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### Foreword, National Injunctions: What Does the Future Hold?

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## FOREWORD

### NATIONAL INJUNCTIONS: WHAT DOES THE FUTURE HOLD?

SUZETTE MALVEAUX\*

This year the 27th Annual Ira C. Rothgerber Conference brought scholars and lawyers from all over the country to discuss one of the most salient legal issues today—the propriety of national injunctions. Federal district court judges are increasingly halting the executive branch from enforcing its signature policies nationwide—fashioning remedies that go beyond the parties and the court’s usual geographic purview.

National injunctions have touched the lives of many of us. They run the gamut, enjoining policies ranging from environmental protection to immigration policies to civil rights protections.<sup>1</sup> They have undermined the policies of both Democratic and Republican Administrations, such as Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents program<sup>2</sup> and Trump’s travel ban.<sup>3</sup> Although national injunctions are not new, this remedy has recently proliferated in response to unprecedented challenges to the rule of law and to Constitutional norms under the Trump Administration.

There is a robust debate taking place over the power and role of the courts in these troubling times. That debate has in-

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1. For example, one of the most familiar national injunctions was a federal district court judge’s preliminary injunction against the Trump Administration’s third travel ban on immigrants arriving from predominantly Muslim countries. *Trump v. Hawaii*, 128 St. Ct. 2392, 2423 (2018). Another example was an injunction against the Obama Administration’s enforcement of guidelines regarding transgender students’ bathroom use in public schools. *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016).

2. *Texas v. United States*, 86 F. Supp. 3d 591, 604, 676 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

3. *Trump v. Hawaii*, 128 St. Ct. at 2423.

cluded academics, practitioners, politicians, and judges.<sup>4</sup> The Justice Department, President, and Supreme Court Justices have even weighed in.<sup>5</sup> Thus, it seemed only fitting for the Byron R. White Center for the Study of American Constitutional Law to host some of the top thought leaders on the subject here at the University of Colorado to continue that conversation.

With our own Attorney General, Phil Weiser, providing key remarks and almost a dozen scholars and lawyers presenting their works on the future of national injunctions, the *University of Colorado Law Review* is proud to bring you this symposium issue. Following is a glimpse into the diverse views and inspiring work to which we were exposed that day. I hope it whets your appetite to keep reading and thinking about this critical and timely constitutional issue.

#### PANEL I: COURT AUTHORITY AND POLICY CONSIDERATIONS

The first panel started with the threshold question of whether Article III and traditional equity limit the federal courts' ability to issue national injunctions. Having answered that question in the affirmative, our opening panelists explored the policy implications of calls for an outright prohibition of national injunctions, recommended limiting principles to guide

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4. See, e.g., *id.* at 2425–28 (Thomas, J., concurring); Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Zachary D. Clopton, *Nationwide Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2018); Howard M. Wasserman, *“Nationwide” Injunctions are Really “Universal” Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018); Memorandum from Jefferson B. Sessions III, Att’y Gen., to Heads of Civil Litigating Components U.S. Att’ys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [hereinafter Sessions Memorandum on Nationwide Injunctions] [<https://perma.cc/B64W-EQHH>].

5. See, e.g., *Trump v. Hawaii*, 138 S. Ct. at 2425–28 (2018) (Thomas, J., concurring); Sessions Memorandum on Nationwide Injunctions, *supra* note 4; *Statement on Sanctuary Cities*, WHITE HOUSE (Apr. 25, 2017), <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/> [<https://perma.cc/W5LJ-F3XA>].

court discretion when selecting this remedy, and situated the spike in national injunctions in a larger political context to better explain the remedy's role.

As an initial matter, Professor Alan Trammell debunks the notion that national injunctions are not authorized by Article III of the Constitution.<sup>6</sup> He contends that critics have it wrong: while plaintiffs must prove standing as it pertains to injury and remedy, once this constitutional hurdle is cleared, their job is done. The standing inquiry ends and the proper scope of the remedy begins. Trammell rejects the contention that judicial power is equivalent to dispute resolution between parties; quite the contrary, Article III does not require such a cramped interpretation of court authority. Consequently, court judgments may bind nonparties.

After putting this initial constitutional matter to bed, Trammell demonstrates how national injunctions (whether a relatively modern phenomenon or a traditional practice) have emerged as part of a larger reordering of the relationship between citizens and government. Far from being an aberration, this powerful remedy is an outgrowth of a larger reconceptualization and expansion of the federal courts' role in vindicating substantive rights. The development of the modern class-action device to curb desegregation, the modern interpretation of section 1983 to hold government actors accountable for constitutional civil rights violations, and the nascent structural reform injunctions of the 1960s signal that the growth of national injunctions is part and parcel of a larger societal phenomenon. While Trammell acknowledges the challenges national injunctions impose, he strongly objects to the constitutional argument against them, concluding that "manufacturing a constitutional home for the objections to nationwide injunctions distorts and impoverishes Article III."<sup>7</sup>

Professor Doug Rendleman supports the notion that federal judges are empowered to issue national injunctions, relying on traditional equity as a source of that power in addition to the Constitution.<sup>8</sup> He contends that equitable jurisdiction fuels

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6. Alan Trammell, Assistant Prof. of Law, Univ. of Ark. Sch. of Law, Rothgerber Conference (Apr. 5, 2019).

7. Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 975, 978 (2020).

8. Doug Rendleman, Prof. of Law, Wash. & Lee Univ. Sch. of Law, Rothgerber Conference (Apr. 5, 2019).

court discretion to order relief beyond the parties. Rendleman reminds us that since the seminal *Marbury v. Madison*,<sup>9</sup> judges have been empowered—if not called—to discern and declare federal laws and executive policies unconstitutional and to grant injunctions that stop their enforcement. This judicial check on abuse of power is particularly important given the current administration's pattern of flouting constitutional norms and rule of law. While recognizing the separation-of-powers function of national injunctions, Rendleman advocates a variety of limiting principles that should guide and constrain the issuance of such extraordinary relief.

With the question of what the court *can* do to provide complete relief, the conversation of our first panel turned to what the court *should* do. Much of the current debate over the propriety of national injunctions has centered around the policy implications of such relief. This is where my scholarship enters the conversation. Weighing the pros and cons of national injunctions, I reject a bright-line prohibition against them—a proposal recently advocated by some academics<sup>10</sup> and adopted by the Trump Administration.<sup>11</sup> While recognizing the remedy's potential drawbacks—such as incentivizing forum shopping and truncating law development—I conclude that an outright prohibition is too blunt an instrument to address the complexity of the problem. On the other side of the ledger is the judiciary's duty (not just capacity) to do justice. I argue that not only are national injunctions efficient and fair—and that they promote the rule of law—but under some circumstances, they are the only way to prevent irreparable harm to those most vulnerable in our society, especially under the current administration.

Professor Charlton Copeland concluded our first panel by contextualizing the recent bump in national injunctions as a natural response to shifting power in the American political system.<sup>12</sup> More specifically, Copeland explores the relationship between Congressional partisan paralysis, increased unilateral executive action, and the subsequent surge in national injunctions. Copeland challenges us to move away from a court-centric analysis and to instead recognize the significant role other insti-

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9. 5 U.S. (1 Cranch) 137 (1803).

10. See, e.g., Bray, *supra* note 4.

11. See, e.g., Sessions Memorandum on Nationwide Injunctions, *supra* note 4.

12. Charlton Copeland, Prof. of Law, Univ. of Miami Sch. of Law, Rothgerber Conference (Apr. 5, 2019).

tutional actors play in explaining the boost in national injunctions. From this wide-angle lens, Copeland invites us to consider how the national injunction reflects the separation-of-powers balance between the branches of government. From this perch, Copeland concludes that more is going on than judges merely perceiving their roles beyond umpires calling balls and strikes. Greater legislative gridlock and an increasing executive appetite for power may help explain the current struggle.

#### PANEL II: LESSONS FROM VARIOUS MODELS

The second panel explored how various analogs, doctrines, and laws can inform the national injunction debate. Panelists analogized the national injunction to issue preclusion, proposed alternative procedural doctrine for achieving the goals of the national injunction, and examined a federal statute that suggests appropriate constraints on national injunctions.

Similar to my own argument, our first panelist, Professor Zachary D. Clopton, contends that the legitimacy of national injunctions is neither a constitutional nor a historical question but rather a policy one.<sup>13</sup> Clopton thus turns to either Congress or the Supreme Court as the antidote, asking them to change course in their preferential treatment of the federal government as defendant. Clopton cleverly draws from the doctrine of offensive nonmutual collateral estoppel to respond to procedure-based criticism of the national injunction. He points to *United States v. Mendoza*, in which the Supreme Court exempted the federal government from the doctrine<sup>14</sup>—which, like national injunctions, allows judgments to benefit nonparties. Clopton concludes that *Mendoza* should be reconsidered and overruled because the policy concerns on which it is based are dubious and in fact weigh in favor of the national injunction.

Like Clopton, the second panelist, Professor Michael T. Morley, looks to alternative doctrine that might help inform the debate over the propriety of national injunctions.<sup>15</sup> Morley seeks to find other procedural mechanisms that would enable nonparties to benefit from a federal court's rulings without the familiar

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13. Zachary D. Clopton, Prof. of Law, Northwestern Univ. Pritzker Sch. of Law, Rothgerber Conference (Apr. 5, 2019).

14. 464 U.S. 154 (1984).

15. Michael T. Morley, Assistant Prof. of Law, Fla. State Univ. Sch. of Law, Rothgerber Conference (Apr. 5, 2019).

attendant baggage. One such mechanism is the Rule 23(b)(2) injunctive class action,<sup>16</sup> complete with due process protections. Morley rejects the conclusion that this class action device requires indivisibility and offers this aggregation device as a salve to the current national injunction problem. While at first blush the class action seems an ideal solution, Morley ultimately concedes it is a problematic substitute in light of various issues, including difficulty ascertaining the class, lack of notice and opt-out rights, and standing concerns.

Morley thus suggests a variety of other doctrinal reforms. He lands on giving district- or circuit-wide stare decisis effect to district court rulings as the antidote. In addition to his prescription, Morley offers a helpful nomenclature to more accurately describe what is often termed the “nationwide injunction.”<sup>17</sup> More precisely, he identifies the “nationwide defendant-oriented injunction” as the target of the current debate.<sup>18</sup>

The third and final panelist, David Hausman, brings the critical perspective of a practitioner to the table as an ACLU Skadden Fellow and attorney in *Trump v. Hawaii*.<sup>19</sup> Hausman argues that the Immigration and Nationality Act (INA) illustrates two important concepts relevant to the debate over the propriety of national injunctions: (1) the district courts’ power to order national injunctions and (2) potential ameliorative mechanisms for national injunction orders.

A word first about the statute itself. One provision prevents systemic challenges to expedited removal—the process by which individuals who have recently arrived in the United States are deported on a fast track—from proceeding as class actions.<sup>20</sup> This statutory provision, instead, permits an individual to seek nationwide relief.<sup>21</sup> The statute requires that such non-class systemic challenges be brought in the federal district court for the District of Columbia within sixty days of a policy change.<sup>22</sup>

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

17. Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 28 (2019).

18. *Id.* at 10, 28.

19. David Hausman, Skadden Fellow, ACLU Immigrants Rights Project, Rothgerber Conference (Apr. 5, 2019); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

20. *See* 8 U.S.C. § 1252(e)(1)(B), (e)(3) (2018).

21. *See id.* § 1252(e)(3).

22. *See id.*

While Hausman does not offer the INA as a blueprint for national injunctions, he does rely on the statute to highlight two salient ideas: (1) Congress has unflinchingly recognized that district court judges have the power to issue a national injunction under certain circumstances as an alternative to class actions, and (2) a national injunction ban is unnecessary where safeguards are put in place. More specifically, the INA's forum selection clause<sup>23</sup> eliminates the problems of forum shopping and inconsistent rulings—two of the biggest criticisms of national injunctions today. Hausman reminds us of the importance of creativity when devising solutions to the challenges posed by the national injunction.

### PANEL III: OTHER CONCEPTIONS OF NATIONAL INJUNCTIONS

The third and final panel of the symposium took us from the bird's-eye view to a wide-angle lens, calling into question various conceptions of the national injunction. The panelists challenged the accuracy of the prevailing historical narrative of national injunctions; questioned the nomenclature used to describe the debate over national injunctions; interrogated federal-government-defendant exceptionalism as a justification for the opposition to national injunctions; and warned progressives of relying on the national injunction for making meaningful change.

Our first panelist, Professor Mila Sohoni, interrupts the common narrative that national injunctions came on the scene in the 1960s and thus are of relatively recent vintage.<sup>24</sup> Critics of the national injunction point to a long history of Article III and traditional equity that does not seem to include this novel remedy. Sohoni, however, calls into question this familiar narrative, identifying such injunctions as to state laws that date back more than a century.<sup>25</sup> And for injunctions as to federal law, they too date back as far back as 1939,<sup>26</sup> seven years prior to the enactment of the Administrative Procedure Act. Sohoni resurrects the lost history of the national injunction and offers

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23. *See id.*

24. Mila Sohoni, Prof. of Law, Univ. of San Diego Sch. of Law, Rothgerber Conference (Apr. 5, 2019).

25. Sohoni, *supra* note 4, at 921–22; *see id.*, at 982–93 (describing seven state cases from 1916 to 1934).

26. *Id.* at 925 (citing *Lukens Steel Co. v. Perkins*, 107 F.2d 627 (D.C. Cir. 1939)).



an important counter-narrative to the remedy's short pedigree and exceptionalism. Her revelations deftly undermine critics' contentions that the federal courts lack the power to issue such broad relief today. Her work attempts to set the historical record straight.

Our next panelist, Professor Howard Wasserman, challenges us to break from the common terminology used to describe the remedy at the heart of public debate.<sup>27</sup> He notes that the real problem is the scope of non-class-action injunctions' enforcement vis-à-vis nonparties, not their territorial scope. Wasserman contends that the conflation of "who" and "where" leads to confusion about what is at the heart of the current controversy. He, like others, instead embraces the term "universal" over "national" or "nationwide" to describe the injunction that is at issue. After this initial brush-clearing, Wasserman offers another distinction that is important to the analysis: the difference between a judgment and an opinion—the former which applies to the parties in a case and the latter which provides the underlying rationale for future actions and eventually forms the basis for precedent. Finally, Wasserman explores whether universal declaratory judgments rather than injunctions solve the current controversy, and he concludes that the former should be as particularized as the latter. He argues that executive discretion and institutional incentives, not judicial supremacy, play key roles in the cessation of the enforcement of laws deemed unconstitutional.

Like Wasserman, our third panelist, Professor Portia Pedro, decries the debate over the misnomered "nationwide injunction," but for different reasons.<sup>28</sup> Her opposition comes from the failure of commentators to include in the term their exclusion of private defendants. The debate, as commonly framed, focuses solely on injunctions that run against the federal government. This omission suggests the propriety of treating the federal government differently as a defendant. She asks why such government-defendant exceptionalism should exist. With the debate reframed as such, Pedro warns of the danger of federal courts not being able to check the power of their executive and legislative sister branches.

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27. Howard Wasserman, Assoc. Dean for Research & Faculty Dev., Prof. of Law, Fla. Int'l Univ. Coll. of Law, Rothgerber Conference (April 5, 2019).

28. Portia Pedro, Assoc. Prof. of Law, Bos. Univ. Sch. of Law, Rothgerber Conference (April 5, 1019).

Our final panelist, Professor Ahmed White, sounds a different type of warning—here, directed specifically to liberals who seek to use national injunctions as a means of safeguarding democracy and achieving progressive agendas.<sup>29</sup> White reminds us of the painful history of the American worker: how, in their effort to organize labor and unionize, workers were thrown into jail and subjected to “government by injunctions.” National injunctions in labor disputes were used to end strikes and put radicals like Eugene Debs in “their place.” White contends that the history of American labor relations reveals injunctions to be fundamentally anti-democratic and repressive and the judges that issue them to be political guardians of powerful interests. White is skeptical that judges—bathed in wealth, power, and privilege—will adequately protect the interests of those most vulnerable in our society, such as immigrants, children, and transgender individuals. White cautions liberals to wean themselves from the notion that the courts are their friends and to realize that progressive judicial decisions stem from a dubious convergence of interests.

In sum, the propriety of national injunctions (if you even call them that) is complex and long standing. The future is uncertain. Much gratitude goes to the participants of the 27th Annual Rothgerber Conference for their insights, labor, brilliance, and time shared together. Many of us continued the discussion well into the breaks and the closing reception—a testament to the passion and conflicting perspectives we brought to the issue. And then we let it go, as we hiked the Colorado mountains that evening—a testament to our mutual friendship and respect for one another, despite our differing views. I trust you too will enjoy the immense contributions our participants are making in this field as you read a sample of their work in this symposium issue.

Sincerely,

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Constitutional Law

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29. Ahmed White, Prof. of Law, Univ. of Colo. Law Sch., Rothgerber Conference (Apr. 5, 2019).