had enormous consequences: Chicago was "the leading grain market in the world,"²¹² and by barring enforcement of the law as to *all* members of the CBoT, the Court halted the Future Trading Act from affecting the supermajority of the country's future trading. Moreover, there is some evidence that the interim injunction affected the enforcement of the Act against a range of targets even broader than the members of the CBoT. The president of the Kansas City Board of Trade later testified to Congress that "[n]o attempt" was made to "carry out the working of the old law, *in view of the injunctions gotten out by other members of other markets,*" and he had been "informed by the Secretary of Agriculture that [the Board] would not be rushed at Kansas City until this law was tested out in the courts."²¹³ And the federal government's merits brief in *Hill* described the Future Trading Act as a law that would "be complied with by the Chicago Board of Trade and *other similar organizations the instant this court lifts its injunction order.*"²¹⁴ Though the *Hill* interim injunction was not formally nationwide, it appears to have effectively hit "pause" on the coercive enforcement of the new federal statute throughout the country — exactly as many nationwide universal preliminary injunctions do today.

C. Chicago Board of Trade v. Olsen

After the *Hill* Court held the Future Trading Act unconstitutional, Congress swiftly moved to enact the Grain Futures Act.²¹⁵ Just as swiftly, a lawsuit was filed seeking to have this new replacement statute declared unconstitutional.²¹⁶

This time, the CBoT itself was the plaintiff. The CBoT's suit named the Secretary of Agriculture (Wallace), the local federal postmaster, and the U.S. Attorney from the Northern District of Illinois as defendants.²¹⁷ An Illinois district court judge then issued a TRO barring certain

²¹² *Bd. of Trade of Chi.*, 246 U.S. at 235.

²¹³ *Grain Futures: Hearings on H.R. 11843 Before the S. Comm. on Agric. and Forestry*, 67th Cong. 27 (1922) (statement of James N. Russell, President of the Kansas City Board of Trade) (emphasis added). At the hearing, Senator Charles McNary asked Russell the following: "Has [the Future Trading Act] been administered since its enactment in the Kansas City exchange?" *Id.* Russell replied: "The Kansas City market applied to the Secretary of Agriculture to be granted a contract market. That privilege was granted. The members kept the records as outlined in the old bill and were ready to turn them over to the Secretary of Agriculture whenever called upon. They never have been asked for them. Our market is working now, in effect, as a contract market, apparently the same as it was under the old regime." *Id.*

²¹⁴ Brief for Appellees at 56, *Hill*, 259 U.S. 44 (No. 616) (emphasis added).

²¹⁵ Pub. L. No. 67-331, ch. 369, 42 Stat. 998 (1922).

²¹⁶ Transcript of Record at 1, 17-19, *Bd. of Trade of Chi. v. Olsen*, 262 U.S. 1 (1923) (No. 701).

²¹⁷ *Id.* at 1-2.

enforcement actions by the U.S. Attorney for the Northern District of Illinois. The order stated that:

[The U.S. Attorney was] restrained from attempting to enforce said Grain Futures Act prior to the hearing and decision by this court of said motion, and also from at any time prosecuting criminally or otherwise . . . any member of said The Board of Trade of the City of Chicago, or any customer of any such member, for or by reason of any violation by him or them of said Act prior to the hearing and decision of said motion by this court²¹⁸

The defendants answered the complaint and asked that the bill be dismissed for want of equity.²¹⁹ The district court then dismissed the suit, but it continued the restraining order pending appeal to the Supreme Court.²²⁰

At the Court, CBoT moved for a stay that would continue the restraining order.²²¹ The Solicitor General made no objection.²²² The Supreme Court then extended the stay:

It is ordered by this court, the defendants not objecting, that *the status quo be preserved* while this cause is pending in this court and for 20 days thereafter by restraining and enjoining the appellee, Charles F. Clyne, as United States District Attorney for the Northern District of Illinois, *from attempting to enforce the act of Congress entitled the “Grain Futures Act” during the pendency of this cause in this court and for 20 days thereafter*, and also from at any time prosecuting criminally, or otherwise, under said act any member of the Board of Trade of the city of Chicago, or any customer of any such member, for, or by reason of, any violation by him or them of any provision of said act committed during the pendency of this cause in this court or 20 days thereafter²²³

The Court’s order thus shielded not only the CBoT and its customers, but also *everyone else within the jurisdiction of the local U.S. Attorney*, from enforcement of the Grain Futures Act pending its decision in the case. This aspect of the order would have mattered to any *nonmember* of the CBoT in the Northern District of Illinois who, for example, disseminated misleading information about the price of grain.²²⁴ In *Olsen*, as in *Hill*, both the district court’s TRO and the

²¹⁸ *Id.* at 28. The TRO also restrained the Postmaster General of the City of Chicago (a federal official) from “interfering with any of the mail passing to or from members of the Chicago Board of Trade and customers of said members prior to the hearing and decision by this court of said motion.” *Id.*

²¹⁹ *Id.* at 39–40.

²²⁰ *Id.* at 77.

²²¹ See *Bd. of Trade of Chi. v. Clyne*, 260 U.S. 704, 704 (1922); see also Motion to Advance and for an Order Preserving the Status Quo at 7–8, *Clyne*, 260 U.S. 704 (No. 701).

²²² See *infra* note 229.

²²³ *Clyne*, 260 U.S. at 704 (emphasis added). The Court also restrained the federal postmaster in Chicago from enforcing the Act and required the CBoT’s members to retain “their records of their contracts for future delivery during the pendency of this stay.” *Id.* at 705.

²²⁴ *Bd. of Trade of Chi. v. Olsen*, 262 U.S. 1, 7 (1923) (noting that the Grain Futures Act declared that “anyone . . . sending intentionally or carelessly, false or misleading quotations or information

Court's order formally applied only to a single federal district. Yet within that district — the most important one in the country so far as futures trading was concerned²²⁵ — the orders barred the enforcement of the Grain Futures Act as to *anyone* until the Court had ruled. Nothing in the briefs, orders, or opinions in *Olsen* suggests any Article III concern or any worry about an absence of equitable power to require that “the status quo be preserved”²²⁶ until the Court decided the case.²²⁷

D. *The Court, Lower Courts, and Article III*

This Part has described three cases ranging in time from 1913 to 1923. In *Lewis Publishing*, the Court's order temporarily enjoined the enforcement of a federal law not only as to the plaintiff, but also as to anyone. In *Hill*, the Court temporarily and later permanently enjoined the enforcement of a federal law in a single federal judicial district as to all 1600 members of the Chicago Board of Trade — only eight of whom were actual plaintiffs. In *Olsen*, the Court temporarily enjoined federal officers in a single federal judicial district from enforcing a federal law against anyone — full stop — until its decision was rendered.

In all three cases, a federal court (the Supreme Court) halted enforcement of a federal law beyond the plaintiffs — either in a single district, as in *Hill* and *Olsen*, or anywhere, as in *Lewis Publishing*.²²⁸ In all three

as to the prices of grain, [would be] guilty of a misdemeanor” (citing Pub. L. No. 67-331, ch. 369, § 9, 42 Stat. 998, 1003 (1922)).

²²⁵ See *id.* at 33 (describing the grain trade in Chicago as “the greatest grain market in the world”).

²²⁶ *Clyne*, 260 U.S. at 704.

²²⁷ On the merits, the federal government prevailed; the Grain Futures Act was upheld. See *Olsen*, 262 U.S. at 37–43.

²²⁸ For an example of a *multi-district*, statewide injunction against federal law issued by a federal district court, see *infra* note 530, which discusses *Wallace v. Thomas*, No. 152 in Equity (E.D. Tex. 1935). On the topic of *district-wide* injunctions, it is worth mentioning one red-herring “district-wide” injunction against federal law from roughly this period. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the plaintiffs (a father and his two sons) sought an injunction against the Fidelity Manufacturing Corporation and William C. Hammer, the U.S. Attorney for the Western District of North Carolina, on the grounds that a federal law prohibiting child labor was unconstitutional. See Transcript of Record at 1, 3–6, *Hammer*, 247 U.S. 251 (No. 704). The district court ordered that:

Hammer . . . and his successors . . . [were] permanently enjoined from in any way or manner enforcing or attempting to enforce the provisions of the aforesaid act of Congress or any part thereof, and from instituting or causing to be instituted any prosecution or proceeding under the aforesaid statute or any of the provisions thereof.

Id. at 15–16. This injunction *seems* to have reached beyond the plaintiffs. See Bray, *supra* note 2, at 436 (describing *Hammer's* injunction as protecting nonparties). But the case appears to have been litigated on the premise that the decree bound only the local U.S. Attorney from prosecuting Fidelity, which was not a plaintiff but *was* a party (and probably the real plaintiff behind the suit). See Motion to Advance at 2, *Hammer*, 247 U.S. 251 (No. 704) (describing the suit as seeking to “restrain[] the said United States attorney from enforcing *against the Fidelity Co.* any of the provisions of that law on the ground that the law is unconstitutional” (emphasis added)); see also Brief for Appellant at 3, *Hammer*, 247 U.S. 251 (No. 704) (“The injunction restrains that company from discharging the former and from limiting the hours of work of the latter to eight hours in any day and six days in any week upon the going into effect of the above statute.”); Brief for Appellees at 3,

cases, the result was a situation much like the modern-day scenario that gives heart palpitations to some critics of the universal injunction: a lawsuit is filed challenging a federal law, a court suspends the law’s enforcement beyond just the plaintiffs without certifying a class, and the case is rushed to a decision by the Justices within a matter of months and without any percolation whatsoever.

One notable difference from the modern day is that, back then, nobody seemed to *mind* this scenario very much — not the parties, not the Court, and not external commentators. The Solicitor General did not object to any of these orders, even though he could easily have asked for narrower interim relief (for instance, an order that shielded *only* the two plaintiff newspaper publishers, or *only* the eight plaintiff members of the CBoT, or *only* the CBoT).²²⁹ That quiescent attitude in the executive branch has, of course, no relevance whatsoever for Article III purposes; the scope of judicial power does not expand and contract based on the Department of Justice’s litigating positions.²³⁰

Hammer, 247 U.S. 251 (No. 704) (“The complaint . . . sought an injunction . . . against the United States District Attorney charged with the enforcement of the statute, to prevent his enforcing it by any proceeding or prosecution *against the defendant company*.” (emphasis added) (citation omitted)). Indeed, that is the relief the complaint sought. See Transcript of Record at 5, *Hammer*, 247 U.S. 251 (No. 704) (“That the said W.C. Hammer . . . be temporarily and permanently enjoined from, in any way or manner, enforcing *against said defendant Fidelity Manufacturing Company* or attempting to enforce the provisions of the aforesaid statute or any part thereof, and from instituting or causing to be instituted any prosecution or proceeding as *against said defendant Fidelity Manufacturing Company* under the aforesaid statute” (emphasis added)).

The injunction’s language appears to have been understood as an imprecise translation of this prayer for relief. In short, the *Hammer* plaintiffs did not really seek an injunction that shielded any party *other than Fidelity*, even within the Western District of North Carolina. Bray chalks up Fidelity’s failure to seek a nationwide universal injunction to its jurisprudential belief that a broader injunction was impossible. See Bray, *supra* note 2, at 436 (“This seems clearly to be because the corporate funders of the litigation did not think a national injunction was possible”). But a simpler explanation would be that Fidelity had no interest in ensuring that its competitors (other mill owners) could continue to hire cheap child labor.

²²⁹ In *Lewis Publishing*, the Wilson Administration’s Postmaster General evidently wished to keep enforcing the law — as he was entitled to do. See *supra* notes 172–175 and accompanying text. In *Hill*, the Solicitor General may have made some objection orally to the Court, but the account of that argument is ambiguous. See *Ask Relief in Grain Deals: Eight Members of Chicago Board of Trade Appeal to Supreme Court*, N.Y. TIMES, Dec. 6, 1921, at 36 (“Solicitor General Beck objected to any suspension by the Court, which would permit the eight members as against the remaining 1682, who were willing to comply with the law, from being excused from penalties in the way of taxes which their transactions during the trial of the case might impose[]). He stated that the Government would not object to the waiving of criminal and punitive penalties so far as they are concerned.”). In *Olsen*, no objection by any arm of the executive branch appears to have been made.

²³⁰ See Bray, *supra* note 2, at 441 (“A court’s equity powers are not determined by the concessions of the parties; many equitable doctrines protect the public and the court itself.”); see also *id.* at 440 (citing as a national injunction the decree in *Harlem Valley Transportation Ass’n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), a case in which the federal government had “not only conceded, but insisted” that the injunction would have nationwide scope, *id.* at 1060 n.2).

But that attitude does have relevance on two other scores. First, it may shed some light on the nagging puzzle of why there were not *more* universal injunctions against federal law earlier in this country's history. There is simply no need to *seek* a universal injunction if the DOJ is willing to abide by a gentlemen's agreement (or a stipulation²³¹) not to enforce a law coercively until the Supreme Court has decided on its legality. The same is true where other arms of the federal government, such as the Department of Agriculture, can be relied upon to maintain the status quo while a challenge to a new law is pending before the Court. Second, the federal government's stance both exemplifies and helps to explain how observers more generally in this period viewed the federal courts' equitable powers and the scope of judicial review. When the JoC's suit was filed, for example, the *New York Times* placidly reported that:

While the suit is brought in the name of a single newspaper publishing corporation, the action, which is in the form of a bill in equity, has the sanction of the American Newspaper Publishers' Association, of which the plaintiff is a member, and *it is regarded as a test case and for the benefit of all the newspapers and periodicals of the United States affected by the law.*²³²

As the *Times* saw it, the whole point of the JoC's suit was to resolve for all concerned the question of the statute's legality, even though just one lonely plaintiff stood at the caption's head.²³³ In that legal milieu,

²³¹ See, e.g., *Wilson v. New*, 243 U.S. 332 (1917). In *Wilson*, a railroad sought an injunction against portions of the Adamson Act, Pub. L. No. 67-252, 39 Stat. 721 (1916), a federal law that established an eight-hour working day for railroads and imposed criminal penalties for violations. See Transcript of Record at 6-8, 15-16, *Wilson*, 243 U.S. 332 (No. 797). The district court, "in view of the importance of securing a prompt decision of the case by the Supreme Court," and *at the urging of the Department of Justice*, decreed that the Act was unconstitutional and enjoined its enforcement *against the plaintiffs*. *Id.* at 49. The Solicitor General then filed a motion to advance with the Court in which he explained that "[n]umerous like cases ha[d] been instituted throughout the United States and [were currently] pending" and that "the subject [was] one of such general interest and importance that all parties [were] deeply anxious for an early disposition of the case." Motion by Appellant to Advance at 2, *Wilson*, 243 U.S. 332 (No. 797). He explained that the Attorney General and counsel for various railroads had stipulated that pending the Court's disposition of the case "no prosecution [would] be instituted by the United States nor any conviction sought" under the Act, *id.* at 3, and that "[a]ny railroad not a party hereto [could] become such by filing with the Attorney General . . . notice of its concurrence in the provisions [of the stipulation]," *id.* at 4. The government further noted that:

In order to avoid the trial of a great number of like suits which had been filed throughout the United States . . . it was agreed that the present case should be made the test case for the purpose of determining the constitutionality of the law, and that certain typical schedules of other railroads might be filed in this court and referred to in argument for the purpose of illustrating the applicability of the law under varying conditions.

Brief for the United States at 2-3, *Wilson*, 243 U.S. 332 (No. 797). In short, rather than insisting on percolation, the federal government here voluntarily *stipulated* to nonenforcement of the Adamson Act pending the Supreme Court's disposition of the case.

²³² *Newspapers Test New Publicity Law*, N.Y. TIMES, Oct. 10, 1912, at 24 (emphasis added).

²³³ See *id.*; see also *Burleson Enjoined*, *supra* note 175, at 1 (noting that the Court "without dissent or explanation" restrained the Postmaster General "from denying the privilege of the mails to newspapers that fail to comply with the exacting provisions of the statute").

it makes sense that a universal injunction against enforcement of a federal statute would not seem to be the startling affront to the separation of powers that it is often made out to be today.

It is true that only one of these three orders (*Lewis Publishing*) formally barred enforcement of the federal law as to *anyone*, and that it was the Supreme Court that issued the order.²³⁴ That scenario is unlike the modern-day scenario in which a district court issues such an order. This difference in the issuing federal court matters in obvious ways for percolation, for forum shopping, and for the possibility of conflicting injunctions.²³⁵ With respect to *Article III*, though, this is *not* a difference that matters. Article III does not differentiate between courts at various levels of the federal judicial hierarchy in its conferral of the power to decide “Cases[] in . . . Equity.”²³⁶ The appropriate scope of injunctive relief varies according to the *case*, not according to the position of the court in the judicial hierarchy. It is tempting to think that a court’s Article III power should be calibrated with the vertical stare decisis effects of its opinions, with the geographical scope of its jurisdiction, or with some amalgam thereof, so that the Supreme Court would be able to issue universal relief to parties nationwide, while the district courts would have only the power to control the conduct of the defendants within their respective districts. But if that were true, then the Supreme Court could give a universal nationwide injunction in any case in which it decided the federal law was unconstitutional — even in, say, a stockholder suit where no officer of the federal government was even a party,²³⁷ because its decision would thereafter be supreme law nationwide — and a district court would not be able to enjoin a defendant from acting *even against the plaintiff* as soon as the defendant set foot outside the district, because the district court’s power would extend only to the district’s borders.²³⁸ Neither corollary is defensible.

There is only one “judicial Power” under Article III to decide cases in equity, and it must be interpreted uniformly. If Article III empowers the Court to issue an injunction that bars enforcement of a federal law against anyone, anywhere, at the behest of a single plaintiff — as the

²³⁴ *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288, 316 (1913); *see also* *Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600, 601 (1913) (per curiam).

²³⁵ When the Supreme Court is on the verge of rendering a controlling precedent on a legal question, there is no point in allowing that question to percolate further, and so a universal nationwide injunction has little cost on that score. When such an order is sought directly from the Supreme Court, the concern about forum shopping also disappears because there is only one Supreme Court. And finally, there is no risk that the Court will issue an injunction that conflicts with its own.

²³⁶ U.S. CONST. art. III, § 2, cl. 1.

²³⁷ *See, e.g., Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601, 617–19, 637 (1895).

²³⁸ *Cf. Bray*, *supra* note 2, at 422 n.19 (“[T]o protect the plaintiff, equity was willing to enjoin acts committed outside of the Chancellor’s territorial jurisdiction. Equity acts in personam. Geographical lines are simply not the stopping point.”); Wasserman, *supra* note 16, at 364.

Court did in the run-up to *Lewis Publishing* — then it confers that same power upon a federal district court. Still, for additional reassurance, it is nonetheless worthwhile to explore another array of cases that are relevant to the Article III analysis and that also shed light on then-prevailing understandings of the judicial power. The next Part turns to that task.

IV. INJUNCTIONS AGAINST STATE LAW

The current controversy over universal injunctions against federal law has been framed around one simple question: whether a federal court can “prohibit the Government from enforcing a policy with respect to anyone, including nonparties.”²³⁹ Opponents of these injunctions contend that they date from the 1960s with respect to federal law. But if what matters are suits in which a federal district court issues an injunction barring enforcement of a statute beyond the plaintiffs where no class has been certified,²⁴⁰ then precedent for that practice with respect to *state* law reaches much further back.²⁴¹ This history of injunctions against state law has important implications for today’s debate over the propriety of universal injunctions against federal law as an Article III matter.

In this Part, section A begins by describing federal injunctions against state law from the early part of the twentieth century. Section B summarizes and comments upon what can be gleaned from this history. Section C assesses the relevance of this history for the Article III analysis.

²³⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring).

²⁴⁰ As explained below, the plaintiffs in the cases described here proceeded either on their own behalf or also on behalf of nonparties alleged to be similarly situated under Equity Rule 38. *See infra* pp. 962–64 (comparing Equity Rule 38 suits and modern-day Rule 23 class action suits for injunctive relief); *see also infra* pp. 975–77 (explaining resemblances between Equity Rule 38 decrees and modern-day universal injunctions).

²⁴¹ There is little literature surveying the scope of federal court injunctions against state laws in the early decades of the twentieth century. Further back, Bray discusses *Scott v. Donald*, 165 U.S. 107 (1897), a federal court suit against a state law in which, according to Bray, the Court objected to an “overbroad injunction” with “reasoning [that] would apply a fortiori to a national injunction.” Bray, *supra* note 2, at 429. For a discussion of *Scott*, *see infra* pp. 974–75. Bray notes that some nineteenth-century *state* courts allowed broader relief that reached to nonplaintiffs, but he stresses that these state court suits addressed municipal or county laws and not federal or state laws. *See* Bray, *supra* note 2, at 427 (“[W]hen courts did give broader relief it was in cases involving municipal or county taxes. . . . [L]ate in the nineteenth century courts extended this reasoning from suits to enjoin tax collection to other challenges, allowing a successful plaintiff to obtain an injunction protecting all similarly situated persons. Again what was challenged were not federal or state laws but municipal ordinances.” (footnotes omitted)). This Part adds to the literature by showing that in the early twentieth century, federal courts gave injunctions that reached beyond the plaintiffs as to state laws.

A. In the Early Twentieth Century

Let us start with *Pierce v. Society of Sisters*.²⁴² After World War I, the country experienced an intense uptick in nationalist and anti-immigrant sentiment. In Oregon, an “odd commingling of patriotic fervor, blind faith in the cure-all powers of common schooling, anti-Catholic and anti-foreign prejudice, and the conviction that private and parochial schools were breeding grounds of Bolshevism”²⁴³ resulted in the passage of a law that mandated public schooling for children between eight and sixteen years old.²⁴⁴ The law was intensely controversial — “the most upsetting factor in the history of Oregon since the agitation over slavery.”²⁴⁵

In *Pierce*, two Oregon private school owners — the Society of Sisters of the Holy Names of Jesus and Mary and the Hill Military Academy — sued before a three-judge federal court to challenge the new state law.²⁴⁶ The defendants were the Governor of Oregon, the State Attorney General, and the District Attorney for Multnomah County.²⁴⁷ The plaintiffs did not sue on behalf of a represented group or class; they sued for themselves, alleging that the law was an unconstitutional interference with their property rights.²⁴⁸ They did not seek to bar enforcement of the law against *only* those students attending their two schools. Instead, they sought an injunction that restrained the state from enforcing the law *full stop*.²⁴⁹ And they received

²⁴² 268 U.S. 510 (1925).

²⁴³ Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1018 (1992).

²⁴⁴ See *Pierce*, 268 U.S. at 530.

²⁴⁵ Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce, and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 905 (1996) (citation omitted).

²⁴⁶ Soc’y of Sisters v. Pierce and Hill Military Acad. v. Pierce, 296 F. 928, 930–31 (D. Or. 1924), *aff’d*, 268 U.S. 510 (1925).

²⁴⁷ Transcript of Record at 1, *Pierce*, 268 U.S. 510 (No. 583) [hereinafter Transcript of Record (Society of Sisters)]; Transcript of Record at 1, *Pierce*, 268 U.S. 510 (No. 584) [hereinafter Transcript of Record (Hill Military Academy)].

²⁴⁸ Soc’y of Sisters, 296 F. at 930–31; see also Transcript of Record (Society of Sisters) at 13–14, *Pierce*, 268 U.S. 510 (No. 583); Transcript of Record (Hill Military Academy) at 6–7, *Pierce*, 268 U.S. 510 (No. 584).

²⁴⁹ Transcript of Record (Society of Sisters) at 14, *Pierce*, 268 U.S. 510 (No. 583) (“Wherefore, plaintiff [Society of Sisters] respectfully prays that said pretended law be declared unconstitutional and void, and that this Honorable Court grant unto plaintiff its interlocutory writ of injunction enjoining and restraining said defendants . . . from enforcing said pretended law on or after September 1, 1926, and from now threatening or giving out that they or either of them will enforce said pretended law on or after September 1, 1926, and from publishing or declaring that said pretended law is valid”); Transcript of Record (Hill Military Academy) at 6–7, *Pierce*, 268 U.S. 510 (No. 584) (“Wherefore, plaintiff [Hill Military Academy] prays that said pretended Law be declared to be unconstitutional and void and that this Honorable Court grant unto plaintiff an interlocutory writ of injunction enjoining and restraining defendants and each of them from publicly threatening to enforce said pretended law on and after September 1, 1926, and from publishing and declaring that said pretended law is a valid law of the State of Oregon”).

one.²⁵⁰ The order for interlocutory injunction in the Society of Sisters lawsuit contained no limitation confining the injunction's scope to the plaintiff:

The application of the plaintiff above named . . . having been duly brought on for hearing . . . and the Judges having concurred in an opinion duly filed, holding that the [Oregon law] . . . is unconstitutional and void and that the defendants should be restrained from enforcing or attempting to enforce said Act, it is Ordered and adjudged that an interlocutory injunction be and the same is hereby granted as prayed for in the amended bill of complaint, and the Clerk of this Court is hereby ordered to issue the same, restraining the defendants . . . from enforcing or attempting to enforce or threatening to enforce said Act, and such Interlocutory injunction shall remain in force until the final hearing and determination of the above entitled suit.²⁵¹

The companion order issued the same day in Hill Military Academy's lawsuit also did not limit its applicability to the plaintiff:

[I]t satisfactorily appearing to the Court that it is a proper case for an injunction and that sufficient grounds exist therefor and that said Act is unconstitutional and void, therefore [i]t is ordered that said motion to dismiss be and the same is hereby overruled and that, until further order in the premises . . . the said [Governor, Attorney General, District Attorney, their agents, and so forth] do absolutely desist and refrain from publishing and declaring that [the Oregon law] . . . is a valid law of the State of Oregon, and from threatening to enforce said Act from and after the 1st day of September, 1926, and from attempting to enforce said Act from and after said date.²⁵²

The Oregon state government then appealed to the Supreme Court.²⁵³ Its filings with the Court made no express objection to the injunctions' scope. But they reflected that the State understood the three-judge court's injunctions to have placed the Act in its entirety in jeopardy, rather than just halting its enforcement as to the two plaintiff schools or their students. In a motion asking the Court to expedite its consideration of the State's appeal, the State noted its need for adequate time to make arrangements for the new students who would then be attending Oregon public schools if the decree were reversed.²⁵⁴ It argued that because of the continued state of "uncertainty as to the validity of the said statute, all persons, corporations, associations and others now engaged in providing educational facilities, other than the public schools," were "at a loss to know what preparations to make with reference to the future conduct of said institutions."²⁵⁵ This motion thus indicated that the injunction was understood to affect not just the two

²⁵⁰ *Soc'y of Sisters*, 296 F. at 938. The lower court opinion's description of the injunction is terse: "The motions to dismiss will be denied, and preliminary injunctions will issue, restraining the defendants from threatening or attempting to enforce the act complained against." *Id.*

²⁵¹ Transcript of Record (Society of Sisters) at 19, *Pierce*, 268 U.S. 510 (No. 583).

²⁵² Transcript of Record (Hill Military Academy) at 11, *Pierce*, 268 U.S. 510 (No. 584).

²⁵³ Motion to Advance at 1, *Pierce*, 268 U.S. 510 (No. 583).

²⁵⁴ *Id.* at 4-5.

²⁵⁵ *Id.* at 5.

plaintiff schools, but “all” private schools in Oregon. In a supplement to its brief, the State explained:

The presumption [in favor of constitutionality] in this case would, therefore, be that it is impracticable to supervise the instruction given in the private and parochial schools so as to assure that children attending these schools will secure a thorough education up to the minimum prescribed by the legislature. In the case of the Society of the Sisters . . . it is alleged that this particular school is giving this minimum of instruction in a proper way, but it is nowhere alleged that all of the private schools operating within the state of Oregon are so doing.²⁵⁶

The State’s argument thus acknowledged that the three-judge court’s injunction reached beyond the Society of Sisters to benefit *other* private schools that perhaps did not provide an adequate education — and indeed had not been alleged to provide an adequate education — and that the Court’s order might ultimately do the same.

As the case reached the Court, it attracted a great deal of attention, including a remarkable amount (for that era) of amicus briefing.²⁵⁷ The Supreme Court heard two days of oral argument on the case.²⁵⁸ The Court’s opinion reflects that it considered the record below and the nature of the relief sought and obtained by the plaintiffs. It noted that “[r]ights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.”²⁵⁹ It described the allegations in the two schools’ bills and noted that “[t]he prayer is for an appropriate injunction.”²⁶⁰ The Court commented that “[t]he inevitable practical result of enforcing the Act under consideration would be destruction of appellees’ primary schools, *and perhaps all other private primary schools for normal children within the State of Oregon.*”²⁶¹ It then affirmed the decrees below, pronouncing the famous lines: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”²⁶²

²⁵⁶ Supplement to Briefs of Appellant at 3, *Pierce*, 268 U.S. 510 (Nos. 583, 584).

²⁵⁷ See Woodhouse, *supra* note 243, at 1100 n.579.

²⁵⁸ In the transcripts of that hearing that are available, the scope of the injunction was mentioned obliquely. Counsel for Society of Sisters began his argument by stating that “this appellee *and all other corporations and individuals of the State of Oregon similarly situated* [were] engaged in a useful and lawful calling.” Transcript of Oral Argument at 30, *Pierce*, 268 U.S. 510 (No. 583) (emphasis added). Later, explaining that pupils had been withdrawn from private schools well before the law’s effective date, he noted that the lower court’s “interlocutory injunction was the only arresting influence that ha[d] come in this decline of the private schools of the State of Oregon. After that injunction, the withdrawals were decreased, and some students returned.” *Id.* at 37.

²⁵⁹ *Pierce*, 268 U.S. at 530.

²⁶⁰ *Id.* at 533.

²⁶¹ *Id.* at 534 (emphasis added).

²⁶² *Id.* at 535.

Pierce is noteworthy both because of the scope of the injunctions it affirmed, which contained no limitation to the two plaintiffs, and because that relief was (twice) labeled an “appropriate” “prayer” by the Court.²⁶³ *Pierce* is also noteworthy because it remains good law today. But *Pierce* is not the only example. In the following decade, the Court decided several cases — *Mitchell v. Penny Stores*,²⁶⁴ *Binford v. J.H. McLeaish & Co.*,²⁶⁵ and *Langer v. Grandin Farmers Co-Operative Elevator Co.*²⁶⁶ — in which it affirmed injunctions that three-judge courts had issued to bar the enforcement of state laws with respect to nonparties.

These cases differ from *Pierce* in that the plaintiffs in these cases — unlike the *Pierce* plaintiffs — invoked either explicitly or implicitly the authority of Equity Rule 38. That rule of procedure allowed a plaintiff to “sue or defend for the whole” when “the question [was] one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court.”²⁶⁷ Like its predecessor,²⁶⁸ Equity Rule 38 allowed “a few . . . to represent the entire body, in order to promote convenience and to prevent a failure of justice.”²⁶⁹

The language of Equity Rule 38, and particularly its references to numerosity and commonality, immediately brings to mind the modern class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure.²⁷⁰ But even though the rule was a progenitor,²⁷¹ it is important not to conflate a representative suit under Equity Rule 38 with the modern injunctive class action device available under Rule 23. Unlike the rule for modern class action practice, neither Equity Rule 38 nor any other rule in effect at the time created a mechanism for a court to “certify” a class. One consequence of this was that a plaintiff’s allegation that she

²⁶³ *Id.* at 530, 533.

²⁶⁴ 284 U.S. 576 (1931) (per curiam).

²⁶⁵ 284 U.S. 598 (1932) (mem.) (per curiam).

²⁶⁶ 292 U.S. 605 (1934) (mem.) (per curiam).

²⁶⁷ EQUITY R. 38, 226 U.S. 649, 673 (1912) (superseded 1938).

²⁶⁸ Equity Rule 38 was adopted in 1912 and became effective in 1913. See 226 U.S. 627, 629 (1912) (promulgating the 1912 version of the Rules of Practice for the Courts of Equity). It was a successor to an earlier rule, Equity Rule 48, which dated back to 1843. See EQUITY R. 48, 42 U.S. (1 How.) xxxix, lvi (1843) (superseded 1912) (“Where the parties on either side are very numerous, . . . the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it.”); see also 1 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE § 540, at 337 n.1 (1909) (“In suits filed by one or more on behalf of many who are in like position, the parties actually bringing the suit are the real parties. Others of the class who come in to share beneficially are only parties *sub modo* [that is, with limitations or qualifications].”).

²⁶⁹ *Bickford’s, Inc. v. Fed. Reserve Bank*, 5 F. Supp. 875, 876 (S.D.N.Y. 1933).

²⁷⁰ See FED. R. CIV. P. 23 (outlining the procedural requirements for class action lawsuits).

²⁷¹ Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn’t We Know You Better After All This Time?*, 165 U. PA. L. REV. 1599, 1600 n.1 (2017) (“The notion of group representation embodied in [Equity Rules 38 and 48] can in turn be traced back to the English Bill of Peace and before that to medieval group litigation in England.”).

was suing on behalf of a large number of similarly situated persons evidently received little testing before the issuance of preliminary injunctive relief shielding those absent parties.²⁷² This is decidedly not the case today when courts issue preliminary injunctive relief shielding “putative” injunctive classes.²⁷³ A second consequence was that the *final* adjudication of an Equity Rule 38 representative suit did not always have binding effect on the absent parties.²⁷⁴ In contrast, a final adjudication of a modern-day injunctive class action *does* bind the class, because certification makes the class “the plaintiff.”²⁷⁵ In the type of Equity Rule 38 suit that involved a joint or common interest, the decree would be binding on absentees;²⁷⁶ such a suit would later be called a “true class suit.”²⁷⁷ But in a second type of Equity Rule 38 suit involving *several* rights, an absentee would *not* be bound by the prior adjudication;²⁷⁸ that kind of suit would later be called a “spurious class suit.”²⁷⁹ An important example of a “spurious class suit” was the type of Equity Rule 38 suit relevant here: a suit in which the court adjudicated the legality of a state statute that independently applied to each of the represented parties.²⁸⁰ Lastly, then as now, questions of res

²⁷² See *infra* p. 975. In the available records and briefs of the cases described below, there is no indication that such allegations were proved.

²⁷³ See, e.g., *Abdi v. Duke*, 280 F. Supp. 3d 373, 398–403 (W.D.N.Y. 2017) (conducting a lengthy analysis of whether preliminary injunctive relief was appropriate for putative class members, which required a finding that class certification was likely), *order clarified sub nom.* *Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018).

²⁷⁴ See Geoffrey C. Hazard, Jr., et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1924–38 (1998); *id.* at 1937 (noting that in 1938, the “state of the law” on the “binding effect of class suits . . . continued to be confused”).

²⁷⁵ See FED. R. CIV. P. 23.

²⁷⁶ See, e.g., *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363–67 (1921), *overruled in part by Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941).

²⁷⁷ See James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 314–16 (1937). Professor James Moore “was responsible for drafting [the 1938] Rule 23, and it is clear that he implemented his best understanding of representative suit precedent.” Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1102 n.20 (2013).

²⁷⁸ See James Wm. Moore & Marcus Cohn, *Federal Class Actions — Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 561 (1938) (“The decree in the spurious type of class action is not binding . . . [T]he [spurious class] suit is a permissive joinder device. It should not be allowed to prejudice the very persons whom the device was invented to aid.”).

²⁷⁹ *Id.* at 562; see Kaplan, *supra* note 84, at 385–86 (explaining that in “class actions taken to be of the nonbinding type,” “nonjoined members of the class” could “appear or intervene *after* the merits had been determined favorably to the class,” *id.* at 385); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 348 (1988) (“The pre-1966 Rule permitted nonbinding class suits, called ‘spurious’ class actions. . . . If the named plaintiff lost the case, the result did not bind the class members, who were free to file later lawsuits on the same claim, and win or lose on the merits without any application of res judicata against them.”).

²⁸⁰ See Moore & Cohn, *supra* note 277, at 319–20, 319 n.97 (listing several federal court cases invoking Equity Rule 38 — including two discussed below — as “spurious” class suits); see also

judicata could arise only if the court reached a *final* decree. What that means is that if a court issued a preliminary injunction *favorable* to the absentees in an Equity Rule 38 suit, they could receive the benefit of that interlocutory order without even implicating the doctrine of res judicata; the grant of a preliminary injunction is not a final judgment (though it can be an appealable order).²⁸¹

The bottom line is that in the twenty-five-year span in which Equity Rule 38 was in effect (1913 until 1938), a plaintiff challenging the enforcement of a state law could proceed under Equity Rule 38 as the asserted representative of a set of similarly situated persons without a court making the absentees into “parties” by certifying the class as “the plaintiff”; the absentees could benefit from interim injunctive relief as the suit was being adjudicated; and — if the suit eventually failed on the merits — that final adjudication would not bind the absentees in subsequent cases.

With this procedural backdrop in hand, the remainder of this section describes several Equity Rule 38 cases from this period in which lower three-judge federal courts issued injunctions barring enforcement of state laws against broad sets of nonparties and in which challenges to those injunctions eventually reached the Supreme Court.

1. *Mitchell v. Penny Stores*. — In the early twentieth century, the country “witnessed an economic change in the methods of retail marketing.”²⁸² The “old corner storekeeper” was increasingly replaced with “the chain grocery, the chain drug store, and the chain five and ten cent store.”²⁸³ In response, dozens of “anti chain store tax measures” were introduced in various states.²⁸⁴ One such state was Mississippi, which in 1930 enacted a law that established a graduated sales tax imposing higher tax rates on operators of five or more stores in the state.²⁸⁵

A Mississippi chain-store operator, Penny Stores, filed a complaint against the Attorney General of Mississippi, members of the Mississippi State Tax Commission, and the State District Attorney, who were the officers responsible for enforcement of the law.²⁸⁶ Penny Stores alleged that the state tax violated the Fourteenth Amendment as well as the

Gramling v. Maxwell, 52 F.2d 256, 263 (W.D.N.C. 1931) (granting a preliminary injunction restraining enforcement of a North Carolina state statute against “complainant and other peach growers” in an Equity Rule 38 suit).

²⁸¹ See, e.g., *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28–29 (1916) (holding that an injunction was not a final judgment entitled to res judicata effect because no final decree had been entered).

²⁸² Edward W. Simms, *Chain Stores and the Courts*, 17 VA. L. REV. 313, 314 (1931).

²⁸³ *Id.*

²⁸⁴ *Id.* at 315.

²⁸⁵ *Penny Stores, Inc. v. Mitchell*, 59 F.2d 789, 789 (S.D. Miss. 1932).

²⁸⁶ See *Mitchell v. Penny Stores, Inc.*, 284 U.S. 576, 576 (1931) (per curiam); see also Transcript of Record at 1, *Mitchell*, 284 U.S. 576 (No. 671).

state’s constitution.²⁸⁷ And it filed its suit seeking injunctive relief on its own behalf *and* on behalf of all other operators of more than five stores in the state.²⁸⁸

Penny Stores’ request for the interlocutory injunction was heard by a three-judge district court.²⁸⁹ That court issued an order stating that:

[A]n interlocutory injunction [must] issue pending hearing and final determination in this cause, enjoining and restraining the defendants and each of them from taking any steps to enforce [the sections of the law] complained of in the original bill of complaint, as against the plaintiff *or any other persons, firms or corporations operating in the state of Mississippi more than five stores and subject to the tax herein complained of*, until this cause may be fully heard and determined.²⁹⁰

The three-judge court did not issue a written opinion.²⁹¹ The State then took a direct appeal to the Supreme Court.²⁹² The Supreme Court issued a brief per curiam opinion in which it made no quarrel with the scope of the injunction:

[T]he only question presented by the record upon this appeal is whether the District Court abused its discretion in granting an injunction until the case could be heard upon the merits. . . . The order was made prior to the decision of this Court in *State Board of Commissioners v. Jackson*, . . . and, as no abuse of discretion is shown, the order must be affirmed.²⁹³

This decision thus continued the preliminary injunction barring enforcement of the state law not only against the plaintiff, but also against *all* owners of more than five stores in Mississippi.²⁹⁴

2. *Binford v. J.H. McLeaish & Co.* — The hauling of cotton in Texas was evidently a hazardous business. In 1931, the Texas legislature sought to make cotton hauling safer by enacting a law that restricted the practice of hauling uncompressed cotton on Texas highways.²⁹⁵ A cotton merchant, J.H. McLeaish & Co., challenged the statute and sought an injunction enjoining its enforcement in a suit against various

²⁸⁷ Transcript of Record at 10–11, *Mitchell*, 284 U.S. 576 (No. 671).

²⁸⁸ *Id.* at 12–13; *see also* Brief for Appellee at 5, *Mitchell*, 284 U.S. 576 (No. 671).

²⁸⁹ *See Penny Stores*, 59 F.2d at 790 (noting that a “three-judge court [was] organized” to review the plaintiff’s “application for an interlocutory injunction”).

²⁹⁰ Transcript of Record at 40, *Mitchell*, 284 U.S. 576 (No. 671) (emphasis added).

²⁹¹ *See id.*

²⁹² *Id.* at 43.

²⁹³ *Mitchell*, 284 U.S. at 576 (citations omitted); *id.* (“The District Court . . . granted an interlocutory injunction . . . restraining the enforcement of the statutory provisions until the cause could be fully heard and determined.”); *see infra* pp. 970–71 (discussing the lawsuit and injunction at issue in *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 (1931)).

²⁹⁴ On remand, in light of *Jackson* and other decisions, the bill was dismissed. *See Penny Stores*, 59 F.2d at 791–93.

²⁹⁵ *See J.H. McLeaish & Co. v. Binford*, 52 F.2d 151, 152 n.1 (S.D. Tex. 1931), *aff’d*, 284 U.S. 598 (1932) (mem.) (per curiam).

Texas sheriffs and constables, district and county attorneys of four counties, the state highway commission, and the Governor and Attorney General of Texas.²⁹⁶ Several parties then intervened as plaintiffs on their own behalf *and on behalf of all others similarly situated*: merchants and handlers of uncompressed cotton, cotton farmers who raised cotton and hauled it uncompressed to Houston, and truckers who engaged as private carriers of uncompressed cotton and other goods.²⁹⁷

The gravamen of the claim was that the law was an unconstitutional classification that sought to steer the cotton-shipping business away from truckers and toward the railroads in violation of the Fourteenth Amendment — or, as the three-judge court’s opinion more poetically put it, that “the statutory means employed [were] . . . but a pretense at regulation . . . behind which prohibition and discrimination stalk[ed].”²⁹⁸ The three-judge court sided with the plaintiffs, concluding that the law was “oppressive as to plaintiffs and interveners because it operate[d] to unreasonably embarrass and restrict to the point of prohibition a legitimate business entitled equally with others to the use of the public roads.”²⁹⁹ The court therefore granted the temporary injunction against the law in terms that reached beyond the plaintiffs and the interveners:

[A]pplication for temporary injunction having been made . . . by J.H. McLeaish & Company, Complainants, owners and handlers of uncompressed cotton, . . . and thereafter certain interventions having been filed under leave of the Court by [other named businesses] for themselves *and in behalf of other interior cotton merchants, handlers of uncompressed cotton, in the State of Texas similarly situated*, and by [other named individuals] for themselves *and in behalf of all cotton growers and cotton farmers in the State of Texas similarly situated*; and by [other named individuals] for themselves *and in behalf of other owners and operators of motor trucks used to transport uncompressed cotton over the highways of the State of Texas similarly situated* . . . the Court . . . is of the opinion that the temporary injunction prayed for . . . should be granted.

²⁹⁶ *Id.* at 152.

²⁹⁷ *Id.* at 153 (“At this hearing there appeared by leave, in addition to the plaintiffs and defendants, certain interveners, all of whom make common cause with plaintiffs as to the purpose and effect of the act, and its unreasonable and discriminatory character as to them. These represented three classes: (1) interior cotton merchants in the business of procuring uncompressed cotton and hauling it upon their own trucks, or trucks of private carriers engaged by them, to Houston for sale and/or shipment[.]; (2) [i]ndividual farmers who raise cotton in the interior and haul it and the cotton of others uncompressed to Houston, for sale and/or shipment there[.]; [and] (3) [p]ersons owning trucks, engaged as private carriers in the business of hauling over the highways uncompressed cotton as well as other commodities.”); *see also* Transcript of Record at 29, *Binford*, 284 U.S. 598 (No. 391) (noting that cotton farmers were intervening “on behalf of all others as are or may be similarly situated”); *id.* at 39 (same for intervenor cotton truckers); *id.* at 52 (same for intervenor interior cotton merchants).

²⁹⁸ *J.H. McLeaish*, 52 F.2d at 155.

²⁹⁹ *Id.* at 156.

It is therefore, ordered, adjudged and decreed by the Court that . . . [the state defendants and] their successors . . . are hereby restrained and enjoined from molesting, arresting, filing complaints or charges against or prosecuting complaints [sic] or interveners, . . . or *those on whose behalf said interveners filed their interventions*, . . . for any violation of said Act in so far as the same relates to the transportation of uncompressed cotton over the highways of the State of Texas until further orders of this Court.³⁰⁰

On appeal, the State of Texas filed a 107-page-long brief (not counting the appendices) in which it acknowledged that the decree had enjoined the enforcement of the law’s provisions with respect to uncompressed cotton and objected to the merits of the lower court’s conclusions.³⁰¹ The Supreme Court’s rejoinder was a single-sentence per curiam decision in which it affirmed the interlocutory injunction.³⁰²

3. *Langer v. Grandin Farmers Co-Operative Elevator Co.* — The economic depression of the 1930s had a particularly severe impact in North Dakota.³⁰³ In 1932, a “group of impoverished farmers” was elected to the North Dakota House of Representatives, and the colorful William “Wild Bill” Langer became the state’s governor.³⁰⁴ The consequence was a slew of legislative and executive efforts to “deal with the crushing impact of the economy on the agricultural sector,”³⁰⁵ one of which was a law authorizing the Governor to impose an embargo on the transportation of agricultural products out of the state if “the sale and returns” on the product became “confiscatory.”³⁰⁶ In other words, if the price of wheat dropped far enough, the Governor was authorized to bar its sale out of the state. Just after the 1933 harvest, Governor Langer exercised that power.³⁰⁷ Because North Dakota produced seventy-five percent of America’s durum wheat, the embargo caused wheat prices to rise immediately.³⁰⁸

A group of about thirty owners and operators of grain elevators then brought suit against the Governor and the state board of railroad commissioners, arguing that the embargo was unconstitutional.³⁰⁹ Procedurally, the case is difficult to classify cleanly as wholly within the parameters of Equity Rule 38. On the one hand, the bill alleged that

³⁰⁰ Transcript of Record at 104–05, *Binford*, 284 U.S. 598 (No. 391) (emphasis added).

³⁰¹ Brief for Appellants at 8–9, 84–90, *Binford*, 284 U.S. 598 (No. 391), 1931 WL 32888, at *8–9, *37–52.

³⁰² *Binford*, 284 U.S. at 598 (“The order granting an interlocutory injunction is affirmed.”).

³⁰³ Sarah M. Vogel, *The Law of Hard Times: Debtor and Farmer Relief Actions of the 1933 North Dakota Legislative Session*, 60 N.D. L. REV. 489, 489–90 (1984).

³⁰⁴ *Id.* at 490.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 497 n.50 (quoting Act of Mar. 3, 1933, ch. 1, § 2, 1933 N.D. Laws 1).

³⁰⁷ *Id.* at 498.

³⁰⁸ *Id.*

³⁰⁹ *Grandin Farmers’ Coop. Elevator Co. v. Langer*, 5 F. Supp. 425, 426 (D.N.D.), *aff’d*, 292 U.S. 605 (1934) (mem.) (per curiam).

“there [were] situated in the State of North Dakota a large number of country elevators, approximately 2200, including the elevators owned by [the] plaintiffs,” which were “used by their respective owners severally in conducting an interstate business and commerce in grain . . . in all respects similar to the business conducted by the plaintiffs” and that the action was brought “by the plaintiffs named herein on behalf of themselves and all other persons and corporations engaged in the same business, and subject to the same conditions hereinbefore set forth, who may join as plaintiffs, or who may be shown to be entitled to relief hereunder.”³¹⁰ But, on the other hand, the theory of the bill was that the law as a whole was an unconstitutional interference with interstate commerce,³¹¹ and the plaintiffs accordingly sought an injunction framed more broadly than would be necessary to protect just the state’s grain elevators: the plaintiffs prayed that “said law . . . , said proclamations[,] and the rules and regulations of said Railroad Commission made in pursuance thereof” be declared “wholly invalid and void” and that the defendants be enjoined from enforcing those laws, proclamations, and regulations.³¹²

The three-judge court agreed that the embargo was unconstitutional on the grounds that it illegally restrained interstate commerce.³¹³ It therefore concluded “that the act of the Legislature and the proclamations of the Governor under it are void,” and it entered an order “granting the interlocutory injunction as prayed.”³¹⁴ That order reached beyond the plaintiffs:

[It is] Ordered[] [t]hat the defendants William Langer, as Governor, . . . the Railroad Commissioners, . . . and their agents . . . be and . . . *are hereby restrained and enjoined, during the pendency of this action or until the further order of this Court, from enforcing the provisions of Chapter 1 of the Laws of North Dakota, for 1933, and from enforcing the proclamations of the Governor in aid and pursuance thereof, and from enforcing, during the*

³¹⁰ Transcript of Record at 16, *Langer*, 292 U.S. 605 (No. 847); *see also id.* at 23 (“[T]hese plaintiffs and each of them hereby claim for themselves, respectively, and for all others similarly situated, the protection of the various laws and constitutional provisions hereinbefore set out.”).

³¹¹ *Id.* at 23 (requesting that the court “order and decree that the provisions of Chapter 1 of the laws of 1933 . . . are in conflict with the Constitution of the United States, and that such statute places an unnecessary and unreasonable burden upon inter-state commerce in grain and other agricultural products” and that “said law, together with the various [related] proclamations . . . are in conflict with and in contravention of and repugnant to the Constitution of the United States”).

³¹² *Id.* at 24 (“[Plaintiffs pray] [t]hat . . . the defendants and each of them . . . be restrained and enjoined, during the pendency of this action, from enforcing the provisions of said Chapter I of the laws of 1933, and the proclamations of the Governor in this bill referred to, made in pursuance thereof, and from enforcing during the pendency of this action any and all rules and regulations made or promulgated, looking to the enforcement of said law and said proclamation, and from instituting against these plaintiffs, or either or any of them, or of the employees of either or any of them, any criminal prosecutions, civil actions, or other proceedings at law, for the alleged violation of said law, said proclamation and/or said rules or regulations made in connection with the enforcement thereof.”).

³¹³ *Grandin Farmers’ Coop. Elevator Co.*, 5 F. Supp. at 428–29.

³¹⁴ *Id.* at 429.

pendency of this action or until the further order of this Court, any and all rules and regulations made or promulgated for the enforcement of the said law and said proclamations, and from instituting against the complainants or any of them, or the employes [sic] of either or any of them, any criminal or civil actions or other proceedings at law for the alleged violation of said Chapter 1 of the Laws of North Dakota for 1933, the proclamations of the Governor made pursuant to the same, or the rules and regulations of the Board of Railroad Commissioners made in connection with the enforcement thereof; and that the defendants and each of them and all officers of the State of North Dakota acting by, through or under either or any of the defendants aforesaid, be and they and each of them are hereby enjoined and restrained from in any manner, by virtue of such Act, proclamations or rules and regulations, interfering with the complainants or any of them in the business of buying, selling or transporting grain for sale or delivery to points outside of the State of North Dakota; and that the enforcement of said Chapter 1 of the Laws of North Dakota for 1933 and the proclamations of the Governor made pursuant thereto, and the rules and regulations of the defendants Railroad Commissioners made in connection with the enforcement thereof, be and the same are each and all enjoined as to the complainants until the final determination of this cause or until the further order of this Court.³¹⁵

The interlocutory injunction contained two distinct parts: first, an injunction against enforcement *generally* (as emphasized in the quote above), and second, an injunction barring enforcement against the complainants *specifically*. The injunction did not limit its terms to grain elevators or to those “similarly situated” to the complainants, but extended to the enforcement of any embargoes that the Governor proclaimed under color of the new state law. That it was so understood is tacit in the statement of jurisdiction that North Dakota filed with the Supreme Court, which quoted only the first half of the injunction — the general injunction against enforcement.³¹⁶ Contemporary press coverage likewise indicates that the injunction was understood to halt the Governor generally from imposing future embargoes on either wheat or beef, which

³¹⁵ Transcript of Record at 48–49, *Langer*, 292 U.S. 605 (No. 847) (emphasis added).

³¹⁶ Statement as to Jurisdiction at 8–9, *Langer*, 292 U.S. 605 (No. 847), 1934 WL 32104, at *8–9 (“That on the 15th day of January, 1934, the said specially constituted court made and entered an Interlocutory Injunction in the above entitled cause enjoining and restraining the Governor of the State of North Dakota and the Railroad Commissioners of the State of North Dakota, their agents, servants, employees, and all officers of the State of North Dakota . . . from enforcing the provisions of said Chapter One of the Laws of North Dakota for 1933 hereinbefore set forth, and from enforcing proclamations of the Governor made in pursuance thereof, and from enforcing during the pendency of this action or until further order of this Court any and all rules and regulations made or promulgated for the enforcement of the said law and the proclamations of the Governor made thereunder upon the grounds and for the reasons that the said law and the proclamations made thereunder are in contravention of the Constitution of the United States . . .”).

Governor Langer had also recently embargoed.³¹⁷ Again, the Supreme Court affirmed the order of the interlocutory injunction in a single-sentence per curiam decision.³¹⁸

4. *Other Noteworthy Cases.* — State defendants in this period were not always so unlucky. Consider *State Board of Tax Commissioners v. Jackson*.³¹⁹ This case involved an Indiana anti-chain-store law passed at the behest of “local merchants’ associations and the Indiana Association of Retailers,” who argued that “chain stores competed in unfair and ‘unneighborly’ ways with independent retailers.”³²⁰ The law required the payment of a license fee that increased as the number of stores in the chain went up, so that an owner of one store would pay only \$3.00 in annual license fees, but an owner of twenty-one stores would pay not \$63.00 in fees, but \$343.00.³²¹

Lafayette Jackson, a chain-store owner with 225 stores in Indianapolis, filed a lawsuit against the State Board of Tax Commissioners and the Attorney General of Indiana.³²² Citing Equity Rule 38, Jackson’s bill alleged that there were over 500 other entities that owned at least two stores in the state and that would be affected by the state statute.³²³

The three-judge court issued an interlocutory injunction barring the defendants “from enforcing or attempting to enforce” the law “in any way, directly or indirectly, against the plaintiff *or any other store owner in the State of Indiana*.”³²⁴ At the merits phase, the three-judge court

³¹⁷ *Federal Court Declares State Statute Is Void*, BISMARCK TRIB., Jan. 15, 1934, at 1 (noting the grain and beef embargoes and explaining that “[t]he decision . . . remove[d] the possibility of similar embargoes being declared in the future”).

³¹⁸ *Langer*, 292 U.S. at 605 (“The order granting an interlocutory injunction is affirmed.”).

³¹⁹ 283 U.S. 527 (1931).

³²⁰ 5 JAMES H. MADISON, INDIANA THROUGH TRADITION AND CHANGE: A HISTORY OF THE HOOSIER STATE AND ITS PEOPLE, 1920–1945, at 236 (1982).

³²¹ See *Jackson*, 283 U.S. at 531–32.

³²² *Jackson v. State Bd. of Tax Comm’rs*, 38 F.2d 652, 654–55 (S.D. Ind. 1930), *rev’d*, 283 U.S. 527 (1931). The law obligated Jackson to pay \$5443 in annual taxes, rather than the \$675 that would have been owed if each of his 225 stores were independently owned. *Id.* at 657.

³²³ Transcript of Record at 4, *Jackson*, 283 U.S. 527 (No. 183) (“[T]he plaintiff prosecutes this case on his own behalf and on behalf of all other individuals, firms, associations, co-partnerships and corporations who are at this time engaged in the operation of two or more stores in the State of Indiana and for the purpose of enjoining the enforcement of said statute . . . against plaintiff and all such other individuals, firms, associations, co-partnerships and corporations owning or operating two or more stores in said State; that the question of the invalidity of said statute is one of common and general interest to all of said class of persons within the meaning of Equity Rule No. 38.”).

³²⁴ *Id.* at 34 (emphasis added). The relevant portions of the order stated the following:

It is therefore ordered, adjudged and decreed by the Court that said defendants, and . . . their agents . . . be and they are hereby enjoined and restrained: First. From enforcing or attempting to enforce in any way, directly or indirectly, against the plaintiff *or any other store owner in the State of Indiana*, being the persons, firms, corporations, associations or co-partnerships, either foreign or domestic, who operate, open[,] maintain or establish any store in the State of Indiana, any of the provisions of [the] Act Second. From enforcing or attempting to enforce against the plaintiff *or any other store owner in the State of Indiana as above described*, any penalty or penalties for the failure on the part of the

held that the law unconstitutionally discriminated between store owners who handled identical types of goods.³²⁵ It then issued a final decree that likewise restrained enforcement of the law in terms that reached beyond the plaintiff to cover *all* store owners in the state.³²⁶

The State appealed to the Supreme Court, which issued a divided opinion. For the majority, Justice Roberts noted that Jackson had filed a bill “on behalf of himself and all others similarly situated”³²⁷ and that the lower court had “entered a perpetual injunction, holding the law offensive to the federal and to the state constitution.”³²⁸ The Court reversed, holding that the law “treat[ed] upon a similar basis all owners of chain stores similarly situated” and that “this [was] all that the Constitution require[d].”³²⁹ In dissent, the “Four Horsemen” — Justices Sutherland, Van Devanter, McReynolds, and Butler — contended that the law was “a mere subterfuge by which the members of one group of taxpayers [were] unequally burdened for the benefit of the members of other groups similarly circumstanced.”³³⁰ But neither the majority nor the dissent criticized the breadth of the decree entered below or suggested that the injunction itself was a “mere subterfuge” by which a single plaintiff could shut down the enforcement of a law across an entire state for the benefit of others “similarly circumstanced.” A narrowly divided Court held that the lower court had decided the merits incorrectly, but none of the Justices criticized the remedy.

Another example is *Rast v. Van Deman & Lewis Co.*³³¹ and its companion case *Tanner v. Little*.³³² These suits concerned, respectively, a

plaintiff or such store owner to apply for or obtain a license under said Act or to pay license fees from the 1st day of July, 1929, to the final determination of this cause. Third. From instituting or maintaining any actions at law or suits in equity to recover from or of the plaintiff or such other store owners as above described any of the penalties provided for by said Act. Fourth. From requiring plaintiff and other store owners in the State of Indiana, as above described, to file applications or obtain a license or licenses before continuing or as a condition to continuing the operation of their respective stores within the State of Indiana. Fifth. From requiring the plaintiff or such other store owners, as above described, to pay any filing or license fees under the provisions of said Act until the final determination of this cause.

Id. at 34–35 (emphasis added); see also *Jackson*, 38 F.2d at 656.

³²⁵ *Jackson*, 38 F.2d at 658–59.

³²⁶ *Id.* at 659; Transcript of Record at 65, *Jackson*, 283 U.S. 527 (No. 183) (“[D]efendants . . . are hereby perpetually enjoined and restrained . . . [f]rom enforcing or attempting to enforce in any way, directly or indirectly, against the plaintiff or any other store owner in the State of Indiana, being the persons, firms, corporations, associations, or co-partnerships, either foreign or domestic, who operate, open, maintain or establish any store in the State of Indiana, any of the provisions of [the] Act . . .” (emphasis added)).

³²⁷ *Jackson*, 283 U.S. at 530.

³²⁸ *Id.* at 531.

³²⁹ *Id.* at 542.

³³⁰ *Id.* at 548 (Sutherland, J., dissenting).

³³¹ 240 U.S. 342 (1916).

³³² 240 U.S. 369 (1916).

Florida law and a Washington law that imposed license fees on businesses offering “redeemable” “coupons” to customers for use as “trading stamps” to buy goods from catalogs and booklets.³³³

In *Tanner*, nineteen plaintiffs of assorted stripes³³⁴ sued for themselves and “for all similarly situated”³³⁵ to obtain an injunction barring the Washington State Attorney General and other state officials from enforcing the law, which they alleged was an unconstitutional interference with property rights.³³⁶ The three-judge court in *Tanner*, noting that “[e]quity jurisdiction is invoked to avoid a multiplicity of suits[] and to prevent irreparable loss and injury to the business and property of the plaintiffs,”³³⁷ held that joinder of the claims and plaintiffs was proper under Equity Rule 38 because the case “would seem to fall within the spirit and equity of that rule.”³³⁸ Indeed, the court seemed to treat “the vast numbers affected” by the challenged law as a factor that “call[ed] peculiarly for the intervention of a court of equity.”³³⁹ Finding that the statute was unconstitutional,³⁴⁰ the court ordered that an interlocutory injunction issue. That injunction barred the law’s enforcement generally with respect to all who were “interested similarly” to the plaintiffs.³⁴¹

In *Rast*, six corporations and individuals, acting on their own behalf and on behalf of “all others similarly situated,” sued every tax collector and state attorney in Florida to enjoin the trading-stamp law.³⁴² The *Rast* three-judge court similarly noted that “[e]quity jurisdiction is invoked to avoid a multiplicity of suits and to prevent irreparable injury

³³³ *Id.* at 371; *see id.* at 369–71.

³³⁴ *Id.* at 370 (describing complainants as “engaged in the business of hardware, cleaning and dyeing, grocery, soap, canned goods, meats, drugs, dry goods, boots and shoes, fuel, photography, laundry and wine”).

³³⁵ *Id.*

³³⁶ *Little v. Tanner*, 208 F. 605, 607 (E.D. Wash. 1913), *rev’d*, 240 U.S. 369.

³³⁷ *Id.*

³³⁸ *Id.* at 608.

³³⁹ *Id.* at 609 (“When we consider the real object of this suit, the vast numbers affected by it, the severity of the penalties imposed, the unauthorized interference with legitimate business methods, and that goods now in original packages containing stamps and other devices are rendered practically valueless, the case seems to call peculiarly for the intervention of a court of equity.”).

³⁴⁰ *Id.* at 611 (noting that its holding was “limited to merchants using trading stamps in connection with their business, for such are the only parties before the court”).

³⁴¹ Transcript of Record at 58, *Tanner*, 240 U.S. 369 (No. 224) (“[I]t was ordered as follows: That the defendants, and each of them and all other persons are enjoined and restrained from bringing directly or indirectly any proceeding at law or in equity for the collection of any tax or sum of money imposed under the [law] . . . and from causing the complainants, or either or any of them, or their officers, agents, servants, or employes [sic], or any one interested similarly as the said complainants or either or any of them, or their solicitors, agents, servants, or employes [sic] to be arrested for violation of the provisions of said Act and from taking any other action or in any other manner interfering with complainants or either of them, or any other person similarly situated, or their business, by reason of said Act.” (emphasis added)).

³⁴² *Van Deman & Lewis Co. v. Rast*, 214 F. 827, 831 (S.D. Fla. 1913), *rev’d*, 240 U.S. 342 (1916).

to the business and property of the complainants.”³⁴³ Holding that the Florida law violated the Due Process Clause, the three-judge court issued an interlocutory injunction that barred the state from enforcing the law against the “[c]omplainants[,] or any of them, or . . . any person, firm or corporation similarly situated,” or from “punishing, fining or imprisoning” the complainants or anyone similarly situated.³⁴⁴

The States appealed to the Supreme Court, which reversed on the merits in both cases.³⁴⁵ In the Court’s eyes, trading-stamp schemes possessed the “seduction and evil” of lotteries and gaming,³⁴⁶ and the States could thus constitutionally tax or prohibit them.³⁴⁷ But the Court did not take issue with the scope of the decrees below. The *Tanner* Court stated that it “concur[red] with the ruling as far as it retained jurisdiction of the suits and the persons of the defendants,”³⁴⁸ and it made no comment on the injunction’s scope. The *Rast* Court concurred with the three-judge court that “the bill set forth grounds of equitable relief,”³⁴⁹ and it likewise made no criticism of the scope of the injunction. Here, as with *Jackson*, the States ultimately prevailed, but the Court did not fault the framing of the bills or criticize the remedy devised by the three-judge courts.

B. Taking Stock

The preceding section described seven cases that ranged in time from 1916 to 1934. We have seen that in 1925, in *Pierce*, the Supreme Court affirmed a universal injunction against the enforcement of Oregon’s public-schooling law in a lawsuit that two plaintiff schools had brought for themselves alone. In 1934, in *Langer*, the Court affirmed per curiam a universal injunction against the enforcement of the North Dakota embargo statute in a case brought by the owners and operators of around thirty grain elevators. While the plaintiffs invoked Equity Rule 38 in their bill, they ultimately sought and obtained an order that was not just limited to the plaintiffs and those similarly situated; it instead barred the Governor from imposing or enforcing any embargoes under color of that law. In the five other cases, various three-judge courts issued injunctions under Equity Rule 38 that barred enforcement of state laws against large classes of persons similarly situated to plaintiffs or plaintiff-intervenors. In two of these cases — *Mitchell* and *Binford* — the Supreme Court affirmed in unanimous per curiams without taking issue with the breadth of the injunction issued by the lower court; in the other three — *Jackson*, *Tanner*, and *Rast* — the Court reversed on the

³⁴³ *Id.*

³⁴⁴ Transcript of Record at 48, *Rast*, 240 U.S. 342 (No. 318).

³⁴⁵ *Tanner*, 240 U.S. at 386; *Rast*, 240 U.S. at 368.

³⁴⁶ *Rast*, 240 U.S. at 365.

³⁴⁷ *Tanner*, 240 U.S. at 386; *Rast*, 240 U.S. at 365–68.

³⁴⁸ *Tanner*, 240 U.S. at 380.

³⁴⁹ *Rast*, 240 U.S. at 355.

merits, again without taking issue with the breadth of the injunctions issued by the lower courts.

These cases enrich our understanding of the history of the universal injunction in several ways. First, they show that injunctions against enforcement beyond the plaintiff were *sometimes* rejected, but they were not rejected out of hand or regarded as illegitimate in principle. Here, it is useful to contrast the case of *Scott v. Donald*,³⁵⁰ in which the Court rejected a decree that had enjoined South Carolina state officials from enforcing a state law concerning the seizure of liquor.³⁵¹ In *Scott*, the Court held that it was “too conjectural” to base an injunction on the theory that the specific plaintiff “so represent[ed]” a class of numerous persons “that he may pray an injunction on behalf of all persons that constitute it.”³⁵² But a holding that a class is “too conjectural” is not the same thing as a holding that the class is “overbroad,”³⁵³ and it is not at all the same thing as a holding that a federal court cannot properly offer injunctive relief that extends beyond the plaintiff.³⁵⁴ The *Scott* plaintiff’s asserted class may have seemed “too conjectural” because it was too *narrow*, not too broad — how many South Carolinians were there, really, who wanted to import such large quantities of liquor for their own consumption?³⁵⁵ Or else the asserted class may have seemed “too conjectural” because it would be too hard to identify its members objectively — how could the state officers know, from looking at a package of liquor sitting at a train station, whether its recipient would be a parched and grateful oenophile, a teetotaler, or a bootlegger? When, in subsequent cases, the Court reviewed decrees that protected very large

³⁵⁰ 165 U.S. 107 (1897); see *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (relying on *Scott* to support the proposition that the “Court has long respected . . . traditional limits on equity and judicial power”); Bray, *supra* note 2, at 429 (discussing *Scott*).

³⁵¹ *Scott*, 165 U.S. at 111–12, 115; see also Transcript of Record at 39–40, *Scott*, 165 U.S. 107 (No. 410). The decree barred confiscation of liquor “imported into or brought into the State of South Carolina by any means of transportation whatsoever by the complainant, James Donald, or any other person whomsoever, for his own use and consumption,” and it prohibited state officials from “hindering” the plaintiff “or any other person” in the state “as importer and consumer of the ales, beers, wines, and spirituous liquors of other States and foreign countries, from importing, holding, possessing, using, and consuming the said intoxicating liquors as aforesaid so imported for his use and consumption.” *Id.* at 40.

³⁵² *Scott*, 165 U.S. at 115 (“The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction.”).

³⁵³ *Contra* Bray, *supra* note 2, at 429 (noting that the *Scott* Court “objected to the overbroad injunction”).

³⁵⁴ *But cf. id.* (arguing that the rationale of *Scott* logically implies that universal injunctions were then considered improper).

³⁵⁵ Donald had imported a barrel of New York beer, six quarts of Maryland whiskey, and a case of California claret in a three-month period. Transcript of Record at 2, *Scott*, 165 U.S. 107 (No. 410).

numbers of entities — for example, chain-store owners in Mississippi,³⁵⁶ or handlers of uncompressed cotton in Texas³⁵⁷ — perhaps it affirmed those decrees because such groups of individuals obviously existed and could easily be identified. And the universal injunctions giving blanket protection to private schools in Oregon³⁵⁸ or agricultural exporters in North Dakota³⁵⁹ were not regarded by the Court as resting on “too conjectural” a basis, even though the relief those plaintiffs procured was sweeping.

Second, and more importantly, these cases show that the actual practice of lower federal courts with respect to *state* government defendants in the early twentieth century bore a rather conspicuous resemblance to the practice of today’s lower federal courts with respect to *federal* government defendants. The cases enjoining the enforcement of state laws described here look a lot more like modern-day universal injunction cases than they do like modern-day class actions. Even the cases in which the plaintiffs *invoked the language of Equity Rule 38* look a lot more like modern-day universal injunction cases than they do like modern-day class actions. Before the lower three-judge courts, the plaintiffs in *Mitchell*, *Binford*, *Langer*, *Jackson*, *Tanner*, and *Rast* did not have to do anything more than *allege* in their bills of complaint that they were suing on behalf of many other persons, on a question of common interest to all of them, in order to obtain preliminary injunctions shielding all those absent parties from the law’s enforcement.³⁶⁰ The available records contain no evidence that the three-judge courts inquired into whether the plaintiffs were in fact adequate or typical representatives of the asserted class before issuing the preliminary injunctions.³⁶¹ Nor do those records reveal that courts issued orders resembling modern-day certification orders or required that notice be issued to the absent parties.³⁶² And the two plaintiffs in *Pierce*, who did *not* allege that they were proceeding on behalf of others, did not need to demonstrate anything more than the illegality of the challenged state law to get a decree that barred the enforcement of that law generally.³⁶³

³⁵⁶ See *supra* section IV.A.1, pp. 964–65 (discussing *Mitchell*).

³⁵⁷ See *supra* section IV.A.2, pp. 965–67 (discussing *Binford*).

³⁵⁸ See *supra* pp. 959–62 (discussing *Pierce*).

³⁵⁹ See *supra* section IV.A.3, pp. 967–70 (discussing *Langer*).

³⁶⁰ As noted, the preliminary injunction in *Langer* went beyond even the thousands of allegedly similarly situated country grain elevators. See *supra* pp. 969–70. *Jackson* eventually resulted in a permanent decree from the lower court. See *Jackson v. State Bd. of Tax Comm’rs*, 38 F.2d 652, 659 (S.D. Ind. 1930), *rev’d*, 283 U.S. 527 (1931).

³⁶¹ Cf. FED. R. CIV. P. 23(a) (requiring that putative class representatives be typical of the class and adequately protect the class’s interests).

³⁶² Cf. *id.* 23(c)(1) (requiring that the judge issue a class certification order); *id.* 23(c)(2)(A) (authorizing notice to injunctive class).

³⁶³ *Soc’y of Sisters v. Pierce and Hill Military Acad. v. Pierce*, 296 F. 928, 930, 938 (D. Or. 1924), *aff’d*, 268 U.S. 510 (1925).

The point is that there is just very little daylight between these injunctions and a modern-day universal injunction.³⁶⁴ If one looks at a randomly chosen universal injunction from a federal district court a few *months* ago,³⁶⁵ and compares it to the three-judge district court's universal injunction in *Pierce* nearly a *century* ago,³⁶⁶ it is hard to see any

³⁶⁴ See, e.g., *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (per curiam) (retaining nationwide injunctions barring enforcement of an executive order against “parties similarly situated to Doe, Dr. Elshikh, and Hawaii”), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.) (per curiam). Is the parallel closer to the modern-day class action? Are these Equity Rule 38 cases merely “proto-class actions”? Not in the sense that matters here. Modern-day class suits make similarly situated absentees into *parties*, whereas in these Equity Rule 38 suits against state officials, the absentees remained *nonparties*. The plaintiffs in these Equity Rule 38 suits won injunctions shielding others similarly situated *without* class certification — and therefore (more importantly) *without* running the risk of binding the whole set of represented parties if the suit failed. See *supra* notes 268–281 and accompanying text. At most, these Equity Rule 38 suits resemble modern-day suits in which a complaint is *filed* on behalf of a putative class of “similarly situated” absentees, and the district court then issues a preliminary injunction barring enforcement beyond the named plaintiff *without first certifying a class*. Many critics of the universal injunction have objected to such injunctions in *noncertified* class suits as vigorously as they have objected to decrees in suits *not* filed on behalf of a class. See, e.g., Brief for Appellants at 57, *Ramos v. Nielsen*, No. 18-16981 (9th Cir. Nov. 29, 2018), 2018 WL 6420267, at *57 (urging that a pre-certification injunction should be limited to the “individual plaintiffs and their relatives” in a case styled as a class action against federal officials); see also Bray, *supra* note 2, at 440 (critiquing *Harlem Valley Transportation Ass'n v. Stafford*, 360 F. Supp. 1057, 1060 n.2 (S.D.N.Y. 1973), a case filed as a class action in which the district court issued a nationwide preliminary injunction without certifying the class, *id.* at 1065–66); *id.* at 464 (contending that class-wide injunctive relief is appropriate “only” if Rule 23(b)(2)’s conditions “are met”); William P. Barr, U.S. Att’y Gen., Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide> [<https://perma.cc/5CUX-8PJM>] (“Members of the class are also generally bound by the district court’s judgment and precluded from relitigating in a different court. Nationwide injunctions do not work that way.”); cf. *Int'l Refugee Assistance Project*, 137 S. Ct. at 2090 (Thomas, J., concurring in part and dissenting in part) (objecting to preliminary injunctive relief that reached beyond the plaintiff in part because “[n]o class ha[d] been certified”). That objection logically follows from the critics’ stance that injunctions may protect only “the plaintiff”; until the performative utterance of class certification, only the named plaintiff is “the plaintiff.” Cf. FED. R. CIV. P. 23. These Equity Rule 38 cases, however, refute the notion that class certification — and its attendant preclusive effect upon absentees — was traditionally thought to be necessary for a court to afford injunctive relief to absentees.

³⁶⁵ *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108–09 (N.D. Cal. 2018). The *Ramos* plaintiffs challenged the Trump Administration’s termination of “Temporary Protected Status” (TPS) for individuals arriving from Sudan, Haiti, El Salvador, and Nicaragua. See *id.* at 1080. The district court issued an order enjoining and restraining the “[d]efendants, their officers, agents, employees, representatives, and all persons acting in concert or participating with them” from “engaging in, committing, or performing, directly or indirectly, by any means whatsoever, implementation and/or enforcement of the decisions to terminate TPS for Sudan, Haiti, El Salvador, and Nicaragua pending resolution of this case on the merits.” *Id.* at 1108. The court’s order also stated the following: “The preliminary injunction shall take effect immediately and shall remain in effect pending resolution of this case on the merits or further order of this Court.” *Id.* at 1109.

³⁶⁶ Transcript of Record (Society of Sisters) at 19, *Pierce*, 268 U.S. 510 (No. 583) (“[T]he Judges having concurred in an opinion duly filed, holding that [the Oregon public-schooling law] . . . is unconstitutional and void and that the defendants should be restrained from enforcing or attempting to enforce said Act, it is Ordered and adjudged that an interlocutory injunction be and the same is hereby granted as prayed for in the amended bill of complaint, and the Clerk of this Court is

difference other than the fact that the enjoined defendant is a different sovereign — which, of course, matters not a whit, if our concern is the nature of the Article III power to decide cases in equity.³⁶⁷

This leads to the third point — which is more a puzzle than a point. If universal injunctions were issued *then* against state law, and they are being issued *now* against federal law, then what accounts for the very different reception accorded to such decrees by actors within our legal system? These early twentieth-century injunctions against state law would have been subject to several of the same criticisms aimed at today’s universal injunctions against federal law.³⁶⁸ Those injunctions thwarted percolation, by preventing the state from enforcing the law against nonparties and thus preventing the state’s own courts from weighing in on the legality of the state law. They created the possibility of forum shopping, by allowing the plaintiffs to choose between state courts and the federal three-judge court.³⁶⁹ They created asymmetric estoppel, by binding the state to comply with an adverse decree as to all those similarly situated nonparties while leaving those absentees free to take another bite at the apple if the initial suits failed. And yet the breadth of the injunctions in the seven cases described above did not seem to draw much fire — none at all from the Supreme Court, and very little *even from the state defendants enjoined*. Most of the briefs concerning those injunctions were verbose documents, with extensive recitations of facts, law, and assignments of error; some of the opinions were quite long, too. But those sources contained curiously little discussion of any perceived flaws in the *scope* of the injunctions. Rather, both the state defendants challenging the decrees and the Justices on appeal were focused on the merits rather than on the scope, notwithstanding the fact that the Court knew how to reject an objectionable decree when it wished to do so.³⁷⁰

There are several possible explanations for why this was the case. One possibility is that those injunctions — despite how they read to

hereby ordered to issue the same, restraining the [state] defendants . . . from enforcing or attempting to enforce or threatening to enforce said Act, and such Interlocutory injunction shall remain in force until the final hearing and determination of the above entitled suit.”).

³⁶⁷ See *infra* section IV.C, pp. 980–82.

³⁶⁸ See *infra* pp. 994–95.

³⁶⁹ It is not clear whether forum shopping among *federal* courts was a meaningful possibility here. An in-state plaintiff in some of these suits would have been able to choose initially between federal district courts within the state (choosing, for instance, between the Southern District of Indiana and the Northern District of Indiana), but she would not have been able to control which three federal judges were then convened to hear her case. And it is unlikely that an out-of-state plaintiff who might have been affected by the state law would have been able to acquire personal jurisdiction over the state defendants before a federal court outside of the state. I am grateful to Dean John Manning for raising this issue.

³⁷⁰ See *supra* pp. 974–75 (discussing *Scott*); see also *infra* note 375 (describing *Matthews v. Rodgers*, 284 U.S. 521 (1932)).

modern eyes — were at the time not *understood* to be universal or to reach beyond the plaintiffs. Perhaps the state government actors viewed those orders as restraining their conduct with respect to *only* the actual plaintiffs and did not take seriously the language restraining enforcement generally or with respect to nonplaintiffs alleged to be similarly situated. But there is no evidence for this possibility, and some that cuts against it.³⁷¹

A second possibility may be that a given state defendant *did* understand such an injunction to be universal or to reach beyond the plaintiffs, felt that it was deeply improper for the three-judge court (or any federal court) to issue such an injunction, but decided that there was no point in objecting to the injunction's scope, because the legality of the challenged act would be resolved fairly soon anyway on direct appeal to the Supreme Court. When a controlling decision was on the verge of being rendered, perhaps there seemed to be little upside in kicking up a fuss about the remedy. This possibility is especially plausible with respect to *Pierce*, because the Oregon law — if upheld — would have gone into effect in September 1926, which was very likely after the Court would have decided the case.³⁷² But the other enjoined laws were not on such a long fuse, and regardless, there was no guarantee that the Court would issue full-fledged precedential opinions addressing the constitutional questions on the merits (as it did in *Pierce* and *Jackson*) rather than simply decline to overturn the preliminary injunctions in the absence of an abuse of discretion (as it did in *Mitchell*, *Binford*, and *Langer*). Thus, it is somewhat surprising that *none* of the state defendants here seemed to make arguments in the alternative — for example, that the state laws were indubitably valid, but that if the injunctions *were* to be upheld, then the decrees should at least be narrowed to protect *only* the individual plaintiffs or a much narrower set of “similarly situated” plaintiffs.³⁷³ The state executive branch lawyering here was “all or nothing” in a way that today's federal executive branch lawyering is decidedly not.³⁷⁴

³⁷¹ See, e.g., *Federal Court Declares State Statute Is Void*, *supra* note 317, at 1 (“The decision . . . removes the possibility of similar embargoes being declared in the future . . .”); *Indiana Chain Store Licensing Act Invalid*, *COURIER-J.* (Louisville, Ky.), Feb. 2, 1930, at 3 (“Indiana's ‘chain store licensing act’ . . . was rendered permanently inoperative today when three judges . . . made permanent an interlocutory decree restraining the State Tax Board from enforcing the measure. . . . The decision means that 44,000 retail stores in Indiana will escape the licensing provisions of the act . . .”); see also *supra* pp. 960–61 and note 258.

³⁷² See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925).

³⁷³ Despite acknowledging the scope of the decree, see *supra* pp. 960–61, the briefs from the Oregon government defendants in *Pierce* did not make this request.

³⁷⁴ For one example of this type of modern executive branch lawyering, consider what followed the Supreme Court's narrowing of an injunction against the Trump Administration's “Muslim ban” so that the injunction protected only those with a “close familial relationship” to someone in the United States. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (per curiam) (“The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that § 2(c) may not be enforced against foreign nationals

These explanations are therefore implausible and incomplete. There is a better and simpler answer: the state government defendants *did* take the decrees to bar enforcement beyond just the plaintiffs or universally, and they did not object to that fact because it was *already* well understood that when a federal district court declared a state law unconstitutional, it could properly enjoin the law’s enforcement against nonparties. Indeed, in *Matthews v. Rodgers*,³⁷⁵ one state government (Mississippi) said exactly that:

In the case at bar the Lower Court held that the statute was unconstitutional only when applied to interstate business. It appears, therefore, then that the statute is not illegal and the taxes levied thereby is not unconstitutional in all cases. . . . *If indeed and in fact the statute had been unconstitutional and the tax illegal, then the Court would have enjoined the officers of the State from enforcing said statute against all persons engaged in buying and selling cotton in the State of Mississippi.*³⁷⁶

If this belief was in fact widespread at the time,³⁷⁷ it would fully explain why these sweeping injunctions against state laws were met with so little consternation as to their scope. The question then becomes why, today, the universal injunction against federal law *has* been met with so much consternation — and whether that consternation is warranted. As the next section explains, it is not, at least as a matter of Article III.

who have a credible claim of a bona fide relationship with a person or entity in the United States. . . . For individuals, a close familial relationship is required.”), *vacated as moot*, 138 S. Ct. 353 (2017) (mem.) (per curiam). Following this decision, the Trump Administration argued to the Ninth Circuit that the district court’s modified injunction should have been vacated to the extent that it incorrectly interpreted “close familial relationship” to include siblings-in-law, cousins, uncles, aunts, nieces, nephews, or grandparents. Reply Brief for Appellants at 21, *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017) (No. 17-16426) (“Even if this Court were to conclude that, for example, grandparents are sufficiently ‘close’ to come within the scope of the injunction as partially stayed, it should not conclude *a fortiori* that all the other relationships are also ‘close,’ but should consider each separately and examine plaintiffs’ arguments for particular family members.”).

³⁷⁵ 284 U.S. 521 (1932). In *Matthews*, a group of Mississippi cotton merchants brought suit to enjoin the collection of a state tax on the grounds that the tax was an unconstitutional interference with interstate commerce. *Id.* at 522. Though the plaintiffs’ bill of complaint was framed more broadly, the three-judge court eventually granted an injunction limited in its terms to the actual set of plaintiffs. See Transcript of Record at 43–44, *Matthews*, 284 U.S. 521 (No. 84). The Supreme Court reversed the decree, reasoning that whether the tax was an unconstitutional interference with interstate commerce had to be determined plaintiff by plaintiff, and so the three-judge court lacked equitable jurisdiction over the case. See *Matthews*, 284 U.S. at 530.

³⁷⁶ Brief for Appellants on Re-Argument at 27, *Matthews*, 284 U.S. 521 (No. 84), 1932 WL 33780, at *27 (emphasis added).

³⁷⁷ See, e.g., William M. Cain, *Extension of Equity Jurisdiction*, 6 NOTRE DAME LAW. 141, 145 (1931) (listing the proposition that “courts of equity may issue injunctions . . . [t]o prevent executive officers of a state from enforcing a legislative act which is plainly unconstitutional and void, and affects a large number of people in the enjoyment of their property” as one example of a “subject[] of litigation” in which “the jurisdiction of equity has long been firmly established, and no one doubts or questions it”).

C. *State Laws, Federal Laws, and Article III*

The use of injunctive powers by federal courts has long provoked friction. When state law was the locus of the most significant legislative activity, the use of the injunction by the federal courts was seen mainly as a problem for federalism — or, in the words of Justice Harlan’s dissent in *Ex parte Young*, as a means of “enabl[ing] the subordinate Federal courts to supervise and control the official action of the states as if they were ‘dependencies’ or provinces.”³⁷⁸ Nowadays, federal law and federal regulatory action are viewed as the most consequential tools of government control, and thus the use of the injunction by the federal courts is seen mainly as a problem for the separation of powers — or, in the words of a recent filing from the Trump Administration, as a “rapidly expanding threat to the respect that each coordinate Branch of our Nation’s government owes the others.”³⁷⁹

If we can properly make an apples-to-apples comparison of these two distinct concerns about constitutional structure, which should we adjudge to be the more serious complaint? Or, to put it more colloquially, which of the two uses of the injunctive power is a “bigger deal”? Perhaps counterintuitively to the casual observer, for a federal court to enjoin a state government from enforcing a *state* law is a much *more* serious use of Article III power than for a federal court to enjoin the federal government from enforcing a *federal* law. For state law, the enjoining court is the court of a different sovereign — a sovereign that the state cannot control. The Eleventh Amendment,³⁸⁰ after all, was enacted to protect the sovereign states from suit in such “foreign” courts.³⁸¹ In contrast, for federal law, the enjoining court is one of the coequal branches of the same government; moreover, the federal sovereign can control its own amenability (and that of its officers) to suit in federal court, which state sovereigns cannot do.³⁸² If a federal court can

³⁷⁸ See *Ex parte Young*, 209 U.S. 123, 175 (1908) (Harlan, J., dissenting).

³⁷⁹ *Karnoski Stay Application*, *supra* note 11, at 27.

³⁸⁰ U.S. CONST. amend. XI.

³⁸¹ Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pt. 1), 126 U. PA. L. REV. 515, 515 (1978) (explaining that the “one interpretation” of the Eleventh Amendment “to which everyone subscribes is that it was intended to overturn” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court’s decision to allow South Carolina citizens to sue Georgia in federal court).

³⁸² Conversely, a federal court judgment against a state can create serious problems if the state chooses not to comply with it. Consider Professor Louis Jaffe’s point about *Louisiana v. Jumel*, 107 U.S. 711 (1883), in which the Court declined to issue a writ of mandamus ordering a state to levy a tax:

When a court presents its *own* legislative and executive authorities with a judgment to be paid, these authorities may see fit not to pay it if there are good enough reasons. *But the judgment of a federal court against a state treasury gives warrant to and imposes perhaps a duty on the President of the United States to enforce the court’s decree; it has the makings of a constitutional crisis.*

Jaffe, *supra* note 47, at 25–26 (second emphasis added).

issue a universal injunction, or an injunction reaching well beyond the plaintiffs, against the enforcement of a state law — which, as we have seen, such courts have in fact done with the Supreme Court’s blessing — then a federal court must also have the power to issue such injunctions against the enforcement of federal law, at least *as an Article III matter*.³⁸³ That the latter power was not often used by the lower federal courts until relatively recently is of no moment: “The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise.”³⁸⁴

To be sure, there are *policy* problems with a universal injunction against a federal law that do not arise with equal force when a universal injunction issues against state law.³⁸⁵ First, and most obviously, a plaintiff seeking a universal injunction against a state law today has less ability to forum shop among federal district courts (because each state is currently subdivided into at most four federal judicial districts) and little to no ability to forum shop among circuit courts (because each state is contained within a single circuit court).³⁸⁶ Second, the two types of injunction have differing consequences for percolation. A typical universal injunction against state law does diminish opportunities for percolation, by preventing both state courts and other federal district courts within (and sometimes outside) the state from opining on the law.³⁸⁷ But it is safe to say that the foregone percolation is less in this context than when a federal district court enjoins enforcement of a federal law or statute in a universal, nationwide decree. Third, the two types of injunction do not pose an equal threat of conflicting injunctions. Challenges to a single federal law are likely to be litigated concurrently in a greater number of venues than are challenges to a single state law, thus posing a concomitantly greater risk of conflicting decrees.³⁸⁸

³⁸³ Jaffe, *supra* note 47, at 23 (“[N]o distinction has ever been explicitly recognized in the cases between suits against state and against federal officers, since rationalization has proceeded in terms of an abstract sovereign equally applicable to both types of case.”).

³⁸⁴ *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950).

³⁸⁵ Bray, *supra* note 2, at 424 n.29 (offering “pragmatic reasons,” including concerns about forum shopping, for treating injunctions against federal law and those against state law differently).

³⁸⁶ It is possible, however, for a state or city law or policy to be challenged outside the federal judicial circuit containing that state or city. See, e.g., *Hassan v. City of New York*, 804 F.3d 277, 284–85 (3d Cir. 2015). I am grateful to Professor Jim Pfander for suggesting this example.

³⁸⁷ See *Amdur & Hausman*, *supra* note 16, at 55; Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 242 (1936) (“The use of federal injunctions to restrain actions by state officers asserted to be violative of constitutional guarantees raises special problems. . . . In many instances, moreover, adjudication of the constitutionality of state legislation or administrative action by the federal courts requires the construction of state statutes in advance of interpretation by the state court of last resort . . .”).

³⁸⁸ See Bray, *supra* note 2, at 424 n.29.

What is very important, though, is to keep these and other *policy* concerns — which are discussed in more detail below³⁸⁹ — sharply distinguished from the *constitutional* contention that universal injunctions are illegitimate as a matter of Article III or first principles of equity. We can address the policy problems with universal injunctions against federal laws without dragging out the heavy artillery of Article III unconstitutionality. Unfortunately, as Part VI will address, the current discourse over the universal injunction has rapidly inflated these policy problems to the status of a constitutional roadblock — and this confusion has spurred the proposal of unduly heavy-handed reforms aimed at curbing the remedial powers of Article III courts. Before turning to that discussion, however, it is necessary to fill in one more piece of the lost history of the universal injunction — the universal injunction against federal agency action.

V. INJUNCTIONS AGAINST FEDERAL AGENCY ACTION

The universal injunction against federal agency action, which is so often in the news today, has a longer pedigree than is generally known. In 1939, in *Lukens Steel Co. v. Perkins*,³⁹⁰ the D.C. Circuit enjoined a federal agency determination from being applied to anyone.³⁹¹ Although the Supreme Court reversed this decision for lack of standing, its reasoning in that case — along with its contemporaneous decisions concerning state and local laws — reveals that the Court was not rejecting the propriety of injunctions reaching beyond the plaintiffs in cases where the plaintiffs *did* have standing.

In this Part, section V.A describes the litigation in *Perkins* and then describes two cases decided close in time to *Perkins* (*Hague v. CIO*³⁹² and *West Virginia State Board of Education v. Barnette*³⁹³) that shed light on the Court's understanding of equitable power in this period. Section V.B finishes the Article's description of the lost history of the universal injunction by turning to the case where that history has been thought to begin: the D.C. Circuit's decision in *Wirtz v. Baldor Electric Co.*³⁹⁴

³⁸⁹ See *infra* pp. 994–96.

³⁹⁰ 107 F.2d 627 (D.C. Cir. 1939) (per curiam), *rev'd*, 310 U.S. 113 (1940).

³⁹¹ See *id.* at 637–39, 644.

³⁹² 307 U.S. 496 (1939).

³⁹³ 319 U.S. 624 (1943).

³⁹⁴ 337 F.2d 518 (D.C. Cir. 1963).

A. Perkins v. Lukens Steel Co.

In 1936, Congress enacted the Walsh-Healey Act.³⁹⁵ The Act required that federal contracts for purchases of goods include a minimum wage term, with the wages to be “determined by the Secretary of Labor” based on the prevailing wages in the “locality.”³⁹⁶ The Secretary of Labor subsequently issued such a determination, which set a minimum wage for iron and steel workers in a “locality” comprising thirteen states, the District of Columbia, and parts of West Virginia.³⁹⁷

Seven steel companies that wished to sell their products to the government promptly filed suit in the D.C. federal district court to challenge the Secretary of Labor’s determination.³⁹⁸ The gravamen of their claim was that the determination was void — not only because the word “locality” could not possibly mean such a large area, but also because the wage set was much too high for their actual “localities.”³⁹⁹ The defendants included the Secretary of Labor, the Treasury Secretary, the Secretary of the Navy, the Secretary of War, the Secretary of the Interior, and the Postmaster General.⁴⁰⁰ After issuing a TRO that “specifically limited its benefits to but three of the complaining companies,” the district court dismissed the complaint, holding that the companies lacked standing.⁴⁰¹

On appeal to the D.C. Circuit, the steel companies had better luck. The panel issued an injunction *pendente lite*, which enjoined the federal agency defendants “until the further order of the Court, from continuing in effect the Determination made under date of January 16, 1939 . . . in the matter entitled ‘In the Matter of the Determination of the Prevailing Minimum Wages in the Steel and Iron Industry.’”⁴⁰² This injunction thus protected not only the plaintiff steel companies, but also all other steel and iron companies, from having to comply with the minimum wage requirement.⁴⁰³

The federal agency defendants objected to the entry of the injunction *pendente lite*, noting that the injunction “suspends the operation of an Act of Congress, the Public Contracts Act, in so far as that statute has

³⁹⁵ Pub. L. No. 74-846, ch. 881, 49 Stat. 2036 (1936) (codified as amended at 41 U.S.C. §§ 6501–6511 (2012)). The Act was also known as the Public Contracts Act. See *Perkins*, 310 U.S. at 116.

³⁹⁶ *Perkins*, 310 U.S. at 116–17.

³⁹⁷ *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 630 (D.C. Cir. 1939) (per curiam), *rev’d*, 310 U.S. 113.

³⁹⁸ *Perkins*, 310 U.S. at 120–21.

³⁹⁹ *Lukens Steel Co.*, 107 F.2d at 630.

⁴⁰⁰ *Perkins*, 310 U.S. at 120.

⁴⁰¹ *Id.* at 121.

⁴⁰² Transcript of Record at 372, *Perkins*, 310 U.S. 113 (No. 593).

⁴⁰³ See *Court Blocks Steel Wage Minimums*, RACINE J.-TIMES, Mar. 27, 1939, at 1 (“The government’s right to dictate minimum wages for industries filling federal contracts was threatened this morning when the U.S. circuit court of appeals for the District of Columbia suspended a schedule of minimum wages for the entire steel industry.”).

been put into actual operation by the Determination.⁴⁰⁴ They also requested that the court clarify the order, claiming that:

[I]t is not clear . . . whether appellees are enjoined from continuing the Determination in effect *even with respect to bidders not parties to this action*. Moreover, in view of the most extraordinary character of any temporary injunctive relief to persons not parties to an action, whose equities do not appear, the appellees are slow to construe the general language of the injunction as meaning to reach this result.⁴⁰⁵

The D.C. Circuit held oral argument on the motion for clarification, but took no action on it.⁴⁰⁶ Instead, it eventually issued a per curiam opinion in which it “continued in effect” the injunction *pendente lite* that it had earlier granted.⁴⁰⁷ It also noted that two judges on the panel were “of opinion that the complaint state[d] a valid cause of action entitling the plaintiffs to an injunction as prayed therein.”⁴⁰⁸

In its merits opinion some months later, the D.C. Circuit held that the Secretary of Labor had exceeded her statutory authority by reading the term “locality” to encompass such a large terrain.⁴⁰⁹ The appeals court held that it had the authority to issue an injunction against that determination,⁴¹⁰ and it offered a lengthy recitation of the facts alleged that showed that the companies were entitled to the injunction.⁴¹¹ The third judge dissented, arguing that the suit was barred by sovereign immunity and that those who contract with the government “cannot complain of the failure of public officers to comply with statutes in regard to the making of contracts.”⁴¹² The dissent was clearly conscious of the scope of the decree.⁴¹³ But the dissent did not address or endorse the government’s contention in its motion for clarification that the injunction should be limited or narrowed in its scope.

The government appealed. Its merits brief to the Court challenged the companies’ standing, not the scope of the decree.⁴¹⁴ To the contrary, the brief assumed and indeed leveraged the proposition that broad

⁴⁰⁴ Transcript of Record at 374, *Perkins*, 310 U.S. 113 (No. 593).

⁴⁰⁵ *Id.* at 374–75 (emphasis added). The steel companies predictably responded that no clarification was necessary. *Id.* at 380–82.

⁴⁰⁶ *Id.* at 385–86.

⁴⁰⁷ *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 629 (D.C. Cir. 1939) (per curiam), *rev’d*, 310 U.S. 113.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 630.

⁴¹⁰ *Id.* at 638.

⁴¹¹ *Id.* at 640–44.

⁴¹² *Id.* at 646–47 (Edgerton, J., dissenting).

⁴¹³ *See id.* at 645 (“A judgment or decree in favor of the appellants will control the terms on which the United States may enter into contracts for the necessary work of the Departments of Labor, War, Navy, the Treasury, the Interior, and the Post Office. It will thereby regulate the conduct by the United States of vast activities of unquestioned constitutionality and legality.”).

⁴¹⁴ Brief for Petitioners, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (No. 593), 1940 WL 71199, at *11.

orders could be issued by courts at the behest of individual plaintiffs. For example, said the government, “[i]f a single disgruntled merchant, dissatisfied with regulations governing eligibility to bid or to obtain an award, may, by invoking the aid of the courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious.”⁴¹⁵ It also argued that “if this suit can be maintained so, too, may any disgruntled bidder obtain *the aid of a court of equity* against completion of contracts *with others*. And we have sketched the far-reaching consequences which such a rule might work upon the contracting and purchasing functions of the Government.”⁴¹⁶ The government made a parade-of-horribles argument, but the parade proceeded from the starting point that a “single disgruntled” bidder or merchant with “the aid of a court of equity” *could in fact tie up or hamper government contracts or purchasing with others*, with consequences that would be “far-reaching” and serious. Notwithstanding its initial sally in that direction before the D.C. Circuit, the government before the Supreme Court did not ask that the injunction be “clarified” or narrowed if it were affirmed; rather, it reverted to the “all or nothing” approach that state defendants took earlier.⁴¹⁷

The Supreme Court reversed.⁴¹⁸ Writing for eight Justices,⁴¹⁹ Justice Black noted the “sweeping” consequences of the D.C. Circuit’s decision,⁴²⁰ observing that “[i]n this vital industry, by action of the [D.C. Circuit], the Act ha[d] been suspended and inoperative for more than a year.”⁴²¹ The Court had stern words for the D.C. Circuit: “In our judgment the action of the [D.C. Circuit went] beyond any controversy that might have existed between the complaining companies and the Government officials.”⁴²² It framed the question before it thus:

We must, therefore, decide whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials who do the Government’s purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in this entire nation-wide industry.⁴²³

The Court then reached its holding: the companies lacked standing to sue.⁴²⁴ The Court reasoned that there was no “recognized legal right[]” to

⁴¹⁵ *Id.* at *70–71.

⁴¹⁶ *Id.* at *80 (emphasis added).

⁴¹⁷ *See supra* pp. 978–79.

⁴¹⁸ *Perkins*, 310 U.S. at 132.

⁴¹⁹ Justice McReynolds dissented without opinion. *Id.*

⁴²⁰ *Id.* at 121.

⁴²¹ *Id.* at 117.

⁴²² *Id.* at 123.

⁴²³ *Id.* at 117.

⁴²⁴ *Id.* at 132 (“Our decision that the complaining companies lack standing to sue does not rest upon a mere formality.”).

bargain with the government on particular terms.⁴²⁵ Nothing in the Walsh-Healey Act, the Court reasoned, “indicat[ed] any intention to abandon a principle acted upon since the Nation’s founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases.”⁴²⁶ That “traditional principle” left the matter of making purchases to “the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers.”⁴²⁷ The limitations in the Walsh-Healey Act were not “a bestowal of litigable rights upon those desirous of selling to the Government,” but were instead “self-imposed restraint[s] for violation of which the Government — but not private litigants — [could] complain.”⁴²⁸ Analogizing the Secretary of Labor to “a purchasing agent of a private corporation,” the Court held that “prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal’s authorization.”⁴²⁹ Noting that “the Secretary’s responsibility is to superior executive and legislative authority,” the Court concluded:

Respondents have no standing in court to enforce that responsibility or to represent the public’s interest in the Secretary’s compliance with the Act. *That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted.*⁴³⁰

As the foregoing description shows, the *Perkins* Court *was* deeply skeptical of the D.C. Circuit’s universal injunction — but, crucially, in the context of a case that involved government contracting, which the Court regarded as implicating purely *public* rights and *no* invasion of private rights.⁴³¹ As a result, the plaintiff steel companies lacked standing to vindicate *even for themselves* any right in the Secretary’s compliance with the Act, let alone a more general “public right or interest” in government purchasing that complied with statutory mandates. It was exclusively the prerogative of “superior executive and legislative authority” to enforce the Secretary’s compliance with those mandates.⁴³² Courts, meanwhile, were entirely out of the picture: “[A] wage determination by the Secretary contemplate[d] no controversy between parties

⁴²⁵ *Id.* at 125; *see also id.* at 127 (“Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”).

⁴²⁶ *Id.* at 128.

⁴²⁷ *Id.* at 127.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 129.

⁴³⁰ *Id.* (emphasis added).

⁴³¹ *See id.* at 128–29.

⁴³² *Id.* at 129.

and no fixing of private rights; *the process of arriving at a wage determination contain[ed] no semblance of these elements which go to make up a litigable controversy as our law knows the concept.*⁴³³

The *Perkins* Court acknowledged that the injunction had greatly interfered with executive action, but *Perkins* did not hold — or even say in dictum — that a universal injunction was categorically inappropriate or that it would be improper in suits where the plaintiffs *did* have standing or that *did* implicate private rights. To the contrary, the *Perkins* Court took care to note that the case involved neither “regulatory power over private business or employment”⁴³⁴ nor an official action that “invade[d] private rights in a manner amounting to a tortious violation,”⁴³⁵ and to distinguish cases that did — including *Pierce v. Society of Sisters*.⁴³⁶

It is useful here to contrast *Perkins* with another case decided at nearly exactly the same time — *Hague v. CIO*⁴³⁷ — because it demonstrates that the Court did not think that any Article III obstacle existed to the issuance of an injunction extending beyond the plaintiffs where private rights *were* implicated. *Hague* was a challenge to the enforcement of a local law in Jersey City, New Jersey.⁴³⁸ The plaintiffs — a group of individuals, a labor organization, and the ACLU — sued to enjoin municipal officials from enforcing ordinances that the officials had used to restrict the holding of meetings and the dissemination of leaflets and pamphlets that explained the rights protected by the National Labor Relations Act.⁴³⁹ Finding the city’s practices unlawful, the district court issued a broad decree enjoining the ordinances’ enforcement.⁴⁴⁰ The Third Circuit affirmed that decree with slight modifications.⁴⁴¹

⁴³³ *Id.* at 127 (emphasis added).

⁴³⁴ *Id.* at 128 (“The Act does not represent an exercise by Congress of regulatory power over private business or employment.”).

⁴³⁵ *Id.* at 129 (explaining that the challenged determination did not infringe on “private rights” and arguing instead that the steel companies sought “through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs”).

⁴³⁶ *See id.* at 129–30, 129 n.21 (distinguishing, inter alia, *Pierce* as one of the cases that “relate[s] to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government’s own supplies,” *id.* at 129–30).

⁴³⁷ 307 U.S. 496 (1939).

⁴³⁸ *Id.* at 501 (opinion of Roberts, J.).

⁴³⁹ 29 U.S.C. §§ 151–160 (2012); *see Hague*, 307 U.S. at 501–04. The plaintiffs alleged, inter alia, that the defendants threatened “the repeated arrests and prosecutions of the plaintiffs and any persons associated with them” and “intimidated workers in Jersey City who [were] members of the CIO and other workers who [were] sympathetic with its activities.” Transcript of Record at 13, *Hague*, 307 U.S. 496 (No. 651); *see also id.* at 19–21 (stating the prayer for relief).

⁴⁴⁰ *Hague v. CIO*, 101 F.2d 774, 794–96 (3d Cir. 1939) (reproducing text of the decree), *aff’d as modified*, 307 U.S. 496.

⁴⁴¹ *Id.* at 791.

When *Hague* was appealed, the Justices divided badly on intricacies of jurisdiction and merits that need not be canvassed here,⁴⁴² what matters is remedy, on which five Justices concurred.⁴⁴³ As it came to the Court, the decree enjoined the city defendants:

From directly or indirectly interfering with the plaintiffs or any of them, or the agents, servants or employees of, or persons acting in sympathy or in concert with the plaintiffs or any of them in their right to communicate their thoughts to other persons in and about the public streets, highways, thoroughfares, parks and places of the City of Jersey City . . .⁴⁴⁴

This portion of the decree extended beyond the plaintiffs to also protect persons “acting . . . with” the plaintiffs, and yet Justice Roberts’s opinion called this paragraph “unassailable.”⁴⁴⁵ The next two paragraphs of the lower court’s decree enjoined officials from interfering with the distribution of circulars, leaflets, handbills, and placards; these paragraphs likewise reached beyond the plaintiffs to “persons acting in sympathy or in concert with the plaintiffs or any of them.”⁴⁴⁶ With respect to these paragraphs, wrote Justice Roberts, the decree went “too far” in that it “attempt[ed] to formulate *the conditions* under which respondents *and their sympathizers* [could] distribute such literature free of interference.”⁴⁴⁷ Yet while these specific conditions were rejected, the decree was otherwise affirmed: “All respondents are entitled to is a decree declaring the ordinance void and enjoining the petitioners from enforcing it.”⁴⁴⁸

As *Hague* shows, the Court — including the same Justice who wrote *Perkins* (Justice Black) — affirmed an injunction that reached beyond the plaintiffs less than a year before deciding *Perkins* itself. In *Perkins*,

⁴⁴² The Justices modified and affirmed the lower court judgment with five votes, but their disagreement over the merits is reflected in the breakdown of their opinions. See *Hague*, 307 U.S. at 500. Justice Roberts wrote an opinion in which Justice Black concurred; Justice Stone wrote an opinion in which Justice Reed concurred; Chief Justice Hughes wrote his own concurring opinion; and Justices McReynolds and Butler dissented. *Id.* Justices Frankfurter and Douglas did not take part in considering or deciding the case. *Id.*

⁴⁴³ See *id.* at 516–18 (opinion of Roberts, J.); *id.* at 518 (opinion of Stone, J.) (“I do not doubt that the decree below, modified as has been proposed, is rightly affirmed . . .”); *id.* at 532 (Hughes, C.J., concurring) (“With respect to the merits I agree with the opinion of Mr. Justice Roberts and in the affirmance of the judgment as modified.”).

⁴⁴⁴ *Hague*, 101 F.2d at 795 (emphasis added).

⁴⁴⁵ *Hague*, 307 U.S. at 517 (opinion of Roberts, J.) (“Paragraph 1 enjoins the petitioners from interfering with the right of the respondents, their agents *and those acting with them*, to communicate their views as individuals to others on the streets in an orderly and peaceable manner. It reserves to the petitioners full liberty to enforce law and order by lawful search and seizure or by arrest and production before a judicial officer. We think this paragraph unassailable.” (emphasis added)).

⁴⁴⁶ *Hague*, 101 F.2d at 795.

⁴⁴⁷ *Hague*, 307 U.S. at 518 (opinion of Roberts, J.) (emphasis added). The decree had qualified its command by requiring that the distribution of circulars, handbills, and placards be “carried out in a manner consistent with the maintenance of public order and not involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets.” *Hague*, 101 F.2d at 795.

⁴⁴⁸ *Hague*, 307 U.S. at 518 (opinion of Roberts, J.). “All,” indeed.

“[t]he contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation,”⁴⁴⁹ and so no injunction of any kind could issue.⁴⁵⁰ In *Hague*, in contrast, where “[t]he wrongs of which respondents complain[ed] [were] tortious invasions of alleged civil rights by persons acting under color of state authority,”⁴⁵¹ the Court affirmed a decree that reached beyond those plaintiffs to “their sympathizers.”⁴⁵² The reason the two cases came out differently is *not* because the enjoined defendant was a local government rather than the federal government, a distinction that does not matter for purposes of Article III. Rather, the reason is that one case (*Perkins*) concerned a challenge to government contracting — a matter that was simply not “a litigable controversy as our law knows the concept”⁴⁵³ — while the other (*Hague*) concerned “tortious invasions” of individual civil rights “by persons acting under color of state authority”⁴⁵⁴ — a matter entirely within the cognizance of an Article III court. The injunction that reached beyond the plaintiffs thus remained alive and kicking — if sought in a case brought by a plaintiff with standing.⁴⁵⁵

That *Perkins* did not implicitly limit or reject injunctions reaching beyond the plaintiffs is established finally by *West Virginia State Board of Education v. Barnette*,⁴⁵⁶ which — like *Hague* — involved a violation of civil rights, and which was decided three years *after Perkins*. The three plaintiffs sued on behalf of themselves and a class of Jehovah’s

⁴⁴⁹ *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129 (1940).

⁴⁵⁰ *See id.* at 132.

⁴⁵¹ *Hague*, 307 U.S. at 507 (opinion of Roberts, J.).

⁴⁵² *Id.* at 518.

⁴⁵³ *Perkins*, 310 U.S. at 127.

⁴⁵⁴ *Hague*, 307 U.S. at 507 (opinion of Roberts, J.).

⁴⁵⁵ The injunction sought in *Massachusetts v. Mellon (Frothingham)*, 262 U.S. 447 (1923), like *Perkins* and unlike *Hague* or *Barnette*, was rejected because the plaintiff lacked standing to vindicate a public right — the right to have public moneys spent in accordance with constitutional limitations. *Id.* at 487–88. Frothingham could not get her injunction because her injury (“interest”) was indistinct and uncertain: “[C]omparatively minute and indeterminable . . . [and] so remote, fluctuating and uncertain, that no basis [was] afforded for an appeal to the preventive powers of a court of equity.” *Id.* at 487. The *Frothingham* Court spoke in terms of standing, not in terms of remedy. To invoke “the preventive powers of a court of equity,” *id.*, to “enjoin[] . . . the acts of the official, the statute notwithstanding,” a party must be in danger of suffering a “direct injury” — and Frothingham’s injury did not pass muster because it was not a “direct injury suffered or threatened, presenting a justiciable issue,” *id.* at 488. Nothing in *Frothingham* spoke to how *broadly* a court could “enjoin the acts of the official, the statute notwithstanding,” *id.*, in a case that *properly* invoked the “preventive powers of a court of equity,” *id.* at 487. *Frothingham*, in short, is best read as it has always been read — as a case about federal taxpayer standing, rather than as a case that *sub silentio* rejected the propriety of a remedy (the injunction protecting nonplaintiffs) that lower federal courts were regularly using as to state laws and that the Supreme Court had itself used quite recently as to a federal law. *See supra* sections III.A–C, pp. 944–54; *supra* sections IV.A–B, pp. 959–79; *see also supra* note 205. *But see* *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (recasting *Frothingham* as expressing a limit on equitable power); *Bray, supra* note 2, at 430–33 (same).

⁴⁵⁶ 319 U.S. 624 (1943).

Witnesses,⁴⁵⁷ and their complaint rested on the proposition that saluting the American flag was inconsistent with the teachings of that church.⁴⁵⁸ Yet the three-judge court did not limit its decree to the plaintiffs or even to the alleged class; rather, it simply enjoined the state officers from requiring that the flag be saluted by “the children of the plaintiffs, or *any other children having religious scruples* against such action.”⁴⁵⁹ This aspect of the decree would have mattered to, for example, a Mennonite child in West Virginia⁴⁶⁰ — not least because “the Mennonites’ doctrine of non-resistance would not allow them to act as plaintiffs in a court of law.”⁴⁶¹ Justice Jackson’s opinion affirmed that decree, taking no issue with its scope.⁴⁶² In his opinion, he famously described the “fixed star in our constitutional constellation”: “[T]hat no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,

⁴⁵⁷ Transcript of Record at 2, *Barnette*, 319 U.S. 624 (No. 591) (“Plaintiffs . . . bring this action for themselves individually and as a class action for the use and benefit of their children and for all other of Jehovah’s witnesses and their children of compulsory school age throughout the entire State of West Virginia.”); *id.* at 15–16 (stating the prayer for relief).

⁴⁵⁸ *Id.* at 3–4.

⁴⁵⁹ *Id.* at 46 (emphasis added); *see id.* at 45–46 (stating the final decree). The final decree read as follows:

[I]t is ordered, adjudged[,] and decreed that the defendants, the West Virginia State Board of Education . . . be, and they are hereby, restrained and enjoined from requiring the children of the plaintiffs, or any other children having religious scruples against such action, to salute the flag of the United States, or any other flag, or from expelling such children . . . for failure to salute it

Id. at 46; *see also* *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 255 (S.D. W. Va. 1942) (enjoining the flag salute requirement “in so far as it applie[d] to children having conscientious scruples against giving such salute”), *aff’d*, 319 U.S. 624; *Court Throws Out Flag Salute Rule*, CHARLESTON GAZETTE, Oct. 7, 1942, at 1 (reporting that the decree enjoined the Board “from requiring the flag salute of children of the Jehovah’s Witnesses sect *and of all others having conscientious religious scruples*” (emphasis added)); *Jehova[h]’s Witnesses Do Not Have to Salute Flag to Attend School*, RALEIGH REG., Oct. 7, 1942, at 5 (“The state board of education was enjoined today from requiring the flag salute of children of the Jehovah’s Witnesses sect *and all others having conscientious religious scruples* against saluting the U.S. flag or that of any other nation.” (emphasis added)). Following the lower court ruling, the state announced that the salute would not be required from “[c]hildren belonging to religious sects whose belief prohibit[ed] their participating completely in giving the flag salute.” *School Flag Salute Requirement Changed to Meet Court Ruling*, CHARLESTON GAZETTE, Oct. 8, 1942, at 6.

⁴⁶⁰ *See* DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 11* (1962) (“By 1929 there had been at least ten such instances [of open clashes between school authorities and religious opponents] in eight states, involving at least four religious sects.”).

⁴⁶¹ *Id.* at 12; *see also id.* at 13–14 (noting that the Tremains, adherents of the Elijah Voice Society, were unwilling “even to defend themselves in court, to say nothing of suing,” *id.* at 14); *id.* at 16 (“None of these early clashes led to a direct test of the constitutionality of the compulsory ceremony as applied to religious objectors. One obvious reason for this was the conscientious inability of the parents involved to sue in the courts, or, in the case of the Tremains, even to defend themselves.”).

⁴⁶² *Barnette*, 319 U.S. at 642 (“[T]he judgment enjoining enforcement of the West Virginia Regulation is [a]ffirmed.”).

religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁴⁶³

If, hypothetically, the federal government had the next day sought to extract flag salutes from schoolchildren attending federally operated schools (say, in the District of Columbia, or on military bases scattered around the country), would the plaintiffs in those cases have been entitled to a less sweeping decree? Would the federal courts, just because *federal* action was at issue, have insisted on pruning the decree so that it reached *only* the plaintiffs or *only* members of an alleged plaintiff class of children of Jehovah’s Witnesses? There is no basis in Article III for thinking that such a hypothetical case would have or should have come out any differently than *Barnette* did. The rule that an injunction must protect only the plaintiffs is not a “fixed star” in our “constitutional constellation”⁴⁶⁴ — although some now urge it to be so made.

B. A Postscript to Perkins: Wirtz v. Baldor Electric Co.

The decision in *Perkins* was soon followed by the enactment of the Administrative Procedure Act⁴⁶⁵ (APA). It lies beyond the scope of this Article to discuss the relevance of *Perkins* to the correct interpretation of that statute; I take up that question elsewhere.⁴⁶⁶ For now, however, a final postscript to *Perkins* is worth mentioning.

In 1952, Congress amended the Walsh-Healey Act to reverse the Supreme Court’s decision in *Perkins* and allow aggrieved government contractors the right to sue.⁴⁶⁷ In the 1960s, a fresh set of plaintiffs

⁴⁶³ *Id.* It is worth underscoring that Justice Jackson had written critically about the use of injunctions by federal courts just two years earlier. See ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 115–23 (1941). Yet he found no fault with the scope of the injunction in *Barnette*. See *Barnette*, 319 U.S. at 624, 642.

⁴⁶⁴ *Barnette*, 319 U.S. at 642.

⁴⁶⁵ Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2018)); see 5 U.S.C. §§ 701–706.

⁴⁶⁶ See Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. (forthcoming 2020) (exploring the implications of *Perkins* and other materials for the debate over the meaning of the APA’s directive that courts “set aside” unlawful agency action under 5 U.S.C. § 706(2)). To preview some of that article’s analysis, the APA is acknowledged to have retained the background principles governing equitable relief; in light of the cases described herein, see *supra* sections III.A–V.A, pp. 944–91, and other decisions, by 1946 the judicial power in equity was understood as encompassing the power to provide relief to those who were not formally parties; the APA’s legislative history (correctly) treated *Perkins* as a case about standing, not as a case that implicitly limited the courts’ equitable remedial power in challenges to federal agency action; and the APA should be read (as it has long been read by lower courts) as authorizing “universal vacatur” of agency action — including rules. See *id.* (manuscript at 13–23). In suits to which the APA applies, this analysis means that the reviewing court has authority (under Article III and 5 U.S.C. § 705) to preliminarily enjoin a rule’s enforcement as to both parties and nonparties until it exercises its authority (under 5 U.S.C. § 706(2)) to decide if the rule on the merits should be set aside and vacated as to both parties and nonparties. See *id.* (manuscript at 11–31).

⁴⁶⁷ See *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 521, 532–33 (D.C. Cir. 1963) (supplemental per curiam opinion after remand issued on June 29, 1964).

sought relief from another minimum wage determination made by the Secretary of Labor under the Act, this time with respect to prevailing wages in the electrical motors and generators industry.⁴⁶⁸

Having decided that the agency determination was improper,⁴⁶⁹ the D.C. Circuit directed the district court on remand to decide which, if any, of the plaintiffs were in fact aggrieved.⁴⁷⁰ Then it went on to address the scope of relief that the district court should award.⁴⁷¹ It noted that the Secretary's determination "establish[ed] a broad rule, having the effect of a statute," and it reasoned — citing *Pierce v. Society of Sisters* — that "[h]ad Congress itself taken similar action, by statute, and had that statute been held unconstitutional in an appropriate suit, there is no doubt that it would necessarily be regarded as unconstitutional as to all persons similarly situated, and not merely as to those who brought the suit attacking it."⁴⁷² It noted that "a court order enjoining the Secretary's determination for the sole benefit of those plaintiffs-appellees who have standing to sue would be to give them an unconscionable bargaining advantage over other firms in the industry," a result that Congress could not have intended.⁴⁷³ The D.C. Circuit thus concluded that if one or more plaintiffs was found to have standing, "the District Court should enjoin the effectiveness of the Secretary's determination with respect to the entire industry."⁴⁷⁴

This case is, of course, *Wirtz v. Baldor Electric Co.*,⁴⁷⁵ which has become (in)famous as the "first" universal injunction against federal law.⁴⁷⁶ But, as the preceding analysis reveals, *Wirtz* linked its exercise of the equitable power back to *Pierce*, which similarly issued a universal injunction, though as to a *state* law.⁴⁷⁷ More generally, *Wirtz* grounded its holding upon the power of the Article III court to fashion a remedy

⁴⁶⁸ *Id.* at 520; *see id.* at 533 (noting that the plaintiffs had filed their suit "on behalf of themselves and all other United States manufacturers of electric motors and generators similarly situated").

⁴⁶⁹ *Id.* at 531.

⁴⁷⁰ *Id.* at 535.

⁴⁷¹ *Id.* at 533–35.

⁴⁷² *Id.* at 534 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 535.

⁴⁷⁵ 337 F.2d 518.

⁴⁷⁶ *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (citing *Wirtz* as "the first [universal] injunction [issued] in the United States" (first alteration in original) (quoting *Bray*, *supra* note 2, at 438)).

⁴⁷⁷ *Cf.* *Bray*, *supra* note 2, at 438 & n.124. *Bray* criticizes *Wirtz*'s reliance on *Pierce*, saying that "'regard[ing a statute] as unconstitutional' is not the same thing as enjoining its enforcement against anyone." *Id.* at 438 (alteration in original) (quoting *Wirtz*, 337 F.2d at 534). He also dismisses *Wirtz*'s reference to *Pierce* by calling *Pierce* a case that "allowed third-party standing." *Id.* at 438 n.124. But *Pierce* in fact *did* enjoin enforcement "against anyone," and third-party standing is still standing; the case was thus aptly cited by *Wirtz*. *See Soc'y of Sisters v. Pierce*, 296 F. 928, 933 (D. Or. 1924) ("It can scarcely be contended that complainants' right to carry on their schools, whether parochial or private, is not a property right . . ."); *see also supra* pp. 959–62.

that would give complete relief to the injured plaintiffs while avoiding collateral damage to both innocent competitors and the overall fairness of government contracting. Rather than being seen as an upstart or outlier, *Wirtz* is better understood as continuing the federal courts’ practice of exercising equitable power to ensure that the remedy for illegal government conduct is both complete and pragmatically sensible — even when that would mean, as it did in *Wirtz* and as it has in many cases since, issuing an injunction that reached beyond the plaintiffs.⁴⁷⁸

VI. THE UNIVERSAL INJUNCTION AND THE USES OF HISTORY

At a rather startling clip, the debate over the universal injunction has morphed from a disagreement over policy, into a set of claims about history, and then into a thesis about constitutional meaning and Article III. That we have reached that terminal phase is explicit in the former Attorney General’s remarks accompanying the Sessions Memorandum,⁴⁷⁹ and it is also tacit in the recently proposed House bill to curtail universal injunctions, which referred (with unwarranted presumptuousness) to such injunctions as “orders purporting to restrain enforcement against non-parties.”⁴⁸⁰ It is evidenced perhaps most prominently by Justice Thomas’s concurring opinion in *Trump v. Hawaii*.⁴⁸¹

If the debate had paused at the first phase — at the stage of policy — it would have been better. As Professor Amanda Frost has explained, universal injunctions “are at times required to provide complete relief

⁴⁷⁸ For a final noteworthy forerunner of today’s universal injunction as to federal laws, see *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), in which the Court (in an opinion by Justice Field) addressed a post-Civil War federal statute that required attorneys practicing before the federal courts to take an oath swearing that they had not committed certain disloyal acts against the United States. *Id.* at 374–75. *Garland*, a lawyer, had been a Confederate soldier and senator, so he could not truthfully take this oath. *Id.* at 375. He petitioned the Court for admission to its bar, arguing that the oath’s requirement was unconstitutional, and that he was “released from compliance” with the law by a presidential pardon he had received from President Andrew Johnson. *Id.* at 376; *see id.* at 375–76. The Court agreed that the oath’s requirement was invalid generally, as an *ex post facto* law and a bill of attainder, *id.* at 377, and in particular that it was invalid as to *Garland*, given his pardon, *id.* at 381. The Court thus granted *Garland*’s petition. *Id.*

Then it did more: it rescinded the provision of its own rules requiring that the oath be taken by attorneys practicing before it, thereby nullifying the requirement imposed by the federal statute as to *all* attorneys seeking to practice at the Court, whether they had been pardoned or not. *See id.* at 381 (“[T]he amendment of the second rule of the court, which requires the oath prescribed by the act of January 24th, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded.”). *Garland* did *not* involve a request for an injunction, but the case illuminates the Court’s understanding of the appropriate response to a ruling that deems a federal statute constitutionally invalid in toto.

⁴⁷⁹ *See* Sessions Memorandum, *supra* note 13; Sessions Press Release, *supra* note 13 (“The Constitution does not grant to a single district judge the power to veto executive branch actions with respect to parties not before the court. Nor does it provide the judiciary with authority to conduct oversight of or review policy of the executive branch. These abuses of judicial power are contrary to law . . .”).

⁴⁸⁰ *See* Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. § 2(a) (2019).

⁴⁸¹ *See Trump v. Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring).

to plaintiffs, to protect similarly situated nonparties, and to avoid the chaos and confusion that comes from a patchwork of injunctions.”⁴⁸² As she and others also acknowledge, however, universal injunctions against federal law may be problematic from a policy perspective on multiple scores. They encourage forum shopping.⁴⁸³ They can stymie the percolation of legal disputes through the circuit courts.⁴⁸⁴ They can result in cases that rush up to the Supreme Court quickly, without an opportunity for thorough briefing or adequate factual development.⁴⁸⁵ They can make a decision by a single district court judge that lacks precedential effect even within that district into an immediately binding rule of conduct for the federal government nationwide,⁴⁸⁶ a result that seems to ignore both the rules of vertical and horizontal precedent and the spirit, though not the letter, of the Supreme Court’s opinion in *United States v. Mendoza*.⁴⁸⁷ They seem to circumvent the class action

⁴⁸² See Frost, *supra* note 16, at 1101 (“In such cases, nationwide injunctions may be appropriate, at times even essential.”).

⁴⁸³ See, e.g., Bray, *supra* note 2, at 459–60. On the other hand, plaintiffs routinely forum shop in all sorts of cases, and plaintiffs can also forum shop for a judge who will issue nationwide injunctive relief to a Rule 23 injunctive class. See Frost, *supra* note 16, at 1104–05; Malveaux, *supra* note 16, at 57.

⁴⁸⁴ See, e.g., Bray, *supra* note 2, at 461–62. On the other hand, percolation may occur notwithstanding a universal injunction. See Amdur & Hausman, *supra* note 16, at 51–53; Frost, *supra* note 16, at 1108–09.

⁴⁸⁵ See Bray Testimony, *supra* note 23, at 5.

⁴⁸⁶ See *id.*; see also Bray, *supra* note 2, at 465.

⁴⁸⁷ 464 U.S. 154, 162–63 (1984) (holding — on policy grounds, not on Article III grounds — that nonmutual offensive issue preclusion is not available against the federal government). On the other hand, preclusion doctrines similarly permit a single lower court judgment to foreclose future litigation horizontally. See Clopton, *supra* note 16, at 10–15; Trammell, *supra* note 16, at 79–80. And courts do not treat the rule as a blanket bar to nonmutual estoppel against the federal government. See Frost, *supra* note 16, at 1113; Trammell, *supra* note 16, at 100.

It is worth saying a brief word about the relation between injunctions and preclusion. Consider the following argument. Traditionally, the law required mutuality of estoppel; traditionally, injunctions were only plaintiff-protective. The combined consequence was that, traditionally, injunctive scope would exactly match preclusive effect: a decree issued at *T1* would have preclusive effect on the shielded party at *T2*. Although *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), then allowed nonmutual preclusion, *Mendoza* retained the older rule of strict mutuality with respect to the federal government. See Clopton, *supra* note 16, at 14 (describing this relationship between *Parklane* and *Mendoza*). Courts today should thus maintain the traditional overlap between injunctive scope and preclusive effect, by limiting their injunctions to protect only those who can be precluded by the *T1* decree. It follows that injunctions against the federal government should shield only the actual plaintiffs (or the members of a certified plaintiff class). Cf. Morley, *Nationwide Injunctions*, *supra* note 16, at 627–33. Accordingly, if universal injunctions against the federal government are to survive, the Court must overturn *Mendoza*.

This is a thought-provoking argument. Note, however, that this argument rests on the premise that, pre-*Parklane*, injunctive scope at *T1* perfectly matched preclusive effect at *T2*. But *Pierce*, the Equity Rule 38 suits above described, and the post-1938 “spurious class suits” all show that injunctive scope was not always coextensive with future preclusive effect. See *supra* pp. 962–64. *Mendoza* retained the preexisting preclusion rules for the federal government — but those preexisting preclusion rules did not limit final injunctive relief (and of course did not limit preliminary injunctive relief) only to parties who would be precluded at *T2*. The proposal that courts today

device by letting plaintiffs who have not satisfied the requirements for class certification obtain relief that is functionally equivalent to class-wide injunctive relief.⁴⁸⁸ They create the risk of conflicting injunctions.⁴⁸⁹

These arguments are not without force. And they suggest the desirability of vetting certain proposals for targeted, narrow-bore reforms. If we were to randomly assign federal judges to hear cases — and I mean truly randomly, in a way that actually eliminated the currently available opportunity for savvy litigants to guarantee that a particular federal judge will hear a case by filing suit in a particular venue — then the worry over forum shopping for friendly judges would fall away.⁴⁹⁰ If Congress were to create three-judge district courts to act as the *nisi prius* court in cases in which a universal injunction against federal law was sought,⁴⁹¹ the worry over forum- and judge-shopping would likewise dissipate. If, in cases where this was possible and sensible, the district courts as a matter of judicial comity limited injunctions against federal law to offer relief only to parties within the territorial bounds of the judicial district — and if the courts of appeal limited their relief to the territorial bounds of the circuit — then opportunities for percolation would be enhanced.⁴⁹² If the Supreme Court were required to hear on appeal all grants of preliminary or final universal injunctions against federal laws or regulations,⁴⁹³ the federal government would be guaranteed an opportunity to obtain in short order a decisive opinion on the law’s legality and the injunction’s scope. If none of the above occurred, but federal judges took great care to issue universal injunctions against federal officers only in cases where they were unavoidable, and in no

should take into account preclusion principles in specifying the scope of an injunction is a thoughtful idea for reform that should be explored fully. See Clopton, *supra* note 16, at 5 (arguing in favor of a “preclusion-based approach” tethered to *Parklane* for issuing nationwide injunctions); Trammell, *supra* note 16, at 104–09 (arguing that preclusion principles should guide the issuance of nationwide injunctions). But it would be inapt to rest that proposal’s justification on the notion that, until *Parklane*, there was a total overlap between *T1* injunctive scope and *T2* preclusion.

⁴⁸⁸ See, e.g., Bray Testimony, *supra* note 23, at 5. But cf. Frost, *supra* note 16, at 1085–86, 1086 n.98 (“[S]ome judges have refused to certify class actions on the ground that a class action is unnecessary because a nationwide injunction would provide equivalent relief.” *Id.* at 1086 n.98.).

⁴⁸⁹ See Bray Testimony, *supra* note 23, at 5. On the other hand, courts avoid creating clashing rulings as a matter of comity, and no such conflicting universal injunctions against the federal government have so far materialized. See Amdur & Hausman, *supra* note 16, at 52.

⁴⁹⁰ Alternatively, Congress could make venue lie in the federal district court for the District of Columbia. See Frost, *supra* note 16, at 1105 (describing the Assigning Proper Placement of Executive Action Lawsuits (APPEAL) Act, H.R. 2660, 115th Cong. (2017)). For criticism of this proposal, see Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1978–80 (2019).

⁴⁹¹ See Costa, *supra* note 16. But see Mank & Solimine, *supra* note 490, at 1980–81 (critiquing the proposal).

⁴⁹² Cf. Morley, *De Facto Class Actions?*, *supra* note 16, at 554 (arguing for limited geographic scope for defendant-oriented injunctions in class actions).

⁴⁹³ See Costa, *supra* note 16.

circumstances to issue injunctions that conflicted with those of other federal district courts,⁴⁹⁴ then the much-bruited possibility that the federal government could be whipsawed between two conflicting universal injunctions would remain — as it is today — a risk that rounds to zero.⁴⁹⁵

Some of these proposals address how universal injunctions against federal law should be litigated, while others speak to how courts should exercise their discretion in crafting a remedy. All of these proposals would leave the *substantive* remedial powers of the federal courts untouched with respect to federal, state, and local governments and with respect to private parties. Any of these proposals might greatly assuage the *policy* worries about the universal injunction. What they would not respond to is the contention that injunctions reaching beyond the plaintiffs are inherently illegitimate as an Article III matter. And it is that *constitutional* contention to which the recent proposal for legislative reform most directly responded.

The House bill proposed to end the universal injunction, except in Rule 23 class action suits.⁴⁹⁶ It proposed to take that remedial power away from *all* federal courts, making no exception for the Supreme Court.⁴⁹⁷ It proposed to take that remedial power away *even when the law at issue was a state or local law*⁴⁹⁸ — that is, in contexts in which the risk of forum shopping for federal judges,⁴⁹⁹ the risk of conflicting injunctions,⁵⁰⁰ and the foregone benefits of percolation are all much diminished.⁵⁰¹ And what about administrative law? Neither the House bill nor its legislative history made any direct reference to the language in the APA that instructs courts to “set aside” unlawful agency action.⁵⁰²

⁴⁹⁴ See Frost, *supra* note 16, at 1106–17 (“[C]ourts can and do alter their injunctions when they learn of such conflicts.” *Id.* at 1106.).

⁴⁹⁵ See *id.* at 1106 (“Conflicting injunctions have yet to pose significant problems, however, despite over fifty years of experience with nationwide injunctions.”); see also Amdur & Hausman, *supra* note 16, at 52 (noting that the risk of conflicting injunctions is “vanishingly low”).

⁴⁹⁶ See Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2(a) (2018).

⁴⁹⁷ Compare *id.* (“No court of the United States . . . shall issue an order . . .”), with 8 U.S.C. § 1252(f)(1) (2018) (“[N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [certain statutory] provisions . . .” (emphasis added)).

⁴⁹⁸ See H.R. 6730 § 2(a) (barring orders restraining the enforcement “of any statute, regulation, order, or similar authority” (emphasis added)).

⁴⁹⁹ In multidistrict states, such as California or Texas, the plaintiff challenging a state law is able to forum shop between those districts. In single-district states, such as Massachusetts, there is only one district court to go to. Circuit shopping in challenges to state law is possible, but extremely unusual. See *supra* note 386 and accompanying text. In any state, plaintiffs may forum shop between state and federal courts.

⁵⁰⁰ I mean as a formal matter; as I noted earlier, the risk of conflicting injunctions is in any event close to zero as a practical matter. See Amdur & Hausman, *supra* note 16, at 52; Frost, *supra* note 16, at 1106; see also *supra* note 489; *supra* note 495 and accompanying text.

⁵⁰¹ See Amdur & Hausman, *supra* note 16, at 53–54.

⁵⁰² See 5 U.S.C. § 706(2) (2018); see also *id.* § 705 (authorizing the reviewing court to “issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings”).

Nor were there any references to the longstanding precedent construing that language to authorize (though not require) courts to vacate invalid rules in their entirety.⁵⁰³ But if a federal court were to choose to enjoin a rule’s enforcement pending its ultimate decision on whether to vacate the rule,⁵⁰⁴ the House bill would have forbidden that preliminary injunction from shielding persons other than the plaintiffs unless the suit was a class action — even if those other persons were being injured by the rule in exactly the same way as the plaintiffs, and even though those other persons would benefit in exactly the same way as the plaintiffs if the rule was eventually vacated. The House bill, in short, would have unsettled not only the federal-state balance, but also the remedial scheme that undergirds federal administrative law.⁵⁰⁵

Earlier Congresses, it bears remembering, have proceeded more cautiously with respect to the equitable powers of the federal courts. In 1910, in the wake of *Ex parte Young*, Congress created three-judge courts to deal with suits seeking injunctions against state laws alleged to be unconstitutional.⁵⁰⁶ In 1932, the Norris-LaGuardia Act⁵⁰⁷ imposed limitations on the issuance of labor injunctions.⁵⁰⁸ In 1934, the Johnson Act⁵⁰⁹ curbed injunctions against rate orders from state public utility commissions;⁵¹⁰ in 1937, the Tax Injunction Act⁵¹¹ similarly precluded injunctions to restrain state taxes.⁵¹² Congress left untouched the equitable powers of federal courts outside these domains. By the late 1930s — when Congress was hearing the Roosevelt Administration’s testimony about the tsunami of federal court injunctions against New Deal legislation⁵¹³ — it would already have been evident that federal

⁵⁰³ See Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 313–21 (2003). See generally Sohoni, *supra* note 466.

⁵⁰⁴ See 5 U.S.C. § 705 (“On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to . . . preserve status or rights pending conclusion of the review proceedings.”).

⁵⁰⁵ I am grateful to Professor Ron Levin for his thoughts on this point.

⁵⁰⁶ Act of June 18, 1910, Pub. L. No. 61-218, ch. 309, § 17, 36 Stat. 539, 557 (codified in Judicial Code of 1911, ch. 231, § 266, 36 Stat. 1087, 1162–63); see Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 118 (2008) (“[T]he eventual legislative compromise reached was grounded largely in procedure, and can only be regarded as a modest rebuke to the Court.”).

⁵⁰⁷ Pub. L. No. 72-65, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

⁵⁰⁸ *Id.* See generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930) (criticizing (ab)uses of injunctive power to quell boycotts and picketing).

⁵⁰⁹ Pub. L. No. 73-222, ch. 283, 48 Stat. 775 (1934) (codified as amended at 28 U.S.C. § 1342 (2012)).

⁵¹⁰ See 28 U.S.C. § 1342; Note, *The Johnson Act: Defining a “Plain, Speedy, and Efficient” Remedy in the State Courts*, 50 HARV. L. REV. 813, 821 (1937).

⁵¹¹ Pub. L. No. 75-332, ch. 726, 50 Stat. 738 (1937) (codified as amended at 28 U.S.C. § 1341).

⁵¹² See 28 U.S.C. § 1341.

⁵¹³ See DEP’T OF JUSTICE, *INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS*, S. DOC. NO. 75-42, at 25–33, 37–39, 41–44 (1937) [hereinafter CUMMINGS REPORT]. These documents were compiled by various federal agencies and sent to Congress in the spring of 1937. See *id.* at iii.

courts could enjoin the wide-scale enforcement of laws at the behest of just a handful of plaintiffs, because courts had already issued such injunctions repeatedly with respect to state laws, and the Supreme Court itself had done so at least once with respect to federal law.⁵¹⁴

What was Congress's response? It enacted the Judiciary Act of 1937,⁵¹⁵ which routed challenges seeking injunctions against federal statutes through the very three-judge courts that Congress had earlier tasked with dealing with constitutional challenges to state statutes — the exact same type of three-judge courts that had been responsible for the issuance of the sweeping injunctions against state laws discussed above.⁵¹⁶ When Congress enacted the APA soon thereafter, it similarly left the federal courts' *substantive* equitable remedial powers untouched.⁵¹⁷ Even in the midst of all the controversy over the injunctive power that occurred before, during, and after the New Deal, Congress did not strip away the federal courts' substantive powers over equitable remedies in any blanket fashion.

Today, however, more dramatic action is on the table. In keeping with the Orwellian delicacy of our modern times, the authors of the House bill named their proposal an “injunctive authority clarification” act, rather than — as earlier and franker Congresses have done — an “anti-injunction” act.⁵¹⁸ But there is simply no good reason for Congress to deploy such a blunt, heavy-handed reform in such a sensitive and important area of law when so many lighter-touch solutions could be usefully employed — no good reason, that is, except if one is convinced that *as an Article III matter* the injunction reaching beyond the plaintiff is unconstitutional.

And that brings us to Justice Thomas and to the constitutional case he has mounted against the universal injunction.⁵¹⁹ Justice Thomas's

⁵¹⁴ See, e.g., *supra* sections III.A–C, pp. 944–54; *supra* section IV.A, pp. 959–73; see *infra* note 530 (describing the injunction against the Bankhead Cotton Control Act).

⁵¹⁵ Pub. L. No. 75-352, ch. 754, 50 Stat. 751 (1937).

⁵¹⁶ *Id.* § 3, 50 Stat. at 752; see *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 250 (1938); see also *supra* section IV.A, pp. 959–73. The provision for a three-judge court was mostly repealed in 1976. See Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 2–3, 90 Stat. 1119, 1119 (codified in part at 28 U.S.C. § 2284). See generally Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555 (1960) (describing the procedural burdens arising from the requirements of the three-judge-court provision).

⁵¹⁷ See Levin, *supra* note 503, at 310–15.

⁵¹⁸ See Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018). Examples of congressional enactments that were known as “Anti-Injunction Acts” include 28 U.S.C. § 2283, which prohibits some injunctions to stay state court proceedings, and 26 U.S.C. § 7421 (2012), which prohibits some suits to restrain collection of “any tax” in “any court by any person,” *id.* § 7421(a).

⁵¹⁹ Justice Thomas's core contention is that the universal injunction falls outside the historical bounds of the equity power conferred by Article III. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425–29 (2018) (Thomas, J., concurring). The proposition that these injunctions also create a separate Article III problem of *standing* — by awarding relief beyond the plaintiff — does not add much to this contention; “[w]hen courts issue nationwide injunctions, they do so in the context of a live case or controversy and for the benefit of a plaintiff who has standing.” Trammell, *supra* note 16, at 82; see also *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (“For a legal dispute to

concurrency *talked* about the history of the equitable power and promiscuously cited the “judicial Power” of Article III courts.⁵²⁰ But what was the engine driving this analysis? The brunt of it was conceptual fiat: Justice Thomas posited a sharp disconnect between the power to render judgment in individual cases and the power to provide relief to nonparties.⁵²¹ But in cases such as *Lewis Publishing, Hill, Pierce, Langer, Hague*, and *Barnette* — cases in which the Court endorsed or itself granted orders that shielded nonparties — it performed the two roles at once, by addressing individual cases *while also* affirming (or itself affording) relief that went beyond the parties. Most of those cases involved state or local laws rather than federal laws, but all of them refute the *ipse dixit* that the intrinsic nature of judicial power under Article III forbids offering relief to shield nonparties.⁵²²

Is the concern, instead, to restrain courts from acting beyond the “longstanding limits on equitable relief” and to reverse the abrupt shift in “the latter half of the 20th century,” when — as Justice Thomas framed it — “some jurists began to conceive of the judicial role in terms of resolving general questions of legality”?⁵²³ If so, it is relevant that injunctions shielding nonparties formed at least a part of the output of the federal courts as far back as 1913. And it is also relevant that even before then — in the 1890s — the Court understood a *lower federal court* “sitting in equity” to be empowered to offer a “comprehensive decree covering the whole ground of controversy”⁵²⁴ that would “determine once for all” the legality of a state law for “the entire community.”⁵²⁵ These decisions matter not

qualify as a genuine case or controversy, at least one plaintiff must have standing to sue.”). The Court found no standing problem in, for example, *Lewis Publishing, Hill, Olsen, Pierce, Langer, Hague*, or *Barnette*, when it approved preliminary or final injunctive relief that extended beyond just the plaintiffs. See *supra* sections III.A–C, pp. 944–54 (discussing *Lewis Publishing, Hill*, and *Olsen*); *supra* pp. 959–62 (discussing *Pierce*); *supra* section IV.A.3, pp. 967–70 (discussing *Langer*); *supra* pp. 987–91 (discussing *Hague* and *Barnette*).

⁵²⁰ *Trump v. Hawaii*, 138 S. Ct. at 2427 (Thomas, J., concurring); see *id.* at 2425–29.

⁵²¹ *Id.* at 2427 (“American courts of equity did not provide relief beyond the parties to the case. . . . For most of our history, courts understood judicial power as ‘fundamentall[y] the power to render judgments in individual cases.’” (alteration in original) (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring))); see also *id.* (“[The courts] did not believe that [they] could make federal policy, and they did not view judicial review in terms of ‘striking down’ laws or regulations.”). Ironically, Justice Thomas voiced these fastidious doubts about the propriety of the universal injunction under Article III in a concurrence to a majority he joined — a concurrence that added a few additional justifications for the result reached by the majority and that then turned to speak “[m]erits aside,” *id.* at 2424, to a remedial question that the majority had rendered moot. It is difficult to reconcile such an excursus with Justice Thomas’s notion that the proper role of an Article III judge is to speak to legal issues only insofar as necessary to resolve individual cases.

⁵²² Cf. *id.* at 2427–28 (“If their injunctions advantaged nonparties, that benefit was merely incidental.” *Id.* at 2427. “[A] plaintiff could not sue to vindicate the private rights of someone else.” *Id.* at 2428.).

⁵²³ *Id.* at 2428.

⁵²⁴ *Smyth v. Ames*, 169 U.S. 466, 517 (1898).

⁵²⁵ *Id.* at 518.

only for their substance and their vintage, but also for their authorship: they were the work product of Supreme Court Justices who had been practicing lawyers in an era when equity was a living, flourishing thing. The names of men like Justice Brewer or Justice McReynolds or even Justice Harlan may not be covered with glory today. But those Justices surely knew how to “set up a bill,” what made a bill “multifarious,” the difference between “a bill in the nature of a supplement” and “a bill in the nature of a revivor,” and so on, because they were elevated to the Court after careers in practice at a time when that kind of knowledge would have been indispensable. The treatise writers whose words the Court today consults with such deference as to the nature of equity — for example, Maitland or Pomeroy (both the father and the son) — were those Justices’ contemporaries,⁵²⁶ and Justice Story was still *living* when some of them were born.⁵²⁷ In short, there is no particular reason to think that Justice Thomas — rather than these earlier Justices, who were rendering decisions much earlier in this country’s history and who were far more familiar with the workings of equity in practice — is today correct in his estimation of the outer scope of the equitable power.⁵²⁸

⁵²⁶ John Norton Pomeroy (1828–1885); Justice Harlan I (1833–1911); Justice Brewer (1837–1910); Frederic Maitland (1850–1906); Justice McReynolds (1862–1945); John Norton Pomeroy, Jr. (1866–1924). See *Timeline of the Justices*, SUP. CT. HIST. SOC’Y, https://supremecourthistory.org/history_timeline.html [<https://perma.cc/ZLP3-B7DA>]. See generally FREDERIC WILLIAM MAITLAND, *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* (H.A.L. Fisher ed., 1911) (three volumes); JOHN NORTON POMEROY & JOHN NORTON POMEROY, JR., *POMEROY’S EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES* (Spencer W. Symons ed., 5th ed. 1941) (1881) (containing six volumes, with four authored by the elder Pomeroy and two authored by his son).

⁵²⁷ Justice Story lived from 1779 to 1845. See *Timeline of the Justices*, *supra* note 526.

⁵²⁸ Justice Thomas cites JOSEPH STORY, *COMMENTARIES ON EQUITY PLEADINGS* § 72, at 61 (London, A. Maxwell 1838), for the “general rule” that “all persons materially interested . . . in the subject-matter of a suit, are to be made *parties* to it . . . , however numerous they may be, so that there may be a complete decree, which shall bind them all,” *Trump v. Hawaii*, 138 S. Ct. at 2427, as well as STORY, *supra*, § 120, at 100, for the notion that “such suits were ‘always’ based on ‘a common interest or a common right,’” *Trump v. Hawaii*, 138 S. Ct. at 2427. But Justice Story also said that such a suit could be brought “where the parties are very numerous, and though they have, or may have, separate and distinct interests,” JOSEPH STORY, *COMMENTARIES ON EQUITY PLEADINGS* § 97, at 119 (Boston, Charles C. Little & James Brown, 3d ed. 1844), <https://babel.hathitrust.org/cgi/pt?id=hvd.32044058146481&view=1up&seq=157> [<https://perma.cc/GNB6-9YPV>], and anyway, quoting Lord Cottenham, he urged that courts abjure “too strict an adherence to forms and rules established under very different circumstances,” *id.* § 135(a), at 170; see also *West v. Randall*, 29 F. Cas. 718, 723 (Story, Circuit Justice, C.C.D.R.I. 1820) (No. 17,424) (“The principle, upon which all these classes of cases stand, is, that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or *grant it without making other persons parties*; and the latter it deems the least evil, as *it can consider other persons as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeopardized*. Of course, the principle always supposes, that the decree can, as between the parties before the court, be fitly made, without substantial *injury* to third persons. If it be otherwise, the court will withhold its interposition.” (emphasis added)); 1 JOHN NORTON POMEROY, *POMEROY’S EQUITY JURISPRUDENCE & EQUITABLE REMEDIES* § 260, at 456–57 (Bancroft-Whitney Co., 4th ed. 1918) (1881), <https://archive.org/stream/>

On the other hand, of course, the goal may *not* be to preserve the ontological essence of judicial power or to resurrect the traditional limits on the extent of equitable relief, but instead to cabin those powers and to dilute them into something weaker, because of considerations that fundamentally have nothing to do with either the intrinsic nature of the Article III judicial power or with the kinds of equitable remedies historically afforded in the federal courts.⁵²⁹ If that is the case, we should be candid about the fact that such an effort is fundamentally a policymaking enterprise, a project of law *reform*, not one of constitutional restoration. Again, broader debates about constitutional law come to mind.

Either way, one point should by now be obvious: we are a long way from knowing all of the relevant history of the equitable power, of which this Article has only begun to scratch the surface. It is taxing to find these decrees, in part because their full text is generally not reproduced in the court opinions collected in electronic databases such as Westlaw or LexisNexis; it is still more challenging to assess how they were understood and received. Even for cases as “recent” as the 1910s, I have been able to examine here only a sub-subset of federal court injunctions within the small subset of cases that ultimately reached the Supreme Court, because only within that small subset was the text of the underlying injunctions (somewhat) accessible. There are pertinent district court injunctions of federal laws with *no* opinions accompanying them from as late as the 1930s that can be obtained only by bespoke requests to the National Archives,⁵³⁰ and other decrees that seem impossible to

equityjurisprudeoripome?ref=ol#page/456 [https://perma.cc/V56J-RYQ7] (“[T]here is no pretense of any privity, or existing legal relation, or common property or other right, among the plaintiffs individually, or between them as a body and the defendant. There is no common right of the single adversary party against them all, as is found in the case of a parson against his parishioners for tithes, or of the lord of a manor against his tenants for a general fine, or for certain rights of common; nor is there any common *right* or interest among them against their single adversary. The only community among them is in the questions at issue to be decided by the court; in the mere external fact that all their remedial rights arose at the same time, from the same wrongful act, are of the same kind, involve similar questions of fact, and depend upon the same questions of law. This sort of community is sufficient, in the opinion of so many and so able courts, to authorize and require the exercise, under such circumstances, of the equitable jurisdiction, in order to prevent a multiplicity of suits.” (footnote omitted)).

⁵²⁹ See *Trump v. Hawaii*, 138 S. Ct. at 2425 (“These injunctions are beginning to take a toll on the federal court system — preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.”).

⁵³⁰ As this Article was nearing completion, I was able to obtain a copy of a preliminary injunction issued with respect to the Bankhead Cotton Control Act, Pub. L. No. 73-169, ch. 156, 48 Stat. 598 (1934). In *Wallace v. Thomas*, No. 152 in Equity (E.D. Tex. 1935), a single district court judge, in an Equity Rule 38 suit, preliminarily enjoined the enforcement of this statute *statewide* (not just district-wide), conditional on the posting of a \$100,000 injunction bond. See Order Granting Temporary Injunction at 3–4, *Wallace* (No. 152 in Equity) (filed July 19, 1935) [https://perma.cc/YM2X-PTY8]. The district court’s order granted to “the plaintiffs, D.C. Wallace, Texas Cotton Ginners Association, a corporation, and every cotton ginner in the State of Texas” an injunction against the collection of taxes under the Act and against enforcement of the Act’s requirements. *Id.* at 3

obtain at all. Can we reach any firm conclusions about whether or not such injunctions barred enforcement against nonplaintiffs simply by drawing an inference from Justice Jackson's *failure* to criticize specifically their universality?⁵³¹ As explained above, the scope of the injunction was not as salient an attribute then as it has today become; to paraphrase something that Justice Jackson *did* say elsewhere, "the matter [of the universal injunction] does not appear to appear to [us] now as it appears to have appeared to [us] then."⁵³² And, to take a jump back, were there injunctions between *Marbury v. Madison*⁵³³ and *Reagan v. Farmers' Loan & Trust Co.*⁵³⁴ that protected plaintiffs from actions by nonparties or restrained defendants from acting *against* nonparties? That history, it seems, is yet to be written.

To those to whom history matters, this history should matter. But it is also worth asking *how much* this history should matter. All of this

(emphasis added). It also enjoined "the respective United States district attorneys for the Eastern, Northern, Southern, and Western Districts of Texas" from prosecuting any proceedings "against each of said cotton ginner, or any of them." *Id.* at 3-4; see CUMMINGS REPORT, *supra* note 513, at 38 ("The effect of this injunction was to tie up the entire cotton crop of the State of Texas."). A full exposition of *Wallace* must be deferred; for now, it is worth underscoring that a district court judge here temporarily enjoined federal officers from outside the district. None of the federal defendants in *Wallace* had nationwide authority. See Order Granting Temporary Injunction, *supra*, at 3 (listing the defendants).

⁵³¹ Cf. Bray, *supra* note 2, at 434-35 (citing JACKSON, *supra* note 463, at 115, 123). Note that Justice Jackson's book, published the year he was confirmed to the Supreme Court (1941), does not mention the universal injunction in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), a case that he had just helped to litigate at the Supreme Court as Attorney General. Bray also describes the Cummings Report as a "dog that didn't bark: if the district courts had been issuing national injunctions, the silence of the report would be inexplicable." Bray, *supra* note 2, at 435. But the report's silence may have other explanations. The precise scope of an injunction may not have been as salient a fact in that period, when the federal government was anyway seemingly unwilling to continue to enforce laws in various districts when they were met with rulings of unconstitutionality and injunctions of individual prosecutions. See *id.* at 435 n.94; see also CUMMINGS REPORT, *supra* note 513, at 37 (describing three injunctions against the Ashurst-Sumners Act, Pub. L. No. 74-215, ch. 412, 49 Stat. 494 (1935) — decrees issued by a single federal judge in the Middle District of Tennessee *in suits in which the federal government appeared only as amicus curiae* — as injunctions "which virtually had the effect of suspending the operation of the statute [for] over a year"). Injunctive scope may also have been less salient if actors within our legal system were by then familiar with, or untroubled by, injunctions that reached beyond the plaintiffs; universal injunctions haven't always been as noteworthy as they are nowadays. Cf. Bray, *supra* note 2, at 439 ("*Wirtz* seems to have been a pebble that sunk without causing any ripples: no subsequent cases noted the scope of the remedy in *Wirtz*"). Finally, the report is a snapshot in time, not a full overview of how all suits against federal government action in this period were concluded; many suits were still pending at the time the report was written. In short, without examining the decrees that ultimately issued, it is perilous to draw any firm inferences from the Cummings Report as to the (non)existence of injunctions reaching beyond the plaintiffs.

⁵³² *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) ("The matter does not appear to appear to me now as it appears to have appeared to me then." (quoting *Andrews v. Styrap*, [1872] 26 LT 704, 706 (Bramwell, B.) (Eng.))).

⁵³³ 5 U.S. (1 Cranch) 137 (1803).

⁵³⁴ 154 U.S. 362 (1894); see *supra* pp. 937-39.

concern about history comes from the fact the Court has said that the federal courts have only those equitable remedial powers authorized by “the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”⁵³⁵ But that statement, if taken literally, is a patently incomplete description of how our legal system now operates, or for that matter, of how it has operated for over a century. Unlike the chancellor, who derived his authority from the Crown and could not enjoin the Crown,⁵³⁶ a federal court can issue a binding injunction against an officer of the executive branch to prevent her from enforcing a law against the plaintiff.⁵³⁷ Where does this power come from? On the strict view that equity power means what it meant in 1789, this power is itself a troublesome invention.⁵³⁸ Officer suits to remedy traditional common law torts (such as trespass) have long been available against state and federal officers,⁵³⁹ but the filing of a lawsuit by the sovereign is not a tort of a traditional kind.⁵⁴⁰ The antisuit injunction against enforcement made famous in *Ex parte Young* was heralded as an

⁵³⁵ Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).

⁵³⁶ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (“As an agent of the King, the Chancellor had no authority to enjoin him. . . . The Chancellor could not give ‘any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee.’ . . . The Attorney General could be sued in Chancery, but not in cases that ‘immediately concerned’ the interests of the Crown. . . . American courts inherited this tradition.” (citations omitted)); Bray, *supra* note 2, at 425 (“In English equity before the Founding of the United States, there were no injunctions against the Crown.”).

⁵³⁷ See, e.g., *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 183–84 (1938) (holding that railway was entitled to sue for an injunction against federal officers to restrain prosecution for violation of federal law); *Miguel v. McCarl*, 291 U.S. 442, 455–56 (1934) (enjoining federal officers from withholding retired military pay and allowances); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110–11 (1902) (enjoining the Postmaster General from withholding mail).

⁵³⁸ Broadening the frame to include *common law* remedial mechanisms illuminates a much longer tradition of broad-scale relief against illegal official action. See James E. Pfander & Jacob Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. (forthcoming 2020) (manuscript at 8) (on file with author) (“A jurisprudence of constitutional remedies that measures the legitimate scope of modern federal equity by looking to the practices of the High Court of Chancery, circa 1789, will capture only a partial view of the remedies available to suitors in the early republic. More troubling[,] it may deprive equity of its characteristic ability to adapt to changes in the remedial system as a whole.”).

⁵³⁹ See, e.g., *United States v. Lee*, 106 U.S. 196, 239–49 (1882) (reviewing case law on officer suits); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 859, 870–71 (1824) (affirming decree against state officers directing restitution of unlawfully taxed funds taken from federal bank).

⁵⁴⁰ See *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 273 (1997) (Kennedy, J., joined by Rehnquist, C.J.) (“[T]he significance of *Young* . . . lies in its treatment of a threatened suit by an official to enforce an unconstitutional state law as if it were a common-law tort.” (emphasis added)); *Ex parte Young*, 209 U.S. 123, 192 (1908) (Harlan, J., dissenting) (“There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.”).

innovation precisely because it used “a traditional tool of equity”⁵⁴¹ — the antisuit injunction — in a highly nontraditional way: to bar the bringing of an enforcement action, which is to say, the *nontortious* filing of a complaint by an attorney general of a state.⁵⁴² We may feel comfortable that a *Young*-type injunction against an officer does not offend sovereign immunity,⁵⁴³ but that still leaves the separate difficulty that on a stringently originalist understanding of equity, American federal courts at the Founding did *not* use the antisuit injunction against enforcement by an officer. Nor can *Marbury* offer any help, if we are committed to staying within the four corners of equity-as-it-was-at-the-Founding. In *Marbury*, the Court treated mandamus as a proper remedy against a federal officer⁵⁴⁴ — but mandamus is a legal and not an equitable remedy,⁵⁴⁵ and mandamus is a far more constrained remedy than the injunction.⁵⁴⁶ In 1893, in *Noble v. Union River Logging Railroad*,⁵⁴⁷ the Court treated the availability of mandamus as logically *entailing* the power to issue an injunction against a federal officer to stop him from acting *ultra vires*.⁵⁴⁸ But two things stand out about that case and its date of decision. One, it was evidently not a well-settled rule *even in* 1893 that such an injunction could in fact issue as to a federal officer.⁵⁴⁹ Two, if it was in *Noble* that

⁵⁴¹ Harrison, *supra* note 145, at 989.

⁵⁴² Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1642 (1997) (“The significance of *Young* lies . . . in its expansion of this suit form [that is, suing a government official] to cases in which plaintiff lacked a common-law action against the defendant as an individual, and sued the defendant *as* an official or *because of* defendant’s official status . . .”).

⁵⁴³ See Harrison, *supra* note 145, at 996–1008.

⁵⁴⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 139 (1803).

⁵⁴⁵ 3 WILLIAM BLACKSTONE, COMMENTARIES *110 (“A writ of mandamus is in general a command issuing in the king’s name *from the Court of King’s Bench*, and directed to any person, corporation, or inferior court of judicature within the king’s dominions, requiring them to do some *particular* thing therein specified which appertains to their office and duty, and which the Court of King’s Bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ . . .” (first emphasis added)); see also FALLON ET AL., *supra* note 47, at 940 (noting availability of “the usual common law remedies” and of “the prerogative writs . . . that were issued by the King’s Bench”).

⁵⁴⁶ *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 304 (1854) (“[T]he only acts to which the power of the courts, by *mandamus*, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer; but that, wherever the right judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise.”).

⁵⁴⁷ 147 U.S. 165 (1893).

⁵⁴⁸ *Id.* at 171–72 (“We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.”).

⁵⁴⁹ The now-canonical citation is the 1902 case of *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). Indeed, the Court was still having to explain the basis of its injunctive powers against federal officers in 1912 by analogy to cases involving personal liability of officers and injunctions against state officers. See *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–20 (1912)

the power to enjoin a federal agency official from an ultra vires act was first actually affirmed by the Court (as at least one commentator has claimed⁵⁵⁰), then that would mean that the pedigree of the injunction against a federal officer to halt ultra vires action *full-stop* is not all that much longer than the pedigree of the injunction that reached beyond the parties; the sweeping injunctions against state and federal laws described above followed shortly after *Noble*.

The point is that the strict original meaning argument about Article III cuts too far. Rewinding the power of federal courts over cases in equity to 1789 would eliminate more than just the *universal* injunction. It would deposit us back in an era in which as *an Article III matter* a federal court *could* offer common law remedies against a federal officer and *could* issue writs of mandamus to a federal officer to perform “purely ministerial” duties, but could *not* issue a *Young*-type injunction that would bar a federal officer from bringing suit to enforce an unconstitutional law and could *not* issue an injunction that would stop him from acting ultra vires.⁵⁵¹ The upshot would be a kind of remedial crazy-quilt rejected as hair-splitting and formalistic even by the famously formalistic justices of the Fuller Court.⁵⁵²

Conversely, however, if one accepts that purely plaintiff-protective injunctions against enforcement suits by federal officers are today constitutionally legitimate, then one has accepted that — by precedent or “gloss” or “liquidation” — federal courts can go beyond what chancery courts did in England at the time of the Founding.⁵⁵³ And once one is at that point, then what sense is there in drawing a line *based on adherence*

(“The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.” (citations omitted)); *see also* Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 296 (1948) (describing the utility of the writs of mandamus and the injunction as “slight” through the late nineteenth century because of the courts’ reluctance to intervene in discretionary decisionmaking by executive officers).

⁵⁵⁰ *See* Lee, *supra* note 549, at 298 n.31 (identifying *Noble* as the case in which an “injunction was first granted to review administrative action”). For the reasons just reviewed, we should of course take such claims with the appropriate amount of salt.

⁵⁵¹ *See supra* pp. 1003–05.

⁵⁵² *See Ex parte Young*, 209 U.S. 123, 166–68 (1908); *Noble*, 147 U.S. at 171; *see also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 972 (2019) (“Since the emergence of the modern regulatory state, the greatest threat to constitutional rights comes from statutes and regulations that are enforceable through criminal and civil penalties, not isolated acts of traditionally tortious lawlessness by individual officials.”).

⁵⁵³ Other cornerstone federal courts doctrines — for example, the political question doctrine — similarly have pedigrees that cannot be traced to the Founding. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1971 (2015).

to original meaning between plaintiff-protective injunctions and injunctions that reach beyond the plaintiffs? At least in public law cases against federal defendants, the ship of strict original meaning sailed away long ago; in such cases, we are all — we all surely must be — no more than “faint-hearted originalists” when it comes to the meaning of Article III.⁵⁵⁴

There are certainly policy problems with the universal injunction against federal law. But these policy problems do not rise to the level of constitutional obstacles, and the Article III objection should be retired. Moreover, when considering how to deal with these policy problems, it is incumbent on critics of the universal injunction — including members of Congress and Supreme Court Justices — to be cognizant of how much they may be disturbing, not restoring, when they call for sharp substantive limits on the equity power of Article III courts. It is surely no coincidence that the pedigree of the injunction reaching beyond the parties extends back to the same period as when constitutional judicial review first matured into the regime recognizable as the one we today live under: a regime of routinized federal court review of the legality of official action.⁵⁵⁵

In a *Zelig*-like way,⁵⁵⁶ that remedy has repeatedly popped up in the background as the federal courts gradually cemented the framework of judicial safeguards that undergirds modern public law. In the era in which the federal courts first took up the task of protecting property

⁵⁵⁴ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). It is noteworthy that in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), none of the Justices adopted a rigidly originalist methodology. Writing for the Court, Justice Scalia relied not only on (a) what English courts did in 1789, but also on (b) the consistent denial of *Mareva*-type injunctive relief by federal and state courts throughout the twentieth century, and on (c) the fact that a *Mareva*-type injunction would alter not merely procedural rights, but the substantive rights of creditors relative to debtors. *Id.* at 322–33. If we treat *Grupo Mexicano* as “methodological” precedent, then the universal injunction should pass muster: first, the universal injunction has a longer lineage than the *Mareva*-type injunction; second, it has not been consistently rejected by federal courts; and third, it does not alter the balance of *substantive* rights between plaintiffs and the federal government (although — like an injunctive class action — it does enable the efficient vindication of those substantive rights). Other cases supply additional methodological support for consulting nineteenth- and twentieth-century practice to determine the meaning of equity. See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1015 (2015) (noting that in four cases in the last two decades, the Court has cited as authority “treatises, including one as recent as” 1993; “equitable decisions, typically its own decisions from the nineteenth century or the early twentieth century”; and “occasionally . . . more recent decisions,” and observing that “the bulk of the authorities . . . came from the middle and late nineteenth and early twentieth centuries”); *id.* at 1022 (“The Court is gathering its equitable rules from when those rules were most systematically expounded.”). The *Grupo Mexicano* dissent endorsed an approach that would comprehend the “grand aims” of equity, not just the precise suite of tools utilized in 1789; the universal injunction fits comfortably within those aims, with room to spare. *Grupo Mexicano*, 527 U.S. at 342 (Ginsburg, J., dissenting).

⁵⁵⁵ See WHITTINGTON, *supra* note 83, at 256 (recounting how “the power of judicial review took on its modern form”). I am grateful to Professor Nicholas Parrillo for his thoughts on this point.

⁵⁵⁶ See ZELIG (Orion Pictures 1983).

rights from novel forms of state legislative power, they issued injunctions that extended beyond the parties in the cases before them.⁵⁵⁷ As the federal government experimented with new forms of economic regulation, the Supreme Court itself issued injunctions that shielded nonplaintiffs (including a nationwide universal injunction) in the course of resolving the legality of these new laws.⁵⁵⁸ When the states later enacted laws that interfered with constitutional rights or interstate commerce, the federal courts used injunctions that reached beyond the plaintiffs to shield them from those state enactments, including a universal injunction in a decision — *Pierce* — that remains a touchstone precedent to this day.⁵⁵⁹ As the Court turned to the task of building modern civil liberties jurisprudence, it again approved of injunctions barring the enforcement of local or state laws with respect to nonplaintiffs in *Hague* and *Barnette*.⁵⁶⁰ In recent years, federal courts have with increasing frequency issued injunctions against the federal executive branch that reach well beyond the plaintiffs, both to shield constitutional rights and to defend rights that sound in statutory law and administrative procedure. These cases have been pressed by ideologically diverse sets of plaintiffs, but they are linked in that they all aim to check the power of an increasingly muscular “presidential administration” — a task that, at least in certain contexts, neither Congress nor internal executive branch mechanisms have proved particularly effective at accomplishing.

Across this history — our American history of American federal courts shielding American rights — the injunction that reaches beyond the plaintiffs has played its unacknowledged role. The power to offer this particular remedy may today appear to be logically divisible and neatly severable from other exercises of judicial power. But the authority to provide a meaningful remedy is important, both functionally and symbolically, for the federal courts’ ability to pronounce robust constitutional or legal norms, to ensure adequate checks on government at both the state and federal level, and thus to secure the rule of law in a constitutional democracy.⁵⁶¹ When the prerogative of federal courts to afford remedies is reduced, their capacity to perform these duties concomitantly erodes.⁵⁶²

⁵⁵⁷ See *supra* Part II, pp. 935–43.

⁵⁵⁸ See *supra* Part III, pp. 943–58.

⁵⁵⁹ See *supra* Part IV, pp. 958–82.

⁵⁶⁰ See *supra* pp. 987–91.

⁵⁶¹ Cf. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787 n.304 (1991) (“The provision of constitutional remedies also promotes respect for the values underlying constitutional norms by demonstrating society’s seriousness about their enforcement.”).

⁵⁶² See Levinson, *supra* note 70, at 904 (explaining that not only is “a right without a remedy . . . worthless, but also . . . a right with less remedy is worth *less*[,] and a right with more remedy is worth *more*”).

By laying stress on these points, I do not mean to advance the proposition that Article III would bar Congress from remedy-stripping the federal courts in the manner that it has recently been considering.⁵⁶³ It would be irresponsible to portentously cast the materials canvassed here as proving that the universal injunction against state or federal law is a constitutionally *obligatory* remedy, and that is therefore not my claim. Indeed, my concern about history flows not so much from the impulse to inscribe a particular historical practice into the Constitution as it does from the worry that we risk allowing selectively crafted conceptions of historical tradition to run away with us.⁵⁶⁴

CONCLUSION

Critics of the universal injunction have staked their claims not only on policy, but also on history, tradition, and Article III. Modern-day narratives unfavorably compare today's "overreach[ing]"⁵⁶⁵ federal judges to their imagined predecessors, who adhered faithfully to some posited set of "historical limits on equity and judicial power"⁵⁶⁶ by limiting their injunctions only to the plaintiffs. But any discussion about eliminating the judicial power to issue injunctions that shield nonparties must be founded on an accurate understanding of the history of such injunctions and on a correct apprehension of the jurisprudential understandings and procedural mechanisms that have shaped the wielding of the equitable power by federal courts.

The contribution of this Article has been to supply some of that necessary account and to draw from it a more complete portrayal of the Article III judicial power. The lynchpin of the *constitutional* case against the universal injunction is that the federal judges who issue such injunctions today are departing from a "longstanding"⁵⁶⁷ historical tradition in which the federal courts uniformly confined relief to plaintiffs and desisted from making pronouncements on "general questions

⁵⁶³ See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953) (Hart's "Dialogue") (stating that Congress has a "wide choice in the selection of remedies" and may deny a particular remedy when alternative remedies exist). Congress might also, holding its nose, find some support in *Yakus v. United States*, 321 U.S. 414, 441–42 (1944), which upheld statutory restrictions on the issuance of injunctions in part because the statute did "only what a court of equity could have done, in the exercise of its discretion to protect the public interest," *id.* at 441, and because "[t]he legislative formulation of what would otherwise be a rule of judicial discretion [was] not a denial of due process or a usurpation of judicial functions," *id.* at 442.

⁵⁶⁴ Shapiro, *supra* note 147, at 88 ("[W]e tend to see that reality [of the past] through the prism of our own preferences, especially when we are using the past to support an argument about how to deal with the present.").

⁵⁶⁵ Statement on Sanctuary Cities Ruling, *supra* note 15; see also *Karnoski* Stay Application, *supra* note 11, at 21, 27.

⁵⁶⁶ *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).

⁵⁶⁷ *Id.* at 2425 (referencing "longstanding limits on equitable relief and the power of Article III courts").

of legality.”⁵⁶⁸ But the injunction restraining the enforcement of laws with respect to nonparties has a richer lineage than present-day discourse reflects. In no small part because that history has been forgotten, federal legislators have proposed to strip the federal courts of the power to issue injunctions that protect nonplaintiffs except in Rule 23 class suits; executive branch lawyers have cast the universal injunction as an “abuse” of judicial power; and Justice Thomas has argued that injunctions reaching beyond the plaintiffs exceed the powers of an Article III court. Many voices now advocate for the rule that a federal court should never issue an injunction that shields anyone other than the plaintiff. But the burden should be high to show that such a rule consistently marked the outer boundaries of the judicial powers of a federal court in equity, or that such a rule must today command how we think about what is permitted or forbidden by a constitutional provision as sensitive and fundamental as Article III. That burden has not been borne.

⁵⁶⁸ *Id.* at 2428 (“By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality . . .”).