FAIR HOUSING'S THIRD ACT: AMERICAN TRAGEDY OR TRIUMPH?

"Nothing can be changed until it is faced."

–James Baldwin

HEATHER R. ABRAHAM †

ABSTRACT

Over fifty years ago, Congress passed the historic Fair Housing Act. But it took eight presidents, fourteen HUD secretaries, and nearly half a century for HUD to promulgate regulations defining the Act's one-of-a-kind affirmative duty to dismantle residential segregation. Meanwhile, segregation flourished. Today, segregation's costs are staggering, spilling over into all aspects of American life, from the racial wealth gap to life expectancy to GDP.

The "Affirmatively Further Fair Housing" or "AFFH" mandate is an overlooked provision that obligates the federal government—and by extension state and local grantees—to identify and dismantle policies that perpetuate segregation, such as exclusionary zoning. This article argues that strengthening the decades-old AFFH mandate by statutory amendment is long overdue. Amendment has real-world implications: Absent amendment, the Fair Housing Act has virtually no chance of reducing residential segregation. As amended, however, it has the potential to become our country's most effective anti-segregation tool yet.

This article's first goal is to account for the Act's historic failure. Only through examining the Act's design flaws can we

† Georgetown University Law Center, Teaching Fellow and Supervising Attorney, Civil Rights Clinic and Voting Rights Institute; LL.M. Candidate, 2020.

unearth the enforcement gaps that must be addressed to overcome persistent inertia and foster a culture of AFFH compliance among local governments. Ultimately, it is at the local level where progress must occur. But history has proven that federal-level accountability is necessary for local compliance. For reasons explained in this article, that accountability has not been forthcoming.

This article's second goal is to demonstrate that the Act itself must be amended to instill a durable compliance process at the local level. As illustrated by case study, the AFFH should not be defined solely by administrative regulation—its current form—because it is unacceptably vulnerable to political crossfire with each new presidential administration. Segregation is too costly a problem to hinge on such precarious enforcement.

To mitigate the Act's long-standing design flaws, this article proposals three statutory amendments: (1) incorporating into the statute itself the components of a 2015 AFFH regulation, including its carefully designed accountability framework, (2) establishing an explicit private right of action to enforce the AFFH mandate, and (3) adding a new protected class—source of income—to ameliorate an unnecessarily common barrier to housing mobility. In all, housing segregation remains a profound collective problem that merits the sustained attention and resources necessary to systematically dismantle it as a matter of federal policy.

New Voices in Civil Rights
AALS 2020 Annual Meeting

Abstract Submission

Flint, Appalachia, and The Green New Deal: Seeking Water Justice in America's Forgotten Places

Priya Baskaran

The United States is in the midst of a widespread infrastructure crisis, with roads, bridges, electrical grids, and water systems in various states of distress from overuse and infrequent maintenance. This crisis is particularly concerning as infrastructure plays a central role in the social and financial health of communities and regions. This article provides a comparative analysis of two communities that appear dissimilar, but are both suffering from parallel drinking water infrastructure crises: Flint, Michigan and McDowell County, West Virginia. Flint is a well-known city located in the heart of the rustbelt and still has a population of nearly 100,000. In contrast, the southern coalfield communities in McDowell County, WV are sparsely populated and tucked into the hills and hollows of Appalachia. However, both of these places can be categorized as "Geographically Disadvantaged Spaces" (GDS) - communities that experience significant spatial inequality. The term spatial inequality, or alternatively spatial disparities, refers to an unequal distribution of key resources - like housing, schools, economic opportunity, and public infrastructure - within specific geographic boundaries. Spatial disparities are created by structural forces, which perpetuate historically low or limited investment by both the public and private sector, resulting in a heightened concentration of poverty within certain communities - GDS. GDS communities are also subject to interlocking systems of subordination based on race and class. Thus, vulnerable populations –African Americans, Latinos, Native Americans, and other racially and economically disenfranchised communities – are too often exposed to the human and economic consequences of spatial disparities, including failing infrastructure. This article uses Geographically Disadvantaged Spaces as a framework for understanding infrastructure degradation and economic stability in the United States, focusing specifically on compromised drinking water systems.

The comparative approach is necessary to highlight structural problems endemic to the entire country, superseding the urban versus rural divide ever-present in current policy, politics, and mainstream media narratives. The presence of high-speed internet access, public transit systems, and even airports and interstate highways can spur development, and thus, are considered economic assets. Conversely, a deficit of functioning infrastructure can lead to public health disasters and financial ruin, creating cycles of out-migration and divestment as residents and resources shift to other areas. The truth is both baffling and profoundly troubling – The United States, long-lauded as one of the most wealthy and prosperous nations in the modern world, regularly fails to provide clean, potable water to some of its citizens and communities. All GDS, whether Flint or Appalachia, are equally unable to access the requisite resources and funding to prevent further decimation of their local economies *and* adequately provide water for their residents.

Interest in funding infrastructure is finally gaining momentum given these implications, drawing the attention of both political parties and even Donald Trump's 2016 presidential campaign. Most recently, the proposed "Green New Deal" is challenging our standards for infrastructure investment by reframing the issue as an economic policy initiative. The repeated and terrible drinking water crises faced by GDS communities indicate the infrastructure degradation is the symptom of historic economic divestment by public and private actors. Thus, any policy proposals, including the Green New Deal, must actively work to dismantle the structural inequities plaguing GDS, including economic disenfranchisement.

WORK-IN-PROGRESS

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ON SACRED LAND

*Khaled A. Beydoun**

ABSTRACT – *2010 through the present marked a prolific uptick in land use discrimination against Muslims – 160% greater than that of the post-9/11 era. Most startlingly, only 20% of Muslim land use disputes were resolved without a federal suit, compared to 84% of suits involving a non-Muslim claimant. This highlights the staunch resistance many local governments have against the creation of mosques and other Muslim institutions, and the vital role the Religious Land Use and Institutionalized Person's Act (RLUIPA) has played in overriding this form of religious discrimination during an era of retrenched protection from the courts.*

The Anti-Sharia Movement, which also emerged in 2010, casts Islam as un-American and Muslim institutions as symbols of threat. It endorses these fears through legislation introduced at the state level. This Article ties the rise in Muslim land use discrimination to the projective influence of the Anti-Sharia Movement on local governments. It makes three arguments: first, that the discriminatory posture of local governments toward Muslim land use requests is shaped by the local effect of the anti-Sharia Movement; Second, that RLUIPA enforcement not only overrides discriminatory denials of Muslim land use requests, but restores collective and collateral rights to Muslim communities by facilitating the creation of institutions vital for religious expression; and, Third, RLUIPA relief retrenches the institutional influence of the Anti-Sharia Movement by imposing penalties on local governments—which have a deterrent effect on prospective discrimination against Muslims within the land use realm, and beyond.

This analysis follows with proposals aimed at enhancing RLUIPA's capacity to diminish anti-Muslim animus, and other forms of religious bigotry, from within local governments. This Article is also concerned wit the other side of the religious freedom debate. And, from the vantage point of the Establishment Clause, concludes with an appeal for coordinated strategies by vulnerable religious minority and LGBTQ groups – the

* Associate Professor of Law, University of Arkansas-Fayetteville School of Law; Senior Affiliated Faculty, University of California at Berkeley, Islamophobia Research & Documentation Project (IRDP). The author sits on the Michigan Advisory Committee for United States Commission for Civil Rights (USCCR).

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common targets of religious movements that wield religious freedom as a basis for discrimination.

AALS 2020 Annual Meeting
New Voices in Civil Rights

Family Separation by Parole and Probation

Alexis Karteron*

Although it is common to hear of America's addiction to incarceration, more than twice as many people—over four million—are subject to community supervision than are incarcerated. Nevertheless, the rights of supervisees are seriously understudied. This Article explores community supervision policies and practices that separate families in both legal and practical terms. Numerous community supervision authorities, *i.e.*, parole and probation authorities, condition the freedom of those they supervise on ending all contact with children and spouses. These supervisees have often been convicted of serious crimes, such as sex offenses or ones concerning domestic violence. But sometimes their records reveal no such convictions or the underlying offenses occurred many years before being told they cannot contact their child or spouse in any way—including by writing or through third parties. Standard supervision conditions that ban probationers and parolees from having any contact with felons operate similarly when close family members have felony records. By imposing such conditions, community supervision authorities function as shadow family court judges, making custody decisions and sometimes effectively terminating parental rights. When not justified to ensure safety, these restrictions constitute grievous infringements on the constitutional rights to parent children, to marry, and to maintain intimate relationships under the First and Fourteenth Amendments. They also can create serious psychological harm.

Family courts are the legal institutions where decisions regarding contact with children and spouses are usually made. There, the prevailing legal standards, such as the Uniform Marriage and Divorce Act's presumption that a noncustodial parent has the right to visit his child, account for the constitutional protections accorded to such relationships. Moreover, family court judges have expertise in the weighty questions that attend decisions regarding the appropriate level of contact between parents and children as well as between spouses. Typical family court practices also give voice to all affected family members regarding potential restrictions on contact. In short, family courts offer robust substantive and procedural protections for supervisees' familial relationships and accord them the respect they deserve.

A review of parole conditions in the 15 states with the highest parole populations reveals that procedural and substantive protections like those available in family court are largely unavailable. In contrast to the federal supervised release system, which explicitly requires that conditions bearing on constitutional rights be narrowly tailored to governmental interests, community supervision authorities at the state level typically consider themselves bound only by a mandate of "reasonableness" and some connection between conditions and rehabilitative goals. States should create mechanisms for routine judicial review of supervision conditions where they do not exist. Alternatively, community supervision authorities must adopt standards and procedures that abide by constitutional principles when family separation is at issue.

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* Associate Professor of Law, Rutgers Law School.

THE MYTH OF THE "NATIONWIDE INJUNCTION"

*Portia Pedro**

A growing number of scholars, litigants, and judges are debating the permissibility and propriety of relief that they are calling "nationwide injunctions." Drawing from the literature, one might define a "nationwide injunction" as an injunction with no geographic limitation that benefits people beyond named plaintiffs or plaintiff classes. Injunctive relief in a number of high profile cases falls within the crosshairs of "nationwide injunction" opponents. On the chopping block is relief in cases involving controversial presidential executive orders, Affordable Care Act provisions, and civil rights issues. Yet it is not clear that a category of "nationwide injunctions" is meaningful or even exists.

Evaluating the two components of the potential definition of "nationwide injunctions" reveals that the targeted injunctions are not unique in the ways that current scholarship presumes and, instead, that the most unique attributes of the debated injunctions have been left out of discussion so far. I provide a radical reconceptualization of both the boundaries of the category of debated injunctions and the focus of the "nationwide injunctions" debate. I argue that the challenged injunctions are not "nationwide injunctions" at all, but are, instead, injunctions against governmental defendants in public law litigation.

I illuminate two previously overlooked battles at the heart of the "nationwide injunctions" debate: one battle is between private law and public law conceptions of litigation and, the other, is over what may be the greatest new litigation protection for governmental defendants. Although the "nationwide injunctions" literature does not frame it this way, this debate turns on whether federal judges or justices can and should employ general injunctive power over governmental defendants who are exercising general legislative or executive power.

It is alarming that commentators and jurists are contemplating what may be the greatest new protection for governmental defendants (since sovereign immunity and the decreased ability to use non-mutual offensive issue preclusion against the government) without discussing the implications for public law litigation or litigation against governmental defendants. Instead of arguing about the permissibility, propriety, and implications of a meaningless category ("nationwide injunctions"), scholars, litigants, judges, and justices should debate the merits of eliminating injunctions against governmental defendants in public law litigation.

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THE MYTH OF THE "NATIONWIDE INJUNCTION"

Portia Pedro

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INTRODUCTION

In the short span of sixty-two days in 2018, three United States Supreme Court Justices — for the first time — shared their thoughts on what many are calling a new phenomenon upon which the Court has not previously spoken — "nationwide injunctions."[1] Scholars, litigants, and federal judges have recently begun debating the permissibility and propriety of "nationwide injunctions" in constitutional and civil rights challenges to controversial Presidential executive orders and federal legislation.[2] Yet it is not clear that this newly-discussed category of

[1] *Trump v. Hawaii*, 138 S.Ct. 2392, 2424–29 (2018) (Thomas, J., concurring); *id.* at 2446 n.13 (Sotomayor, J., dissenting); *Trump v. Hawaii*. No. 17-65, Tr. at 72 (Justice Gorsuch discussing "this troubling rise of this nationwide injunction, cosmic injunction"). The Supreme Court heard oral argument in on *Trump v. Hawaii* on April 25, 2018 and released its opinions on the case on June 26, 2018. *Id.* The Court found it "unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court" because the Court reversed the District Court decision on other grounds. *Trump v. Hawaii*, 138 S. Ct. at 2423.

[2] *Trump v. Hawaii*, 138 S.Ct. 2392, 2424–29 (2018) (Thomas, J., concurring); *id.* at 2446 n.13 (Sotomayor, J., dissenting); *Trump v. Hawaii*. No. 17-65, Tr. at 72; Spencer E. Amdur & David Hausman, Nationwide Injunctions and Nationwide Harm, 131 Harv. L. Rev. F. 49, 55 (2017); Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065 (2018); The Role and Impact of Nationwide Injunctions: Written Testimony for the H. Comm. on the Judiciary, Subcomm. on the Courts, Intellectual Property and the Internet (Nov. 30, 2017) (statement of Amanda Frost); Suzette M. Malveaux, The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today, 66 U. KAN. L. REV. 325 (2017); Suzette M. Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. F. 56, 64 (2017); Michael T. Morley, Public Law at the Cathedral: Enjoining the Government, 35 Cardozo L. Rev. 2543 (2014); Trammell, Alan M., Demystifying Nationwide Injunctions (Nov. 26, 2018) (Available at https://ssrn.com/abstract=3290838); Nicholas Bagley & Samuel Bray, Judges Shouldn't Have the Power to Halt Laws Nationwide, The Atlantic (Oct. 31, 2018), www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injuctions/574471/; Getzel Berger, Nationwide Injunctions Against the Federal Government: A Structural Approach 92 N.Y.U. L. Rev. 1068 (2017); Getzel Berger, Nationwide injunctions are wrong – even when they stop Trump, LA Times (May 12, 2017), www.latimes.com/opinion/op-ed/la-oe-berger-injunctions-lower-federal-courts-judges-20170512-story.html; Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 482 (2017); Ronald A. Cass, Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Broding Constitutional Structure (George Mason Legal Studies Research Paper No. LS 18-22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231456; Kate Huddleston, Nationwide Injunctions: Venue Considerations, 127 Yale L.J.F. 242 (2017); Memorandum from the Attorney General to Heads of Civil Litigating Components United States Attorneys (Sept. 13, 2018) (available at www.justice.gov/opa/press-release/file/1093881/download); Michael Morley, Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts, 97 B.U.L. Rev. 611, 657 (2017); Zayn Siddique, Nationwide Injunctions, 117 Colum. L. Rev. 2095 (2017); Kevin C. Walsh, Equity, the Judicial Power, and the Problem of the National Injunction, JOTWELL (November 24, 2016) (reviewing Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction (2016), available at SSRN), http://courtslaw.jotwell.com/eguity-the-judicial-power-and-the-problem-of-the-national-injunction/; Howard Wasserman, 'Nationwide' Injunctions are Really 'Universal' Injunctions and They Are Never Appropriate 22 Lewis & Clark L. Rev. 3335 (2018); Katherine B. Wheeler, Why There Should Be a Presumption Against Nationwide Preliminary Injunctions , 96 N.C. L. Rev. 200 (2017); Jack Beermann, Two Views on the Nationwide Injunction, JOTWELL (August 8, 2018) (reviewing 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

"nationwide injunctions" is meaningful or even exists as a separate type of injunction.

I look to this nascent debate to construct a working definition of "nationwide injunctions" as those injunctions that have no geographic limitation and that benefit people beyond named plaintiffs or named plaintiff classes. Scholars posit numerous bases for questioning whether courts can or should issue "nationwide injunctions." The grounds for critics' concerns fall into broader categories, saying that these injunctions are inappropriate or problematic for jurisdictional, jurisprudential, prudential, historical, or substantive reasons.[3] The core of the jurisdictional criticisms is that neither Article III of the U.S. Constitution nor the judiciary's equitable powers[4] give federal courts authority over the cases in question, the claims at issue, or the authority to issue this type of injunction with benefits extending to entities who may not have standing.[5] At the heart of the jurisprudential criticisms of "nationwide injunctions" is the idea that, even if federal courts do have the authority to issue such injunctions, various legal principles — agency non-acquiescence, avoiding inconsistent judgments, decreasing forumshopping, and matching the scope of relief to the extent of the established violation — counsel against courts using that power to issue

(2018)); Josh Blackman, Five Unanswered Questions from Trump v. Hawaii, 51 Case. W. Res. J. Int'l L. 139, 151-54 (2019); Matthew Erickson, Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions, 113 Nw. U. L. Rev. 331, 370 (2018); Andrew Kent, Nationwide Injunctions and the Lower Federal Courts, LawFare (Jan. 3, 2017), www.lawfare.com/nationwide-injunctions-and-lower-federal-courts; Alexandra D. Lahav, Go Big or Go Home: The Debate Over National Injunctions, JOTWELL (October 23, 2018) (reviewing Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065 (2018)); Suzette M. Malveaux, Preclusion Law as a Model for National Injunctions, JOTWELL (Dec. 5, 2018) (reviewing Alan M. Trammel, Demystifying Nationwide Injunctions (Nov. 26, 2018), available at SSRN), https://www.jotwell.com/preclusion-law-as-a-model-for-national-injunctions/); Samuel Bray, Does the APA Support National Injunctions? The Volokh Conspiracy (May 8, 2018), https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction?utm_source=dlvr.it&utm_medium=twitter; Ronald M. Levin, The National Injunction and the Administrative Procedure Act, The Regulatory Review (Sept. 18, 2018), www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/; Chris Walker, Quick Reaction to Bray's Argument that the APA Does Not Support Nationwide Injunctions, Yale J. on Reg.: Notice and Comment (May 8, 2018), http://yalejreg.com/nc/quick-reaction-to-brays-argument-that-the-apa-does-not-support-nationwide-injunctions/. [[[Need to add cases.]]]

[3] *See infra* Part II.B1.II.

[4] That there is no basis for federal courts to exercise this equitable power is also the primary historical concern with "nationwide injunctions."

[5] See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. LAW REV. 417 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 BOST. UNIV. LAW REV. 615 (2017); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS CLARK LAW REV. 335 (2018); Russell L. Weaver, *Nationwide Injunctions*, 117 2095–2150 (201AD).

"nationwide injunctions."[6] The primary prudential arguments against "nationwide injunctions" include separation of powers concerns, concerns for promoting percolation of cases in the federal court system, and concerns that, because the precedential reach of lower federal courts is geographically limited or nonexistent, those lower federal courts should not be able to bind federal governmental entities, or perhaps other entities, across the entire country or beyond.[7] The substantive arguments against "nationwide injunctions" turn on the idea that the court issuing the injunction may be wrong on the merits in its decision to do so, so federal courts (or at least lower federal courts) should refrain from issuing these injunctions altogether.

Commentators' proposed solutions to the problems that they identify fall into three main groupings[8]:

> (1) that lower federal courts not provide relief against a federal governmental defendant. Some proposals limit this restriction to cases of national importance or say that lower federal courts should only issue "nationwide injunctions" if certain additional requirements obtain[9]
>
> (2) that federal courts (including the Supreme Court) never issue injunctions that benefit anyone other than named plaintiffs or named plaintiff classes unless those benefits are indivisible[10]
>
> (3) various compromise approaches suggesting restrictions on injunctions against governmental entities that are contingent on other doctrines such as preclusion.[11]

Voices in this debate focus on injunctions in a variety of different cases ranging from challenges to executive orders, challenges to federal statutes, and challenges to agency rulemaking or decisions. Although the targeted injunctions are in a wide swath of cases, most everyone refers to the problematic type of injunction in a similar way — as "nationwide,"

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[6] See, e.g., Wasserman, *supra* note 6; Amanda Frost, *In Defense of Nationwide Injunctions*, 93 NEW YORK UNIV. LAW REV. 1065 (2018); Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 NEW YORK UNIV. LAW REV. 1068 (2017); Weaver, *supra* note 6.

[7] Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, GEORG. MASON UNIV. LEG. STUD. RES. PAP. SER. 1 (2018); Frost, *supra* note 7; Katherine B. Wheeler, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 NORTH CAROL. LAW REV. 200 (2017) (argument limited to preliminary injunctions); Berger, *supra* note 7; Weaver, *supra* note 6.

[8] *See infra* Part II.B2.

[9] See, e.g., Zachary D. Clopton, *National Injunctions and Preclusion*, MICH. LAW REV.

[10] See, e.g., Bray, *supra* note 6; Wasserman, *supra* note 6; Morley, *supra* note 6.

[11] See, e.g., Clopton, *supra* note 10; Frost, *supra* note 7; Alan M. Trammell, DEMYSTIFYING NATIONWIDE INJUNCTIONS (Nov. 26, 2018).

"national,"[12] "universal,"[13] "defendant-oriented,"[14] or even "cosmic"[15] injunctions. Some scholars have noted that the terms "nationwide injunctions" or "national injunctions" are misleading and inapt,[16] for various reasons,[17] while others have argued about terminology, saying that this is a question of nomenclature.[18] I contend, however, that the glitch in the "nationwide injunctions" debate goes far beyond a misleading misnomer. Regardless of whether one calls the targeted injunctions nationwide, national, universal, or defendant-oriented, the categorization is not meaningful because no such grouping of injunctions exists.

The best definition of "nationwide injunctions" that can be gleaned from the literature on the topic is injunctions that (1) do not have any geographic limitation and (2) that benefit people beyond named plaintiffs or plaintiff classes.[19] But federal courts issue nearly no injunctions with geographic limitations. Thus, defining a category of injunction by limiting the category to those injunctions without a geographic limitation is no distinction at all.

When one looks at the types of cases in which courts granted injunctions that benefit people beyond named plaintiffs or plaintiff classes, something stands out — nearly all of the defendants are governmental entities and nearly all of the cases involve public law, [20] or civil rights, litigation. Perhaps the "nationwide injunction" does not exist and, instead, the unspoken battle at the heart of the "nationwide injunction" debate is waged to shield governmental defendants from civil rights, and public law, litigation. If so, a victory for "nationwide injunction" critics could signal the end of what is arguably the most meaningful civil rights and public law remedy in the United States[21] — the public law injunction. I draw from both Professor Abram Chayes and

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[12] See, e.g., Bray, *supra* note 6.

[13] See Wasserman, *supra* note 6.

[14] See Michael T. Morley, *Disaggregating Nationwide Injunctions*, 70 ALA. LAW REV. (2018) (forthcoming).

[15] *Trump v. Hawaii*. No. 17-65, Tr. at 72 (Justice Gorsuch).

[16] Frost, *supra* note 7 at 1071; Wasserman, *supra* note 6; Morley, *supra* note 6; Bray, *supra* note 6 at 419 n.5.

[17] Although Professor Amanda Frost also calls these injunctions "nationwide," like Professor Samuel Bray, Frost seems to agree with Wasserman that the question of "nationwide" injunctions is really who they benefit, not their geographical scope. Frost, *supra* note 7 at 1067, 1069 ("courts have issued nationwide injunctions barring the executive from enforcing federal laws and policies against anyone, not just the plaintiffs in the case before them"; calling these injunctions "a remedy that extends beyond the parties").

[18] Wasserman, *supra* note 6 at 338, 349–53.

[19] *See infra* Part II.A1.

[20] See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. LAW REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. LAW REV. 1 (1979).

[21] *See infra* Part I.

Professor Owen Fiss to develop this term.[22] The public law injunction, or structural reform injunction, is an injunction that seeks to remedy group interests outside of the class action litigation context[23] and, in doing so, satisfies a constitutional need to inform and limit our governmental structure by giving specific meaning, operational content, and setting priorities for public values.[24] I propose that there is no such meaningful category as a "nationwide injunction." Instead, what these scholars, jurists, and litigants should debate is whether courts should protect governmental entities from public law litigation, including constitutional and civil rights claims.

Although the "nationwide injunctions" literature does not frame it this way,[25] the debate turns on whether federal judges or justices resolving adjudication can and should employ general injunctive power over governmental defendants' exercises of general legislative or executive power. To the extent that public law injunctions only apply to, or only tend to arise against, governmental defendants, and not private defendants, restricting the issuance of such injunctions would, in some ways, be a new, special governmental protection.[26] Given that there has been a decades-long struggle over what protections federal courts must or should afford to government defendants,[27] it is alarming that scholars and jurists are contemplating what may be the greatest new protection for governmental defendants (since sovereign immunity) without discussing the implications for public law litigation or even discussing governmental defendants and that whether governmental entities are entitled to a new protection is at the core of this controversy.

To give a concrete example, I had my own interaction with what some may call a "universal injunction." In June 2013, the moment that I and co-counsel[28] in a New Jersey marriage equality case[29] had been anxiously waiting for had finally arrived. The New Jersey Supreme Court had previously held that the state of New Jersey had to give same-sex couples access to the same benefits as heterosexual couples.[30] Then, in June 2013, the United States Supreme Court held in *U.S. v. Windsor*[31], that the Defense of Marriage Act[32] was unconstitutional and that the federal

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[22] Chayes, *supra* note 21; Fiss, *supra* note 21.

[23] Chayes, *supra* note 21 at 1292.

[24] Fiss, *supra* note 21.

[25] *See infra* Part II.A.

[26] *See infra* III.B.

[27] *See infra* Part I.

[28] While it was truly our client plaintiffs who had won and I do not presume to have been as eager for the victory as they were, I note myself and co-counsel because, as attorneys, we knew and understood the U.S. Supreme Court's opinion and its import for the litigation in light of state precedent.

[29] Garden State Equality v. Dow, 79 A.3d 1036 (N.J. 2013).

[30] Lewis v. Harris, 188 N.J. 415 (2006).

[31] 570 U.S. 744 (2013).

[32] 1 U.S.C. § 7 (2012).

government could not deny same-sex married couples federal marital benefits. Because New Jersey precedent requires same-sex couples to have access to the same benefits as heterosexual couples, now that *Windsor* meant that federal benefits were available to same-sex couples, but only if those couples were married, the state of New Jersey would no longer be able to exclude same-sex couples from marriage. In short, we won. But, when I was pulled into an emergency meeting with co-counsel, we quickly realized that we did not yet know what it was that we had won or what we should say that we had won.

In that meeting, we debated what we would argue that we won — in our summary judgment motion and our draft injunction, what would we say that the trial court should order? Would co-counsel and I say that the injunction should only require New Jersey to allow our seven plaintiff couples to marry? Anyone who was a member of our associational plaintiff, Garden State Equality? Every same-sex couple? We decided, in relative short order, to ask the trial court to enter an injunction directing the state of New Jersey to allow *any* same-sex couples who met the state's marriage license requirements to enter into civil marriages. The trial court granted our summary judgment motion and issued an injunction requiring New Jersey to allow same-sex couples to marry.[33] Today, some would characterize the injunction that we asked for, and won, as a "nationwide," or in our case, "statewide," injunction. A number of scholars, litigants, and judges are now debating whether, in cases such as that one, perhaps a court could, at most, order New Jersey to allow our seven plaintiff couples to marry and that New Jersey could continue to deny every other same-sex couple the ability to marry unless each and every couple sued the state and won.

This Article proceeds in three parts. Part I sets out the rules and doctrines that apply to injunctions. Federal courts have been issuing injunctions against governmental defendants in public law litigation for at least seventy years and such injunctions are arguably the foundation of civil rights and public law litigation.[34] For decades, the Supreme Court has affirmed or even issued injunctions that would fit within a category of "nationwide injunctions" as described in the current literature and, when the Court has reversed a lower court decision that could be described as involving a "nationwide injunction," the reversal has been on grounds unrelated to the propriety of the remedy.

Yet, in recent scholarship and judicial opinions,[35] many are sounding the alarm regarding the need to break with this tradition. In Part II, I distill existing judicial opinions and literature to outline the main critiques of this supposed category of injunctions and to describe the

[33] Garden State Equality v. Dow, 79 A.3d 1036 (N.J. 2013).
[34] *See infra* Part I.
[35] *See infra* Part II.

current proposed solutions to the problems critics worry that these injunctions pose.[36] Even with the growing number of scholars, litigants, governmental entities, judges, and justices debating the propriety and even legality of the "nationwide injunction," the definition and understanding of what exactly constitutes a "nationwide injunction" is surprisingly thin.[37]

In Part III, I argue that there is nearly nothing unique about the "type" of injunction that scholars are debating beyond that the injunction is against a governmental defendant in public law litigation. Looking at a number of these public law injunctions, federal courts issuing injunctions against governmental entities may be enjoining only what they hold to be illegal government action (or inaction).[38]

If what most scholars are, in fact, contesting in this "nationwide injunction" debate is whether district courts, courts of appeals, or the Supreme Court can or should issue injunctions *against the federal government*,[39] calling attention to this mislabeling and ill-fitting framework and naming what is actually at the core of the dispute changes the questions that one should ask and potential paths forward.

In this final part, I explain that the "nationwide injunction" is not just a misnomer; it is not a meaningful category at all. "Nationwide injunctions" is not a meaningful category because the potential features of this supposed type of injunction are that the injunctions are not limited in geographic scope (but I will show that nearly no federal court injunctions are limited in scope) and that this supposed type of injunction is not limited to benefiting named plaintiffs or named plaintiff classes. I will demonstrate that the second feature of "nationwide injunctions" is not a separate "type" of injunction, but is, instead, a core foundational feature of injunctions against the government in public law litigation. Thus, the logical result of "nationwide injunctions" critics' arguments would be to restrict or to end injunctions against governmental defendants in public law litigation.

I respond to "nationwide injunctions" critics' calls to end these injunctions with a counter call of alarm. Before we foreclose access to our courts, dispute resolution, or meaningful relief, we should debate the merits and risks of eliminating injunctions against governmental defendants in public law litigation. If recent debates turn judges or the

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[36] *Id.*

[37] *See infra* Part III.

[38] *See infra* Part III.

[39] It seems that most "nationwide injunction" opponents have argued that injunctions are improper only as against the federal governmental defendant. While I do not address this question in this Article, resolving this question would require answering at least two questions. Should injunctions against governmental defendants be different than injunctions against private entities? When it comes to governmental defendants, should injunctions be prohibited only against federal entities and not against state or other local entities? Spencer E Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARVARD LAW REV. FORUM 49–55, 49–55, 54–55 (2017).

Supreme Court against issuing public law injunctions against governmental defendants, then it is not only one public law claim that will fail and it will not be only one administration or Congress that "wins." Meaningful and complete relief for many challenges, including civil rights and constitutional challenges, may go out of existence. Before urging judges and justices to go down that path, let's at least discuss the heart of this controversy — protecting governmental defendants against public law and civil rights claims.