DISAGGREGATING THE HISTORY OF NATIONWIDE INJUNCTIONS: A RESPONSE TO PROFESSOR SOHONI

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INTRODUCTION

One of the most important issues in the ongoing controversy over nationwide injunctions is whether Article III of the U.S. Constitution allows federal courts to issue them. Scholars debate whether a plaintiff has standing to seek, and a federal court has power to issue, an injunction specifically crafted to protect the rights of third-party nonlitigants—many of whom are invariably outside the court's jurisdiction—when doing so is unnecessary to protect the rights of the plaintiffs before the court.[1]

In a recent article in the *Harvard Law Review* entitled *The Lost History of the "Universal" Injunction* (hereafter, "*Lost History*"), Professor Mila Sohoni contends that the "Article III objection to the universal injunction should be retired" because "Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century."[2] Her article discusses fifteen main examples of cases from various federal courts from between 1894[3] and 1943[4] in which she contends that "nationwide" or "universal" injunctions were issued. All of these cases predate the U.S. Court of Appeals for the D.C. Circuit's ruling in *Wirtz v. Baldor Electric Co.*,[5] which is sometimes identified as the first known nationwide injunction.[6] Based on these examples, *Lost History* concludes that the Article III judicial power "includes the power to issue injunctions that protect those who are not plaintiffs" in a case, including nationwide injunctions,

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1. *Compare* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 471–72 (2017), *and* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 523–27 (2016), *with* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1090 (2018).

2. Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020).

3. *See* Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362 (1894), *discussed in* Sohoni, *supra* note 2, at 937–39.

4. *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *discussed in* Sohoni, *supra* note 2, at 989–91.

5. 337 F.2d 518 (D.C. Cir. 1963).

6. Sohoni, *supra* note 2, at 943, 982, 992 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring); Bray, *supra* note 1, at 438).

and that arguments to the contrary constitute "a sharp departure from precedent."[7]

Before responding to *Lost History*, a quick note on terminology is in order. The terms "nationwide injunction" and "universal injunction," despite their ubiquity, are ambiguous. These concepts embrace up to five different categories of orders, each raising distinct jurisdictional, rule-based, fairness-related, prudential, and structural concerns.[8] These categories include:

- **Plaintiff-Oriented Injunction**—An order in a nonclass case prohibiting the defendant from enforcing a challenged legal provision against the plaintiff or plaintiffs before the court, regardless of where such violations occur.
- **Plaintiff-Class Injunction**—An order prohibiting the defendant from enforcing a challenged legal provision against any members of a plaintiff class that includes all right holders within a particular geographic area, potentially including the entire nation.
- **Associational Injunction**—An order in a case brought by a plaintiff entity asserting associational standing on behalf of its members that prohibits the defendant from enforcing a challenged legal provision against anyone, potentially anywhere in the nation.
- **Defendant-Oriented Injunction**—An order in a nonclass case brought by individuals or entities asserting organizational standing that prohibits the defendant from enforcing a challenged legal provision against anyone, potentially anywhere in the nation, including third-party nonlitigants, when doing so is unnecessary to protect the rights of the plaintiffs before the court.
- **Private Enforcement Injunction**—An order attempting to prohibit all potential plaintiffs throughout a designated area, potentially including the entire nation, from bringing a private right of action under a challenged legal provision against a particular person or entity.[9]

The type of nationwide or universal injunction at the heart of most debates over the issue may be referred to as a defendant-oriented injunction—the fourth category set forth above. A defendant-oriented injunction is an order issued in a nonclass case that completely prohibits the government defendants from enforcing the challenged legal provision against anyone, anywhere—including third-party nonlitigants who may be outside the court's geographic jurisdiction—when doing so is unnecessary to protect the rights of the plaintiffs before the court.[10] This is the type of order that *Lost History* seeks to defend.[11]

7. *Id.* at 927–28.

8. Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 9–10 (2019) (proposing a taxonomy to distinguish among the five types of nationwide injunctions).

9. *Id.*

10. *Id.*; *see also* Morley, *supra* note 1, at 490–91.

11. Sohoni, *supra* note 2, at 922.

This Article will use the term defendant-oriented injunction to avoid conflating such orders with other types of nationwide or universal injunctions.

This Article demonstrates that the Article III objection to defendant-oriented injunctions, nationwide and otherwise, survives *Lost History*'s critique for three main reasons. Part I explains that the only case discussed in *Lost History* in which the Supreme Court expressly addressed the validity of nationwide defendant-oriented injunctions, *Perkins v. Lukens Steel Co.*,[12] rejected them. *Perkins*'s express consideration of such orders carries far greater weight than the inferences that *Lost History* invites readers to draw from a small group of other cases that do not analyze the issue or assess potential Article III considerations.

Part II shows that only four of the cases *Lost History* discusses (including *Perkins*) actually involve defendant-oriented injunctions.[13] Most of the other orders it cites, in contrast, have materially different characteristics and are properly classified in distinct categories within the taxonomy summarized above. They do not support the notion that early twentieth-century federal courts issued broad nationwide or statewide defendant-oriented injunctions aimed at enforcing the rights of third-party nonlitigants.

Part III demonstrates that, even treating all fifteen of *Lost History's* orders as relevant examples, they do not suggest that the Supreme Court has historically embraced universal or defendant-oriented injunctions. In nearly all of the cases that *Lost History* relies upon, the scope of the orders was neither contested by the parties nor expressly considered or addressed by the Supreme Court. To the contrary, in several cases, the government either explicitly or implicitly agreed to the requested relief on an interim basis, alleviating the need for the Court to consider their propriety. In others, the Court either affirmed the lower court's judgment in a terse per curiam opinion as short as a single sentence, or reversed the district court's merits ruling, eliminating its opportunity to consider remedial issues. Additionally, for most of the cases involving challenges to state legal provisions, the scope of injunctive relief was largely irrelevant as a practical matter, rendering potential technical violations of Article III academic. Little, if anything, can be gleaned from a handful of cases in which a trial court issued a broad injunction without explanation, and its scope was neither contested, expressly addressed by the Supreme Court, nor of any practical consequence.

Thus, the limited number of nationwide defendant-oriented injunctions that *Lost History* cites does not suggest that the Supreme Court either approved of their use or that the federal judiciary had a practice of issuing such orders in the early twentieth century.

12. 310 U.S. 113, 131 (1940), *superseded by statute*, 5 U.S.C. § 702.

13. *See infra* note 29.

I. NATIONWIDE DEFENDANT-ORIENTED INJUNCTIONS AND THE SUPREME COURT

Lost History invites the reader to draw inferences about the federal judiciary's position in the early twentieth century concerning the Article III validity of defendant-oriented injunctions primarily from federal courts' actions in cases in which the parties did not litigate the proper scope of relief.[14] As discussed later, in many of these cases, the government was willing to voluntarily refrain from enforcing the challenged legal provisions against anyone until the Supreme Court reviewed their validity.[15] And the scope of the injunctions in many other cases made no practical difference under the circumstances, regardless of any technical Article III problems with the courts' orders.[16] In contrast, in the only case that *Lost History* discusses in which the Supreme Court expressly grappled with the proper scope of relief, *Perkins v. Lukens Steel Co.*, the Court repeatedly expressed Article III objections to nationwide defendant-oriented injunctions.[17]

In *Perkins*, the Secretary of Labor had issued an order setting the minimum wage that federal contractors were required to pay iron and steel workers in a particular region of the nation.[18] Seven steel companies challenged the order. The D.C. Circuit held that the region the Secretary had designated was too broad and issued a preliminary injunction prohibiting him from enforcing the wage order against anyone.[19]

On appeal, the Supreme Court framed the issue primarily in terms of the scope of the injunctive relief that the plaintiffs had sought:

> 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*.[20]

The Court later re-emphasized that the seven plaintiffs "did not merely pray relief for themselves against the Secretary's wage determination," but rather sought to restrain the government from mandating that minimum wage in its contracts "with any other steel and iron manufacturers throughout the United States."[21]

14. *See infra* Part III.
15. *See* Sohoni, *supra* note 2, at 946 & n.175, 948 & n.190, 955 & n.229.
16. *See infra* notes 118–131 and accompanying text.
17. 310 U.S. at 120–23, 129.
18. *Id.* at 116–17.
19. Sohoni, *supra* note 2, at 984.
20. *Perkins*, 310 U.S. at 117 (emphasis added).
21. *Id.* at 120–21.

The Court concluded that such a sweeping injunction exceeded the bounds of "any controversy that might have existed between the complaining companies and the Government officials."[22] It explained that the lower court's order prohibited the government from applying the challenged order "to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief."[23] The Court further held that the plaintiffs lacked standing to challenge the Secretary's wage determination, pointing to the plaintiffs' request that the order "be suspended as to the entire steel industry."[24] Article III did not empower particular iron and steel companies to enforce the rights of the public at large or to have an administrative action completely invalidated as to the world.[25]

Lost History attempts to downplay *Perkins*'s significance. It points out that the plaintiffs would have lacked standing under the Court's reasoning, even if they had sought a narrower injunction enforcing only their own rights.[26] But that analysis does not account for the other, independent aspects of the Court's ruling. The Court expressly declared that the plaintiffs' request for industry-wide relief went beyond the scope of the Article III controversy before the Court. And it identified one of the main issues before the Court as whether a federal court may enjoin executive officials from enforcing an order "not merely" as to the litigants before it, but rather an entire industry. Thus, *Perkins* cannot be cabined in the manner *Lost History* suggests. Rather than bolstering the article's thesis, the case demonstrates that the Supreme Court has consistently rejected nationwide defendant-oriented injunctions[27]—including in challenges to administrative agency action—as far back as 1940.

II. DISAGGREGATING THE HISTORY OF NATIONWIDE INJUNCTIONS

Most of the orders that *Lost History* analyzes are not the type of defendant-oriented injunctions at the heart of ongoing debates over nationwide or universal injunctions. Rather, they have materially different features and are properly classified in distinct categories. Accordingly, most of the examples presented in *Lost History* do not bolster its thesis that nationwide or universal injunctions have a "more venerable lineage than heretofore recognized."[28]

22. *Id.* at 123.
23. *Id.*
24. *Id.* at 129.
25. *Id.*
26. Sohoni, *supra* note 2, at 986.
27. *See also* Morley, *supra* note 8, at 28–29 nn.148–50 (citing cases).
28. Sohoni, *supra* note 2, at 924.

Of the fifteen injunctions that *Lost History* examines, only four qualify as defendant-oriented or universal injunctions.[29] The Supreme Court expressly overturned one of those orders in *Perkins v. Lukens Steel Co.*[30] The government had consented to another in *Journal of Commerce & Commercial Bulletin v. Burleson*, alleviating the need for the Court to consider its propriety.[31] And the other two were statewide defendant-oriented injunctions against state laws. Their scope was not contested before the Court, not expressly addressed by the Court, and under the circumstances of those cases, irrelevant as a practical matter.[32] Thus, even *Lost History*'s strongest examples provide scant support for the notion that federal courts in the early twentieth century viewed defendant-oriented injunctions as consistent with Article III.

The remainder of this Article will proceed through each part of *Lost History*, discussing the examples presented there. The orders that *Lost History* analyzes throughout its Part II appear to be traditional—and completely appropriate—plaintiff-oriented injunctions, tailored to enforcing only the rights of the particular plaintiffs before the court.[33] In *Reagan v. Farmers' Loan & Trust Co.*, railroad shareholders sued the Texas Attorney General and state railroad commissioners on the railroad's behalf to enjoin them from enforcing certain rates the commission had issued.[34] The district court entered a broad injunction prohibiting those state officials, as well as "all other individuals, persons, or corporations," from suing that particular railroad for violating either the commission's rate order or the state railroad act.[35] The Supreme Court reversed the decree insofar as it completely prohibited the railroad commission from enforcing the act in any way against the railroad.[36] The Court affirmed the order "so far *only* as it restrains *the defendants* from enforcing the rates already established."[37]

The Court's ruling in *Reagan* did not mention whether the injunction, as modified, would restrict the conduct of third-party nonlitigants such as private shippers. *Lost History* states, "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 . . . .'"[38] To the

29. The four defendant-oriented injunctions include the orders issued in *Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600 (1913), *cited in* Sohoni, *supra* note 2, at 946; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *cited in* Sohoni, *supra* note 2, at 959–62; *Perkins*, 310 U.S. 113, *cited in* Sohoni, *supra* note 2, at 985–87; and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *cited in* Sohoni, *supra* note 2, at 989–90.

30. 310 U.S. at 131; *see supra* Part I.

31. 229 U.S. at 600; *see infra* notes 97, 100–101 and accompanying text.

32. *See infra* Part III.

33. Morley, *supra* note 8, at 9; *see also* Morley, *supra* note 1, at 490–91.

34. 154 U.S. 362 (1894), *discussed in* Sohoni, *supra* note 2, at 937.

35. *Id.* at 370, *quoted in* Sohoni, *supra* note 2, at 937.

36. *Id.* at 413.

37. *Id.* (emphasis added).

38. Sohoni, *supra* note 2, at 939 (quoting *Reagan*, 154 U.S. at 413).

contrary, the best reading appears to be that the Supreme Court did exactly what it said: it restrained "the defendants," rather than affirming an injunction against the world. This interpretation leads to an outcome similar to that the Court imposed in *Lost History*'s next example from four years later, *Smyth v. Ames*.[39] The *Smyth* Court affirmed a comparable injunction against railroad rates in a different state that "did not expressly reach beyond the defendant officials to enjoin nonparties."[40] Thus, on their face, the Court's rulings in *Reagan* and *Smyth* expressly affirmed injunctions that barred only the defendants in those cases from enforcing the challenged state legal provisions against the plaintiffs' railroads.

Even if *Lost History*'s proposed interpretation of *Reagan* were correct, however, and the Court had prohibited the general public from attempting to enforce the challenged rate order against the railroad, that injunction would still constitute a traditional plaintiff-oriented injunction, rather than a defendant-oriented injunction. As *Lost History* acknowledges in a footnote, even the original district court order in *Reagan* prohibited enforcement of the state railroad act and challenged rate order against only the particular railroad on whose behalf the plaintiff shareholders had sued.[41] As in *Smyth*,[42] the order as upheld by the *Reagan* Court did not reach further to protect the rights of other railroads or prohibit enforcement of the underlying state laws against other entities.[43]

Alternatively, under *Lost History*'s interpretation of the order in *Reagan*, it could properly be deemed a private enforcement injunction: an order completely prohibiting anyone, including potential private plaintiffs, from enforcing a legal provision against a particular entity.[44] The focus of such an injunction—the protection of that entity's rights—is appropriate and in accordance with traditional equitable notions.[45] The main difference between a private enforcement injunction and a plaintiff-oriented injunction is that the former seeks to protect an entity from the public at large, while the latter protects that entity only from the defendants, their agents, and accomplices.[46]

39. 169 U.S. 466 (1898).

40. Sohoni, *supra* note 2, at 939 (emphasis omitted) (citing *Smyth*, 169 U.S. at 476–78).

41. *Id.* at 937 n.101 ("The *Reagan* injunction does not reach beyond *the plaintiff* . . . ."); *see Reagan*, 154 U.S. at 370 (enjoining "all other individuals . . . or corporations" from "instituting or prosecuting any suit or suits *against the said railroad company*" for exceeding the rates specified in the challenged order (emphasis added)).

42. *Smyth*, 169 U.S. at 476–77, 550 (affirming injunction prohibiting the state Board of Transportation or Attorney General from pursuing administrative proceedings "against said railroad companies" for violations of the challenged statute), *aff'g* Ames v. Union Pac. R.R., 64 F. 165 (C.C.D. Neb. 1894).

43. *See Reagan*, 154 U.S. at 413 (ordering modifications to the lower court's injunction, which protected only the railroad on whose behalf the lawsuit had been filed); *see also* Sohoni, *supra* note 2, at 937–38 (discussing the lower court's injunction).

44. *See* Morley, *supra* note 8, at 41.

45. *Cf. id.* at 11 & n.38; Bray, *supra* note 1, at 469.

46. *See* FED. R. CIV. P. 65(d)(2).

Whether the *Reagan* Court erred in enjoining private lawsuits by third parties against the plaintiff railroad is an issue distinct from the propriety of defendant-oriented injunctions. It depends on the proper interpretation of the traditional equitable principles, presently codified at Federal Rule of Civil Procedure 65(d)(2), specifying the range of third parties whose conduct may be enjoined by a court.[47] The debate over defendant-oriented injunctions, in contrast, concerns the range of third parties whose rights may be protected by a court.

The fact that courts generally refuse to issue private enforcement injunctions[48] is yet another reason why the Supreme Court's ruling concerning the injunction in *Reagan* should be taken at face value, as limiting the conduct only of the defendants in the case, rather than extending to all of the plaintiff railroad's potential customers, as well. Only last year, the U.S. Court of Appeals for the Fifth Circuit rejected a district court's attempt to enforce against third parties an injunction that invalidated a U.S. Department of Labor regulation. In 2014, several states sued the Department of Labor in a Texas federal district court, securing an injunction that barred the Department from enforcing its recently promulgated regulation concerning overtime pay.[49] After the injunction was in place, a New Jersey resident sued his employer, Chipotle, for violating the overtime regulation; neither litigant had been involved in the Texas litigation.[50]

The Texas district court held the employee in contempt.[51] Federal Rule of Civil Procedure 65(d)(2)(C) provides that an injunction applies not only to the named party and its agents, but also to anyone else with notice of the injunction who acts "in active concert or participation" with them.[52] Citing that rule, the Texas court held that the employee knew about the injunction, and by invoking the Department of Labor's invalidated regulation, acted in concert with the Department.[53] The Fifth Circuit reversed, holding that the employee was "not in privity with the [Department] and not otherwise bound by the injunction."[54] The court made clear that a ruling holding a legal provision unconstitutional in litigation between a private plaintiff and a government agency does not, in itself, impact the rights of third parties, particularly those in other jurisdictions where

47. *Id.*; *see* Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945) (holding that the provision presently codified as Rule 65(d) "is derived from the common-law doctrine that . . . defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding").

48. *See* Morley, *supra* note 8, at 41.

49. Nevada v. U.S. Dep't of Labor (*Nevada I*), 275 F. Supp. 3d 795, 799–800 (E.D. Tex. 2017), *appeal docketed*, No. 17-41130 (5th Cir. Nov. 2, 2017).

50. *See* Nevada v. U.S. Dep't of Labor (*Nevada II*), 321 F. Supp. 3d 709, 714 (E.D. Tex. 2018), *rev'd sub nom.*, Texas v. U.S. Dep't of Labor, 929 F.3d 205 (5th Cir. 2019).

51. *Id.* at 727.

52. FED. R. CIV. P. 65(d)(2)(C).

53. *Nevada II*, 321 F. Supp. 3d at 725.

54. *Texas*, 929 F.3d at 213.

that ruling lacks stare decisis effect.[55] Indeed, the district court itself had recognized the "dearth of precedent" supporting its ruling when it held the employee in contempt.[56]

Thus, even if *Lost History*'s interpretation of the Supreme Court's conclusion in *Reagan* is correct, it does not appear to reflect a broad practice of issuing private enforcement injunctions. Regardless, such private enforcement injunctions are materially different from defendant-oriented injunctions—the type of order at issue in current disputes over nationwide injunctions. As noted earlier, private enforcement injunctions focus on protecting the rights of the plaintiff before the court from violations by any third parties, rather than protecting the rights of third-party nonlitigants.

In Part III of *Lost History*, the only order that constituted a bona fide defendant-oriented or universal injunction was issued in *Journal of Commerce & Commercial Bulletin v. Burleson*.[57] In contrast, the injunctions in the other cases discussed in that Part—*Hill v. Wallace*[58] and *Board of Trade of the City of Chicago v. Clyne*[59]—were not defendant-oriented injunctions. In *Hill*, the plaintiffs were members of the Chicago Board of Trade who sued to challenge the federal Future Trading Act on behalf of all board members "who may wish to join and share in the relief granted."[60] They sought an injunction to prohibit both the board's directors from complying with the Act and federal officials from implementing and enforcing it against the board or its members.[61] *Lost History* presents *Hill* as an example of a defendant-oriented or universal injunction because both the preliminary and permanent injunctions that the Supreme Court entered barred enforcement of the challenged statute against not only the individual plaintiffs, but all other members of the Chicago Board of Trade as well.[62]

The order was not a defendant-oriented injunction, however, because as *Lost History* acknowledges, it did not bar the government from "enforcing the Future Trading Act against *other* boards of trade or their members."[63] It is more

55. *Id.*

56. *Nevada II*, 321 F. Supp. 3d at 725.

57. 229 U.S. 600, 600 (1913), *discussed in* Sohoni, *supra* note 2, at 945. *Lost History* discusses this injunction under the name of the accompanying case, *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913). *See* Sohoni, *supra* note 2, at 944–46.

58. 257 U.S. 310 (1921) (*Hill II*) (granting modified injunction pending appeal), *vacating* 257 U.S. 615 (1921) (*Hill I*) (granting unopposed motion for injunction pending appeal), *discussed in* Sohoni, *supra* note 2, at 948–49. *Hill* is the only case in Part III in which the plaintiffs prevailed on the merits and the Court replaced its preliminary injunction with a comparable permanent injunction. Hill v. Wallace, 259 U.S. 44, 72 (1922) (*Hill III*), *cited in* Sohoni, *supra* note 2, at 950–51.

59. 260 U.S. 704 (1922), *cited in* Sohoni, *supra* note 2, at 953. *Lost History* discusses this injunction under the case's subsequent name, *Board of Trade v. Olsen*, 262 U.S. 1 (1923). *See* Sohoni, *supra* note 2, at 952–54.

60. *Hill III*, 259 U.S. at 45.

61. *Id.* at 48–49.

62. Sohoni, *supra* note 2, at 950–52.

63. *Id.* at 951.

properly characterized as a plaintiff-class injunction, protecting the rights of the class of rightholders on whose behalf the suit was brought, consistent with Rule 38 of the Equity Rules of 1912.[64] Rule 38 provided, "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, one or more may sue or defend for the whole."[65]

Equity Rule 38 was an antecedent to the modern rules governing class actions,[66] particularly Federal Rule of Civil Procedure 23(b)(2).[67] Rule 23(b)(2) allows courts to certify plaintiff classes to seek injunctions without providing notice or an opportunity to opt out to class members.[68] Despite the substantial procedural differences between Equity Rule 38 and the modern Rule 23, the injunction in *Hill* is part of the "lineage" of modern plaintiff-class injunctions, rather than defendant-oriented injunctions.[69] The order in *Hill* protected only members of the plaintiff class, to which the individual plaintiffs belonged, rather than the public at large.

The injunction in *Clyne*, in contrast, is properly characterized as an associational injunction, rather than a defendant-oriented or universal injunction. A court enters an associational injunction in cases where an entity asserts associational standing to protect the rights of its members.[70] The plaintiff in *Clyne* was the Chicago Board of Trade. It challenged the constitutionality of the federal Grain Futures Act, seeking an injunction against the statute's enforcement.[71] Without objection by the government, the Supreme Court entered a stay pending appeal that enjoined the U.S. 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 twenty 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

64. FED. EQUITY R. 38 (1912) (repealed 1938), *reprinted in* THE NEW FEDERAL EQUITY RULES PROMULGATED BY THE UNITED STATES SUPREME COURT AT THE OCTOBER TERM, 1912, at 203 (James Love Hopkins 2d ed., 1918) [hereinafter FED. EQUITY R. 38].

65. *Id.*

66. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE–CIVIL § 1751, at 10–17 (3d ed. 2005).

67. FED. R. CIV. P. 23(b)(2).

68. FED. R. CIV. P. 23(c)(2)(A) (specifying that notice is optional for Rule 23(b)(2) class actions). *Compare* FED. R. CIV. P. 23(c)(3)(B) (specifying that a judgment's description of a Rule 23(b)(3) class must include those "who have not requested exclusion"), *with* FED. R. CIV. P. 23(c)(3)(A) (requiring judgments in Rule 23(b)(2) class actions to describe the certified class but omitting any reference to members who requested exclusion).

69. *See* Sohoni, *supra* note 2, at 924.

70. Morley, *supra* note 8, at 25 (quoting United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc., 517 U.S. 544, 553 (1996)).

71. Bd. of Trade v. Clyne, 260 U.S. 704, 704–05 (1922).

> or them of any provision of said act committed during the pendency of this cause in this Court or twenty days thereafter . . . .[72]

Thus, the injunction specifically prohibited the U.S. Attorney from prosecuting the Board of Trade's members or those members' customers for violating the challenged Act. The board had associational standing to enforce its members' rights. And those members' rights would have been undermined just as much whether the government attempted to enforce the allegedly unconstitutional statute directly against them, or indirectly, by prosecuting their customers.

Lost History interprets this injunction differently, arguing that it prohibited the U.S. Attorney from enforcing the Act against anyone in his jurisdiction.[73] Although that interpretation is certainly possible, it is unlikely the Court would have specifically referred to the board's members and customers in its order if it had intended to enjoin enforcement of the law against the world at large. Moreover, that interpretation introduces an unexplained internal inconsistency into the order. Under *Lost History*'s proposed view, the Court completely enjoined enforcement of the Grain Futures Act against anyone, but then also specifically prohibited criminal prosecutions only of the board's members and customers. It is unclear why the Court would have provided different levels of protection to different groups of people. The most plausible construction of the injunction is that the entire order protected the parties the Court expressly identified: the Chicago Board of Trade's members and their customers. Viewed from that perspective, *Clyne* was a typical, and appropriate, associational injunction.

In any event, *Clyne* is of very limited value in determining the Court's understanding of Article III's limits on injunctive relief, since the interlocutory injunction was unopposed, and the Court did not address its scope.[74] And the Court did not revisit the issue after ruling on the underlying appeal, since it ultimately upheld the Grain Futures Act's validity.[75] Thus, it appears that *Hill* and *Clyne* neither involved defendant-oriented injunctions nor support their modern use.

In Part IV of *Lost History*, all of the cited cases (with the exception of *Pierce v. Society of Sisters*[76]) were also proto-class actions under Equity Rule 38, leading to plaintiff-class injunctions.[77] In that respect, they were structurally comparable

72. *Id.* at 704.

73. Sohoni, *supra* note 2, at 953–54.

74. *See Clyne*, 260 U.S. at 704–05.

75. Board of Trade v. Olsen, 262 U.S. 1, 40–43 (1923).

76. 268 U.S. 510 (1925).

77. Mitchell v. Penny Stores, 284 U.S. 576 (1931) (per curiam) (affirming interlocutory injunction), *case dismissed*, 59 F.2d 789 (S.D. Miss. 1932) (three-judge court) (noting the case had been filed under Equity Rule 38), *appeal dismissed sub nom.*, 287 U.S. 672 (1932), *cited in* Sohoni, *supra* note 2, at 964-65; J.H. McLeaish & Co. v. Binford, 52 F.2d 151, 153, 156 (S.D. Tex. 1931) (three-judge court) (identifying "classes" of plaintiffs challenging validity of state statute and granting preliminary injunction), *aff'd per curiam*, 284 U.S. 598 (1932),

to the order in *Hill v. Wallace*.[78] In three of these cases, the Court reversed the lower courts on the merits, and thus did not even approve the injunction.[79] Finally, Part V presents *Hague v. Committee for Industrial Organization*[80] as a case in which the Court affirmed an injunction that "reached beyond the plaintiffs."[81] To the contrary, *Hague* is another example of a conventional plaintiff-oriented injunction.

The local ordinance challenged in *Hague* prohibited the public distribution of printed literature within the municipality.[82] The ordinance also required speakers to obtain a license from the chief of police to hold public meetings at which they would advocate obstructing the government or changing it through unlawful means.[83] After holding the ordinance unconstitutional, the *Hague* plurality held that the plaintiffs were entitled to an order prohibiting the defendants 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."[84] Critically, the Court did not hold that the injunction must completely prohibit the defendants from enforcing the challenged provisions against anyone.[85] To the contrary, the order it required was tailored to enforcing the rights of the party plaintiffs; it protected third parties only insofar as they were acting in concert with those plaintiffs. Thus, the order paralleled Rule 65(d)(2)(C), which applies injunctions not only to defendants but others acting in concert with them.[86]

cited in Sohoni, *supra* note 2, at 965–67; Langer v. Grandin Farmers' Co-op Elevator Co., 292 U.S. 605 (1934) (per curiam) (affirming interlocutory injunction), *cited in* Sohoni, *supra* note 2, at 967, 970; Jackson v. St. Bd. of Tax Comm'rs, 38 F.2d 652, 655, 659 (S.D. Ind. 1930) (three-judge court) (noting the case was brought under Equity Rule 38 and entering a permanent injunction), *rev'd*, 283 U.S. 527 (1931) (stating that the case had been filed on behalf of the appellee "and all others similarly situated" and remanding with instructions to dismiss the bill), *cited in* Sohoni, *supra* note 2, at 970–71; Van Deman & Lewis Co. v. Rast, 214 F. 827, 831, 834 (S.D. Fla. 1913) (three-judge court) (noting that "[t]he instant suit is brought by complainants and all others similarly situated" and granting interlocutory injunction), *rev'd*, 240 U.S. 342 (1916), *cited in* Sohoni, *supra* note 2, at 972–73; Tanner v. Little, 240 U.S. 369, 370 (1916) (noting "[c]omplainants sue for all similarly situated" parties and reversing the lower court's interlocutory injunction), *cited in* Sohoni, *supra* note 2, at 972–73; *see also* Sohoni, *supra* note 2, at 962–64, 973.

78. *See supra* notes 60–69 and accompanying text.

79. *Jackson*, 283 U.S. at 542–43; *Rast*, 240 U.S. at 368 (1916); *Tanner*, 240 U.S. at 385.

80. 307 U.S. 496, 518 (1939) (plurality opinion).

81. Sohoni, *supra* note 2, at 988.

82. *Hague*, 307 U.S. at 501–02.

83. *Id.*

84. *Id.* at 517.

85. The plurality's opinion effectively precluded the respondents from enforcing the challenged ordinance against anyone, but it did so as a matter of stare decisis, rather than through an injunction. *See* Morley, *supra* note 8, at 53–56; *see also* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 652 (2017).

86. FED. R. CIV. P. 65(d)(2)(C). In the final example that *Lost History* provides, *West Virginia State Board of Education v. Barnette*, the parties did not contest the scope of the district court's injunction, and the Court did not expressly consider or address it. *See* Sohoni, *supra* note 2, at 990–91 (citing W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

Lost History underscores the importance of distinguishing among the different types of orders that could be, or have been, classified as nationwide or universal injunctions. Plaintiff-oriented injunctions,[87] plaintiff-class injunctions,[88] associational injunctions,[89] defendant-oriented injunctions,[90] and private enforcement injunctions[91] are distinct categories of orders which each raise very different jurisdictional, rule-based, prudential, fairness-related, and structural concerns, and require different treatment by courts.[92] Because of the important differences among the various categories of injunctions, orders that fall within other categories cannot be used as precedents to support the constitutionality of defendant-oriented injunctions. Only a few of the orders that *Lost History* discusses can properly be considered defendant-oriented injunctions. And, as discussed in the next Part, those examples provide little guidance concerning Article III's limits on the permissible scope of injunctive relief.

III. DRAWING THE RIGHT INFERENCES

Even if all of the orders that *Lost History* discusses were properly deemed defendant-oriented or universal injunctions, they provide limited insight into whether the Supreme Court viewed such relief as constitutionally valid in the early twentieth century for four reasons. First, the piece presents a handful of examples of alleged universal injunctions despite the deluge of constitutional litigation that occurred in the wake of *Ex parte Young*,[93] throughout the *Lochner* Era, [94] and at the dawn of the New Deal.[95] It is difficult to conclude that *Lost History's* sporadic examples represent an implicit, largely unacknowledged consensus that defendant-oriented or universal injunctions were constitutionally permitted.[96]

87. *See supra* note 33 and accompanying text.

88. *See supra* note 64 and accompanying text.

89. *See supra* note 70 and accompanying text.

90. *See supra* note 10 and accompanying text.

91. *See supra* note 44 and accompanying text.

92. Morley, *supra* note 8, at 9–10.

93. 209 U.S. 123 (1908).

94. *See* Lochner v. New York, 198 U.S. 45, 56–57 (1905).

95. *See, e.g.*, S. REP. NO. 75-711, at 27–28 (1937) (describing repeated federal injunctions against New Deal initiatives).

96. *Cf.* Sohoni, *supra* note 2, at 979 (claiming that these cases show it was "well understood that when a federal district court declared a state law unconstitutional, it could properly enjoin the law's enforcement against nonparties").

Second, in all of the examples in Part II—*Journal of Commerce & Commercial Bulletin v. Burleson*,[97] *Hill v. Wallace*,[98] and *Board of Trade of the City of Chicago v. Clyne*[99]—the requests for interlocutory injunctions were unopposed.[100] Indeed, in *Burleson*, the plaintiffs contended that the government had affirmatively "agreed not to enforce the Act against the plaintiffs 'or other newspaper publishers throughout the country' pending the Court's decision."[101] Accordingly, these authorities offer little insight into whether the Supreme Court viewed defendant-oriented injunctions—nationwide or otherwise—as permissible under Article III.

The government's acquiescence to motions for interlocutory relief effectively rendered them consent decrees. Because a consent decree is a "hybrid" of an injunction and contract,[102] the government may agree to relief through a consent decree that a court would otherwise lack power to order.[103] In *Local No. 93, International Association of Firefighters v. City of Cleveland*—citing cases dating back to the 1880s and 1920s—the Supreme Court identified four requirements for federal consent decrees: the "dispute" must be "within the court's subject-matter jurisdiction,"[104] the "decree must 'com[e] within the general scope of the . . . pleadings,'"[105] the decree "must further the objectives of the law upon which the complaint [is] based,"[106] and it must not be "unlawful."[107]

Local No. 93 suggests that, so long as a court has subject-matter jurisdiction over a case, the government may agree to a consent decree crafted to protect the rights of third-party nonlitigants, regardless of whether the plaintiffs had Article III standing to seek such relief.[108] Indeed, even in cases without such consent-based orders, the government sometimes voluntarily agreed to refrain

97. 229 U.S. 600 (1913), *cited in* Sohoni, *supra* note 2, at 945–46.

98. *Hill II*, 257 U.S. 310 (1921), *vacating Hill I*, 257 U.S. 615 (1921), *cited in* Sohoni, *supra* note 2, at 948–49. *Hill* is the only case out of these examples in which the Supreme Court entered a permanent injunction after final judgment. *See Hill III*, 259 U.S. 44, 72 (1922).

99. 260 U.S. 704 (1922), *cited in* Sohoni, *supra* note 2, at 953.

100. Sohoni, *supra* note 2, at 946 (explaining that, in *Burleson*, the Solicitor General "made no response" to the request for interlocutory relief); *Hill II*, 257 U.S. at 310 (explaining that the appellants' motion for interlocutory relief was granted, "the appellees not objecting"); *Clyne*, 260 U.S. at 704 (granting the appellants' motion for interlocutory relief, "the defendants not objecting").

101. Sohoni, *supra* note 2, at 945 (emphasis omitted) (quoting Motion by Appellant for Restraining Order at 3, Journal of Commerce & Comm. Bulletin v. Burleson, 229 U.S. 600 (1913) (No. 818)).

102. Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 519 (1986).

103. Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 389 (1992); United States v. Armour & Co., 402 U.S. 673, 682–83 (1971); *see also Local No. 93*, 478 U.S. at 525 ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.").

104. *Local No. 93*, 478 U.S. at 525.

105. *Id.* (quoting Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1879)).

106. *Id.* (citing EEOC v. Safeway Stores, Inc., 611 F.2d 795, 799 (10th Cir. 1979); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1125, 1128 (D.C. Cir. 1983)).

107. *Id.* at 526.

108. *See id.* at 525.

from enforcing the challenged legal provisions.[109] I have elsewhere critiqued the standards that courts apply in approving consent decrees in public-law cases involving governmental litigants,[110] but *Local No. 93* reflects the law as it presently stands. Thus, these consent-based injunctions do not necessarily provide any insight into the federal judiciary's early understanding of Article III.

Third, in nearly all of the examples that *Lost History* cites, the scope of injunctive relief was neither litigated by the parties nor expressly examined by the Court from either a jurisdictional, equitable, or substantive perspective.[111] In several of these cases, the Supreme Court reversed the lower courts' rulings on the merits, and thus did not even implicitly endorse the scope of the injunctions those courts had issued.[112] In others, the Court issued only terse, nonsubstantive per curiam opinions,[113] sometimes as short as a single sentence.[114] Indeed, in the only case in which the Court expressly addressed the scope of relief, *Perkins v. Lukens Steel Co.*,[115] it objected to nationwide defendant-oriented injunctions.[116]

The Supreme Court has repeatedly cautioned that litigants may not infer jurisdictional conclusions based on its actions in cases which do not expressly discuss those jurisdictional issues. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."[117] The opinions that *Lost History*

109. *See* Sohoni, *supra* note 2, at 955 n.229.

110. *See* Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014).

111. *See, e.g.*, Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 413 (1894); Smyth v. Ames, 169 U.S. 466, 517–18, 550 (1898); J. of Com. & Com. Bull. v. Burleson, 229 U.S. 600, 601 (1913) (per curiam); *Hill II*, 257 U.S. 310, 310–11 (1921), *vacating Hill I*, 257 U.S. 615 (1921); Bd. of Trade v. Clyne, 260 U.S. 704, 704–05 (1922); Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925); Mitchell v. Penny Stores, 284 U.S. 576, 576–77 (1931) (per curiam); Binford v. J.H. McLeaish & Co., 284 U.S. 598 (1932), *aff'g* 52 F.2d 151 (S.D. Tex. 1931) (three-judge court); St. Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 530–31, 543 (1931); Van Deman & Lewis Co. v. Rast, 214 F. 827, 831, 834 (S.D. Fla. 1913), *rev'd*, 240 U.S. 342 (1916); Tanner v. Little, 240 U.S. 369, 370, 386 (1916); Hague v. Comm. for Indus. Org., 307 U.S. 496, 517 (1939); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 642 (1943). As discussed earlier, in several cases the government either explicitly or implicitly consented to the requested injunction. *See supra* notes 97–100 and accompanying text.

112. *Jackson*, 283 U.S. at 542–43; *Tanner*, 240 U.S. at 386; Rast v. Van Deman & Lewis Co., 240 U.S. 342, 368 (1916); *see also* Lewis Pub'g Co. v. Morgan, 229 U.S. 288, 316 (1913) (affirming district court's dismissal despite entering a preliminary injunction pending appeal, reported at *Burleson*, 229 U.S. at 601); Bd. of Trade v. Olsen, 262 U.S. 1, 43 (1922) (affirming district court's dismissal despite entering a preliminary injunction pending appeal, reported at *Clyne*, 260 U.S. at 704–05).

113. *Mitchell*, 284 U.S. at 576.

114. Langer v. Grandin Farmers' Co-op Elevator Co., 202 U.S. 605, 605 (1934); *Binford*, 284 U.S. at 598.

115. 310 U.S. 113, 131 (1940), *superseded by statute*, 5 U.S.C. § 702.

116. *See supra* Part I.

117. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011); *see also* Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this

cites did not hold that defendant-oriented injunctions that unnecessarily protect the rights of third-party nonlitigants are permissible. Nor did those opinions address the Article III concerns with such orders.

Finally, about half of *Lost History*'s examples involve injunctions prohibiting state officials from enforcing state statutes. The circumstances of those cases made the scope of the injunctions irrelevant as a practical matter, regardless of their technical Article III violations. Accordingly, it would have been unlikely for litigants to bother raising the issue or for the Supreme Court to adjudicate it.

Throughout most of the twentieth century, when a plaintiff sought a preliminary injunction (and, later, a permanent injunction) in federal court against a state law on constitutional grounds, the case had to be heard by a three-judge panel of the district court.[118] The court's ruling was directly appealable, as of right, to the U.S. Supreme Court, bypassing the intermediate court of appeals.[119] The preliminary injunction hearing in *Pierce v. Society of Sisters*, for example, was held before a three-judge district court comprised of the only two district judges of the U.S. District Court for the District of Oregon,[120] Judges Charles E. Wolverton and Robert S. Bean. They were joined by Circuit Judge William Ball Gilbert,[121] one of only three circuit court of appeals judges on the Ninth Circuit at the time.[122] Although the breadth of the statewide defendant-oriented injunction that the panel issued was technically improper, it was irrelevant as a practical matter, since any subsequent federal challenge would have been heard by a three-judge court comprised of the same two Oregon judges, along with Judge Gilbert or one of his two Ninth Circuit colleagues. And the appeal in *Pierce* went directly to the U.S. Supreme Court,[123] whose ruling would be binding across the state (and nation) as a matter of stare decisis. Thus, the litigants had no real incentive to raise Article III concerns about the scope of injunctive relief before either the three-judge district court or the Supreme Court itself.

The same is true of nearly all of the other challenges to state legal provisions that *Lost History* cites. In *West Virginia State Board of Education v. Barnette*,[124] the

Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.").

118. *See* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 727–33 (2020) (citing Judges' Bill of 1925, ch. 229, § 238, 43 Stat. 936, 938 (1925); Mann-Elkins Act, ch. 309, § 17, 36 Stat. 539, 557 (1910)).

119. *Id.*

120. *See* Act of Mar. 3, 1859, ch. 135, § 2, 11 Stat. 437, 437 (1859) (authorizing first judgeship in the District of Oregon); Act of Mar. 2, 1909, ch. 243, § 3, 35 Stat. 686, 686 (1909) (authorizing second judgeship there).

121. 268 U.S. 510 (1925), *aff'g* 296 F. 928, 931 (D. Or. 1924) (three-judge court).

122. Judgeships on the U.S. Court of Appeals for the Ninth Circuit were created by the Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826 (Mar. 3, 1891).

123. *Pierce*, 268 U.S. at 510; *see also* Morley, *supra* note 118, at 727–33.

124. 319 U.S. 624 (1943), *aff'g* 47 F. Supp. 251 (S.D. W. Va. 1942) (three-judge court).

district court panel was comprised of both district judges of the U.S. District Court for the Southern District of West Virginia[125]—Ben Moore and Harry Watkins—as well as Fourth Circuit Judge John Parker.[126] Any subsequent federal challenge to the state's flag-salute requirement would have unavoidably been heard by the same two district judges. Likewise, in *Jackson v. State Board of Tax Commissioners*, a constitutional challenge filed in the U.S. District Court for the Southern District of Indiana,[127] the three-judge district court panel was comprised of the Southern District of Indiana's sole district judge,[128] Robert Baltzell; the Northern District of Indiana's sole district judge,[129] Thomas Slick; and Seventh Circuit Judge William Sparks.[130] Yet again, in any subsequent challenges, one of the two district judges would definitely have been included on the panel, and the other was virtually certain to have been included.

When these rulings are viewed in historical context, Article III concerns about the scope of injunctive relief become largely academic. As late as 1920, there were only 97 federal district court judges across the entire nation,[131] which at the time was comprised of 48 states. Due to federal law's three-judge district court and direct appeal requirements, as well as the general dearth of district court judges in most jurisdictions in the early twentieth century, all district court panels hearing constitutional challenges to a particular state legal provision were likely to be comprised of at least a majority of the same judges. Defendants knew that, even if injunctions were narrowly tailored to only the particular plaintiffs in a case, those judges would issue the same rulings in any future cases to come before them. Thus, these cases provide scant support for the notions that defendant-oriented or universal injunctions were generally accepted as consistent with Article III in the early twentieth century, or that the Supreme Court had approved of them.

CONCLUSION

Lost History provides intriguing new insight into the early twentieth-century history of federal injunctions in constitutional cases. It does not provide reason to believe, however, that federal courts at the time had a general practice of issuing broad, defendant-oriented injunctions in constitutional cases. Nor does

125. Act of June 25, 1921, ch. 30, § 1, 42 Stat. 67, 67 (1921) (authorizing first judgeship for the Southern District of West Virginia); Act of June 22, 1936, ch. 695, 49 Stat. 1805, 1805 (1936) (authorizing second judgeship there).

126. *Barnette*, 47 F. Supp. at 252.

127. 38 F.2d 652 (S.D. Ind. 1930) (three-judge court), *rev'd*, 283 U.S. 527 (1931).

128. Act of Apr. 21, 1928, ch. 393, § 80, 45 Stat. 437, 437 (1928) (authorizing a single judgeship for each of Indiana's two federal judicial districts).

129. *Id.*

130. *Jackson*, 38 F.2d at 653.

131. FEDERAL JUDICIAL CENTER, AUTHORIZED JUDGESHIPS – FROM 1789 TO PRESENT 8 (2019), https://www.uscourts.gov/sites/default/files/allauth.pdf.

it demonstrate the existence of a consensus that Article III allows such relief. Most of the orders in the cases that *Lost History* discusses were appropriately tailored to enforcing the rights of the plaintiffs in the case,[132] members of plaintiff classes under Equity Rule 38,[133] or members of a plaintiff association asserting associational standing.[134] In most of these cases, the court did not expressly consider or address the propriety of a broad defendant-oriented injunction. Indeed, in several cases, the government implicitly or expressly consented to the requested relief. In the one case in which the Supreme Court directly reviewed the propriety of a nationwide defendant-oriented injunction, it held that the injunction exceeded the bounds of "any controversy that might have existed between the complaining companies and the Government officials."[135]

In addition, in constitutional challenges to state laws like *Pierce v. Society of Sisters*[136] and *West Virginia State Board of Education v. Barnette*,[137] litigants' failure to contest, and the Supreme Court's failure to address, the scope of the district courts' injunctions were understandable due to the jurisdictional context in which those matters were litigated. Such cases were heard by three-judge district court panels, with direct appeal as of right to the U.S. Supreme Court.[138] Because most federal judicial districts in the early twentieth century had only one or two judges,[139] all constitutional challenges to a particular state law would be heard by a panel comprised of mostly the same judges. Whether the court issued a plaintiff-oriented injunction or a defendant-oriented injunction was largely irrelevant, because any future case would almost certainly be heard by a majority of the same judges, likely leading to the same outcome. And once the Supreme Court adjudicated the appeal, its opinion applied to all rightholders throughout the state and nation as a matter of stare decisis, regardless of the scope of any injunction.

Lost History implicates another, more fundamental question about not only defendant-oriented injunctions, but justiciability doctrine more broadly. The

132. Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 370 (1894), *cited by* Sohoni, *supra* note 2, at 937–39; Smyth v. Ames, 169 U.S. 466, 517–18 (1898), *cited by* Sohoni, *supra* note 2, at 939–41; Hague v. Comm. for Indus. Org., 307 U.S. 496, 501 (1939), *cited by* Sohoni, *supra* note 2, at 988.

133. Langer v. Grandin Farmers' Co-op Elevator Co., 292 U.S. 605 (1934), *cited by* Sohoni, *supra* note 2, at 969–70; Binford v. J.H. McLeaish & Co., 284 U.S. 598, 598 (1932) (per curiam), *aff'g* 52 F.2d 151 (S.D. Tex. 1931) (three-judge court), *cited by* Sohoni, *supra* note 2, at 965–67; Mitchell v. Penny Stores, 284 U.S. 576, 576–77 (1931) (per curiam), *cited by* Sohoni, *supra* note 2, at 964–65; State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 530 (1931), *cited by* Sohoni, *supra* note 2, at 970–71; *Hill III*, 259 U.S. 44, 72 (1922), *cited by* Sohoni, *supra* note 2, at 950–51; *Hill II*, 257 U.S. 310, 310–11 (1921), *cited by* Sohoni, *supra* note 2, at 948–49; Tanner v. Little, 240 U.S. 369, 370 (1916), *cited by* Sohoni, *supra* note 2, at 972–73; Van Deman & Lewis Co. v. Rast, 214 F. 827, 831 (S.D. Fla. 1913), *rev'd*, 240 U.S. 342 (1916), *cited by* Sohoni, *supra* note 2, at 971.

134. Board of Trade v. Clyne, 260 U.S. 704, 704–05 (1922), *cited by* Sohoni, *supra* note 2, at 953.

135. Perkins v. Lukens Steel Co., 310 U.S. 113, 123 (1940), *superseded by statute*, 5 U.S.C. § 702.

136. 268 U.S. 510 (1925), *aff'g* 296 F. 928, 931 (D. Or. 1924) (three-judge court).

137. 319 U.S. 624 (1943), *aff'g* 47 F. Supp. 251 (S.D. W. Va. 1942) (three-judge court).

138. *See supra* note 118–119 and accompanying text.

139. *See supra* note 131.

article seeks guidance about whether Article III allows courts to grant relief to third-party nonlitigants based on federal courts' rulings "in the period from 1890 to 1943."[140] It is far from clear what significance such rulings should have in modern constitutional jurisprudence. On the one hand, that period is over a century removed from the Founding Era, offering very little insight into the original public meaning of Article III,[141] or even the manner in which early courts may have liquidated the meaning of that provision.[142] On the other hand, many scholars have argued that standing doctrine has dramatically evolved over the course of the twentieth century.[143] Regardless of early twentieth century practice, modern Supreme Court doctrine reflects a plaintiff-centric conception of standing that is inconsistent with defendant-oriented injunctions.[144] Thus, even if some federal courts experimented with broad nationwide or statewide defendant-oriented injunctions in the early twentieth century, that does not suggest they are consistent with Article III doctrine as it has evolved over the decades since. In short, while *Lost History* presents a useful perspective on the evolution of equitable remedies, it neither demonstrates the historical legitimacy of defendant-oriented injunctions, nor lays to rest the compelling Article III objections against them.

140. Sohoni, *supra* note 2, at 929.

141. *Cf.* Akhil Reed Amar, Comment, Heller*,* HLR*, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 173–74 (2008) (arguing that reliance on post-1791 materials can distort the original meaning of constitutional provisions).

142. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (arguing that postenactment historical practice can be used to fix the meaning of vague constitutional provisions).

143. *See, e.g.*, Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1220 (2014) ("The better approach is to recognize that standing isn't required by the Constitution's text alone, but rather emerges from a twentieth century construction of Article III's ambiguities."); Robert Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996).

144. *See, e.g.*, Hollingsworth v. Perry, 570 U.S. 693, 705 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992))); Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (holding that a plaintiff "bears the burden of showing that he has standing for each type of relief sought"); Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs . . . ."); *see also* Salazar v. Buono, 559 U.S. 700, 734 (2010) (Scalia, J., concurring) (holding that Article III forbids federal courts from issuing orders that "cover additional actions that produce no concrete harm to the original plaintiff"); U.S. Dep't of Def. v. Meinhold, 510 U.S. 939, 939 (1993) (mem.) (staying a lower court injunction insofar as it prohibited the military from applying the challenged regulation to anyone other than the individual plaintiff).