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Toward Establishing a Pre-Extinction Definition of 'Nationwide Injunctions'

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TOWARD ESTABLISHING A PRE-EXTINCTION DEFINITION OF “NATIONWIDE INJUNCTIONS”

PORTIA PEDRO*

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PREFACE

*Then it dawned upon me with a certain suddenness that I was
different from the others*

—W.E.B. DuBois¹

I start this piece with a personal narrative because I grew up in a family of storytellers. Even the story behind my name is part of who I am, and how I think, as a legal scholar. My parents chose my first name as a mixture of an homage to the cars that my mechanic dad worked on, loves, and has sometimes owned, and of a Shakespearean female character who saves a life by impersonating a lawyer and representing her client with innovative, brilliant reasoning.² It surprised me to learn in law school that some use a fictional judge, “Portia,” as a counter to Professor Ronald Dworkin’s fictional judge, Hercules.³ Despite the newness of that information, learning this use of my name made me feel more at ease in Harvard Law School classrooms as I took multiple classes on jurisprudence. My parents chose a closer figure when deciding on my middle name, Dolores. Dolores Massey Pedro (better known in my family as “Dear”) was my librarian grandmother who would enchant us all, especially otherwise unruly kids at my childhood birthday parties, with tales from books, her life, and our history. So “every time I tell a story now, it’s an act of love in honor of the memory and wisdom of my elders who first told me my favorite stories.”⁴

1. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (Henry Louis Gates, Jr. & Terri Hume Oliver eds., W.W. Norton & Co., 1999) (1903).

2. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (Kenneth Myrick ed., Signet Classic 2d ed. rev. 1987) (1598).

3. See Robert John Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 *MISS. L.J.* 225, 349 (1998); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105–06 (1977); but see MARGARET E. MONTOYA, *BEYOND PORTIA: WOMEN, LAW AND LITERATURE IN THE UNITED STATES* (Jacqueline St. Joan & Annette Bennington McElhiney eds., 1997) (encouraging scholars, jurists, and lawyers to look beyond “Portia” for other women’s experiences with the law).

4. Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 *MICH. L. REV.* 741, 742 (1997). For excellent examples of personal narrative in legal scholarship, see Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1710–14 (1993); Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 *HARV. LATINO L. REV.* 349 (1997) (discussing the relationship between narrative, identity formation, and legal scholarship); MONTOYA, *supra* note 3 (presenting literature on women’s

In the summer of 2018, I formally joined legal academia as an entry-level, tenure-track professor. As a Black⁵ woman and junior scholar with many Muslim and immigrant relatives and loved ones in the wake of controversies surrounding the Muslim Ban, the Asylum Ban, and threats to other immigration policies, I found my first academic year peppered with panels and workshops that centered around perspectives on “nationwide injunctions” that I found astonishing and unsettling. By way of brief introduction, injunctions are court orders, usually aimed at defendants, that prohibit or require certain actions. “Nationwide injunctions” are probably most often described as injunctions that have no geographic limitation and that benefit people beyond named plaintiffs or defined plaintiff classes. Recent controversial “nationwide injunction” cases have included motions, some granted, for court orders to prevent the enforcement of presidential executive orders regarding immigration,⁶ the Muslim Ban,⁷ the Asylum Ban,⁸ certain provisions of the Affordable Care Act,⁹ and more.¹⁰ I put “nationwide,” “national,” “universal,” “defendant-oriented” injunctions, and other similar terms in quotation marks or with a clear descriptor (like “so-called”) that indicates my viewpoint because I worry that the term “nationwide injunction” and all similar terms are a mis-

experiences with law to shed light on otherwise unarticulated premises); Patricia J. Williams, *The Death of the Profane*, in *ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 44, 44 (1991); Patricia J. Williams, *On Being the Object of Property*, in *THE ALCHEMY OF RACE AND RIGHTS*, *supra* at 216, 236 (discussing the origin and meaning of author’s name).

5. As a general practice, I capitalize “Black” and do not capitalize “white.” Harris, *supra* note 4, at 1710 n.3; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244 n.6 (1991); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1332 n.2 (1988).

6. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (DAPA); *Texas v. United States*, 328 F. Supp. 3d 662, 680–81 (S.D. Tex. 2018) (DACA); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018) (DACA).

7. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017).

8. *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255–56 (9th Cir. 2018).

9. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).

10. *See, e.g., City of Chicago v. Sessions*, 888 F.3d 272, 288–89 (7th Cir. 2018) (plaintiffs requesting injunction to prevent enforcement of immigration-related funding restrictions that would affect sanctuary cities); *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 397–98 (M.D.N.C. 2019) (plaintiffs requesting injunction to prevent enforcement of unlawful presence rules for students and exchange visitors).

leading and inaccurate framing that biases the debate and masks the true concerns and stakes of the debate.¹¹

At the first panel that I attended where panelists discussed their papers advocating for the end of “nationwide injunctions,”¹² I wondered if, perhaps, the entire conference was not for me.¹³ After all, it was in the South, a region made up of states and people that engaged in a war to maintain enslavement of people who looked like me and held out longer and more violently than other states did in their attempts to maintain a white supremacist, apartheid system.¹⁴ As I heard what sounded to me like panelists’ arguments that courts should not issue injunctions requiring defendants to comply with the Constitution or law, I realized that I was the only (visible) person of color in the room and that I was one of only two women.¹⁵ I started probing

11. For a discussion of framing and its influence within the political science context, see GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE (2004) (applying Erving Goffman’s social science concept of framing in the context of political science); Chris Riley, *The Rite of Rhetoric: Cognitive Framing in Technology Law*, 9 NEV. L.J. 495, 500 (2009) (citing LAKOFF, *supra*) (footnote omitted):

... [S]ome worldviews fit some frames better than others, creating the distinct possibility of argumentative techniques based on framing. Practical framing activity by political machines is based on the appropriate choice of language — e.g., speakers describe activities using terminology that reinforces their fundamental worldviews. Lakoff uses framing to explain Republican political successes in recent decades, to which he credits, in part, operatives in the Republican Party who have emphasized framing techniques for some time.

12. I attended the Federal Courts/Civil Procedure Works-in-Progress Workshop at the 2018 Southeastern Association of Law Schools (SEALS) Annual Conference in Fort Lauderdale on Friday, August 10.

13. Previously and since, I had and have felt very much at home at the SEALS Annual Conference. I had attended the conference the previous year and had received generous support in its Prospective Law Teachers Workshop, a rigorous program led by Professors Bradley Areheart and Leah Chan Grinvald to help those seeking law professor positions. The networking opportunities and warm scholarly communities led to several potential job opportunities and, perhaps even better, inclusion in continued scholarly conversation in the form of various workshops, roundtables, and conferences where insightful feedback on my work in this area helped immeasurably as I improved and refined various articulations of this project.

14. I am sharing the thoughts that were echoing in my head at the time, but, of course, the South is also made up of people who *do* look like me as well as many who fought valiantly to end slavery and segregation, even when that meant fighting against their own loved ones.

15. That said, I believe that there were only six people in the room: two panelists, one moderator/facilitator, and three audience members, of which I was one. To my knowledge, nobody in the room identified as LGBT, queer, or transgender.

my memory, worrying that school desegregation injunctions, like that in *Brown v. Board of Education*,¹⁶ benefited individuals beyond the defined plaintiff class. That would mean that the desegregation injunctions, which arguably are closely linked to the grievous nature of the remedied injury, share important structural characteristics with the injunctions in the crosshairs of “nationwide injunctions” critics’ arguments. I felt like I almost couldn’t breathe.

I desperately wanted to talk to (or, really, to text with) some friends who are people of color, including some beyond legal academia or, at least, outside of my specialty, to vent and to confirm what I was feeling. I wasn’t sure if the source of the disconnect was the conference, my beloved specialty areas (civil procedure, remedies, and federal courts), or my “second sight”¹⁷—my perspective from the other (nonwhite) side of the veil of race¹⁸ (or other marginalized identities). I considered whether my take on this subject was extremely different from most other legal scholars writing in the area, who are predominantly heterosexual, white, and male.

Of course, I knew that U.S. enslavement of African people and their children had not been abolished by a federal court, but the seemingly logical result of the panelists’ arguments sickened me. A number of my newfound colleagues in academia appeared to suggest that, even if the Supreme Court held that slavery was unconstitutional, the Court should not issue an order preventing any state from treating humans as slaves and property belonging to an owner.¹⁹ Instead, individuals not party to the Supreme Court case but nevertheless harmed or at risk of being harmed by the defendants’ unconstitutional actions would need to bring their own litigation, as a class or individually, person by person.

To make this hypothetical more realistic, in the New Jersey marriage equality case²⁰ that my former colleagues and I worked on and won for our clients (couples and an organization),

16. *Brown I*, 347 U.S. 483 (1954).

17. Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. LAW REV. 946, 954, 954 n.39 (2002).

18. DUBOIS, *supra* note 1.

19. Recently, some “nationwide injunctions” skeptics let me know that, in their opinions, slavery might be unique enough to justify departing from what they see as the rules that should govern the rest of injunctive relief. I’ll set that aside for a later discussion on whether there’s some other way for nonparties to obtain relief that might be sufficiently close to a “nationwide injunction.”

20. *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013).

the panelists' arguments would have suggested that the trial court and New Jersey Supreme Court, at most, should have issued an order requiring New Jersey to allow *only* our seven plaintiff couples to marry. The panelists' arguments would have suggested that we should not or could not have received the injunction that we requested, that the trial court granted, and that the New Jersey Supreme Court affirmed—an injunction requiring New Jersey to allow same-sex couples to marry.²¹

I wasn't sure if the panelists did not understand the gravity of the potential implications for those without full humanity in the United States and what it feels like to think that you may have to individually litigate every single unlawful, discriminatory, or unconstitutional law that cuts against you. On a personal level, this brings to mind my experience of being a college student and thinking that I had no choice but to try to work full-time to earn my tuition, registration fees, and room and board because the Financial Aid Office had told me that I would have to "appeal" its decision. When the person at that office told me that I could not get any aid unless I appealed, I had no clue what an appeal was, who could make this appeal, or what the chances were of it working. To me, hearing that I would need to appeal sounded like, "You will not ever get any financial aid to attend school." And I had graduated from an elite, private, college-preparatory high school (on scholarship); participated in student government; and spoke out on social issues. If I didn't feel I could make a financial aid appeal, how would others—who had grown up in much more difficult situations than I had—respond to the idea that they would have to individually litigate every single unconstitutional or illegal government statute, policy, or order? Would it be prudent for each affected individual to separately challenge a generally applicable congressional firearm regulation in order to receive an injunction against an unconstitutional statutory provision? To have all current and potential future affected individuals joined into a class action?

21. *See id.* In this New Jersey marriage equality case, we requested an injunction to prevent the state of New Jersey from allowing only heterosexual couples to marry within the state. Granted, that injunction might be a "statewide injunction" instead of a "nationwide injunction," but similar arguments and concerns likely apply to both. While there are some similarities between "statewide" and "nationwide" injunctions—there are multiple district courts within a state and within the United States—there are also differences—a state exists within a single federal circuit.

Moreover, I wasn't sure if emphasis on formalism led the panelists not to see or care, or if reaching a point where marginalized people would have to litigate each claim one by one (or through a likely impossible-to-certify class action) was the panelists' intended result. My almost-refrain of "I wasn't sure" is because I wasn't sure then, nor do I claim to be sure now, of the reasons for the differences in my thinking and that of my interlocutors on the subject of "nationwide injunctions."

My political values and the passions that drove me to practice law are of the left-leaning, social-justice sort, so those types of concerns and potential claims immediately come to mind. That said, my experiences and perspective also inform my appreciation for procedural and remedial protections, like injunctive relief, that apply to everyone, including plaintiffs with socially conservative and right-leaning causes. These right-leaning causes include, for example, challenges to: (1) provisions limiting or regulating gun licensing and ownership; (2) provisions of the Affordable Care Act that relate to providing birth control or abortions; and (3) President Obama's executive actions regarding immigration policies, such as his Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.²²

To my relief, the panel moderator, Professor Andy Wright (also a white man), brought up *Stell v. Savannah-Chatham County Board of Education*,²³ where a district court judge in

22. Press Release, Office of the Press Sec'y, White House, Weekly Address: Immigration Accountability Executive Action (Nov. 22, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action> [<https://perma.cc/7QGN-H2J2>]; Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enft, and R. Gil Kerlikowske, Comm'r of U.S. Customs & Border Prot. 4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/Z7B9-K5MG>]. The Obama Administration also referred to this program as "Deferred Action for Parental Accountability."

23. 220 F. Supp. 667 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir. 1964). In *Stell*—which the court decided in 1963, nine years after *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954)—the district court denied the Black plaintiffs' motion for a preliminary injunction that would prevent the continued operation of segregated public schools. *Stell*, 333 F.2d at 57–58, *overruled in part by United States v. Jefferson Cty. Bd. Of Educ.*, 380 F.2d 385 (5th Cir. 1967). The district court dismissed the complaint after accepting expert testimony from the school board purportedly demonstrating that there were "inherent" differences in Black students' and white students' capacities for education and after allowing white parents and students to intervene and accepting their expert testimony that

Georgia attempted to redecide *Brown v. Board of Education*²⁴ with new litigants. Wright noted that the Fifth Circuit had slapped down the district court's decision in *Stell*²⁵ and asked panelists if their proposals would mean that individual federal judges could or should readjudicate questions that the Supreme Court had decided and for which the Court had issued or affirmed injunctions.

Although the panelists' responses did not assuage my concerns about their proposals, Wright's comments let me know that I was not completely alone at that conference or even in that room—someone else also saw the danger that began to gnaw at my insides when I heard scholars discuss “nationwide injunctions.” As a left-leaning Black woman, I am building my scholarly home in a field of mostly white men who are debating the future of a remedy that Black people have used and continue to use—albeit often only somewhat successfully so and in other areas outside of education—to end segregation and achieve racial equity. Without this remedy I would neither have any of the educational degrees that I have been fortunate enough to attain nor be an official part of this scholarly discussion. Essentially, much of “nationwide injunctions” skeptics' arguments likely undermine the legal remedies used to combat structural subordination in the United States. I was truly perplexed that I could see and feel this concern, yet many other more-seasoned legal scholars did not seem to. It seemed not to be even a consideration for them.

Unlike the critical legal studies (CLS) rights-skepticism and the critical race theory critique of that skepticism, I do not know if the basis for the difference in approaches and reactions to “na-

educating Black and white students together in Savannah would “impair the educational opportunities” of, and “cause . . . grave psychological harm” to, both Black and white students. 220 F. Supp. at 668. *Stell* is similar to *Gibson v. Harris*, 322 F.2d 780, 781 (5th Cir. 1963), which the U.S. Court of Appeals for the Fifth Circuit treated as *Stell*'s companion case. In *Gibson v. Harris*, the district court enjoined the school board from implementing a plan to desegregate a public school because white plaintiffs alleged that desegregation would be detrimental for both Black and white students. *Stell*, 333 F.2d at 58–59.

24. *Brown I*, 347 U.S. 483 (1954).

25. The Fifth Circuit vacated the injunction that prevented the Glynn County school board from implementing its desegregation plan and reversed the judgment that dismissed the Savannah litigation because “the major premise of the decision of [*Brown I*]” was not “limited to the facts of the cases there presented.” *Stell*, 333 F.2d at 61. Instead, *Brown* “proscrib[ed] segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal.” *Id.*

tionwide injunctions” turns upon some as-of-yet unnamed theoretical split, dissimilarities in life experiences due to sociocultural differences, or something else entirely. What I do know is that, to my mind, “what is needed, therefore, is not the abandonment of” the targeted injunctions, “but an attempt to become multilingual in the semantics of evaluating” the targeted injunctions.²⁶ The potential shortcomings of federal courts’ procedural, remedial, appellate, or injunctive mechanisms do not guarantee that eliminating “nationwide injunctions” is a good or better solution than the current mechanisms.²⁷ If we take seriously Professor Daryl Levinson’s contention that there is not a meaningful constitutional right unless that right is also supported by a meaningful remedy, then we should take criticism of the CLS abandonment of rights discourse as a serious warning about projects to abandon remedies for those rights, including “nationwide injunctions.”²⁸

During the next conference session where the same scholars presented these arguments, I felt more prepared to hear them. The presentation was also shorter due to several discussions of other projects.²⁹ Still, I experienced a persistent pang of danger on the subject—it set off my “Spidey-sense.”³⁰ Although I had an almost visceral reaction to some of the proposals, I did not see an opportunity to make a useful intervention in the area, myself, until a few months later.

At the Tenth Annual Junior Faculty Federal Courts Workshop,³¹ Professor Norman Spaulding (an African American man)

26. Patricia J. Williams, *The Pain of Word Bondage*, in *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 4, at 146, 149 (1991).

27. *Id.* at 158 (“[F]ailure of rights discourse, much noted in CLS scholarship, does not logically mean that informal systems will lead to better outcomes.”).

28. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 4 *COLUM. L. REV.* 857 (1999); Williams, *supra* note 26, at 163–65.

29. This was during the Civil Procedure Workshop discussion group at the 2018 Southeastern Association of Law Schools (SEALS) Annual Conference in Fort Lauderdale, Florida, on Saturday, August 11.

30. “The superhero Spider-Man possesses an enhanced awareness of his immediate surroundings that manifests as an acute tingling when he is in danger.” Seth W. Stoughton, *Terry v. Ohio and the (Un)forgettable Frisk*, 15 *OHIO ST. J. CRIM. L.* 19, 33 n.20 (2017). I don’t claim to be a superhero, nor do I claim that I was in literal danger, but some popular culture references come to mind easily.

31. The Tenth Annual Junior Faculty Federal Courts Workshop was hosted by The University of Oklahoma College of Law on September 14–15, 2018. A few scholars had warned me to be wary of the workshop because some had heard tales of what could be called a less-than-hospitable reception of new scholars to the field, particularly when those new scholars were women, people of color, or produced left-of-center scholarship. I do not know what did or didn’t happen in those years; it was

provided a powerful, intellectual voice to my discomfort with the “nationwide injunctions” conversation with his comments on a trio of papers.³² I use the term “conversation” here instead of “debate” because Spaulding’s comments highlighted that all of the scholars presenting papers at the workshop session were engaging in a conversation that ignored a number of threshold issues. His comments made the “nationwide injunctions” literature seem more like a one-sided conversation than a debate. Assuming this one-sided-conversation description was accurate, I began to wonder what another perspective on the subject might look like.

Spaulding declared that he would not use the terms “nationwide injunction” or “national injunction” because neither described the subject of any of the authors’ papers. Instead, Spaulding said that the remedy that the papers targeted was a prophylactic injunction against the government. Building on that idea, Spaulding contended that the first crucial step in any paper on the subject must be to define the injunctions at issue in that manner. Next, Spaulding contended that a paper must defend why federal courts either could not or should not issue prophylactic injunctions or, at least, not prophylactic injunctions against the government, in light of the long history of equitable and analogous forms of structural and prophylactic relief.

before my time, and I do not mean to dredge up or involve myself in past drama. I had chosen not to submit a proposal to the workshop the prior year, in part due to mentors’ concerns about whether me attending the workshop might drum up hostility toward my tenure-track candidacy while I was on the market for a law professor position. Professor Roger Michalski organized the 2018 workshop and, like other workshop organizers since him (I don’t personally know anything of what happened before), did a smashingly standout job of encouraging me, as well as others who don’t fit the typical federal courts scholar demographic, to attend and engage. Regardless of how others may have experienced the workshop in years past and, perhaps, because of those growing pains, I now thoroughly enjoy the workshop and regard it as one of the key yearly conferences (along with the Annual Civil Procedure Workshop, organized by Professors Brooke Coleman, David Marcus, and Elizabeth Porter, and some remedies workshops to which Professor Caprice Roberts ensured I was invited) that contributes the most to my scholarly development and my integration in the field.

32. Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019) [hereinafter Morley, *Disaggregating Nationwide Injunctions*]. I don’t mean to suggest that all three papers or scholars take the same position regarding “nationwide injunctions.” To the contrary, Professors Trammell and Clopton defend courts issuing “nationwide injunctions” in certain circumstances.

I call “nationwide injunctions” a “targeted” remedy because it seems that the central organizing feature of the “nationwide injunctions” debate is *which* injunctions critics are attacking. I worry that the tail may be wagging the dog because critics are taking aim at certain injunctions and, perhaps, reverse engineering a label, a category, and a type of injunction that they claim fits the targeted injunctions. The “nationwide injunctions” category strikes me as a potentially false construction. I do not accuse any of these scholars of being disingenuous in their pursuits or of intentionally reverse engineering their arguments. But if the targeted injunctions are plaintiff victories in lawsuits brought primarily from the left, challenging primarily right-wing governmental actions, and the scholars are primarily on the ideological right, perhaps that should give us pause. Perhaps—along with failing to acknowledge the practical implications of their arguments for subordinated communities and social equality—“nationwide injunction” critics are creating a problem where there isn’t one and are reverse engineering a distinction when there isn’t really a significant difference. Much in the same way that colleagues in the field press me to explain that my scholarly position is not instrumentalist in nature, why should we not press “nationwide injunction” critics? I hope that scholars engage with and figure out what the salient characteristics and groupings, if any, of the targeted injunctions actually are.

Motivated by Spaulding’s charge,³³ I set out to write such a paper. I wanted to learn about and understand the perspectives of those opposed to “nationwide injunctions,” with a hope that

33. At some point after the workshop, Professor Suzette Malveaux, a Black woman who is also Provost Professor of Civil Rights Law and Director of The Byron R. White Center for the Study of American Constitutional Law at the University of Colorado Law School, invited me to participate in the Twenty-Seventh Annual Ira C. Rothgerber Jr. Conference on “nationwide injunctions.” This symposium invitation was my excuse to begin putting pen to paper about the subject. When I participated in the Rothgerber Conference, it was the first time that I had seen a racially- and gender-diverse group of people discuss “nationwide injunctions.” That conference presented me with the first opportunity to interact in both scholarly and social settings with nearly all of the scholars whom I had seen present their work at the prior “nationwide injunctions” discussions. As a newcomer to the conversation, I welcomed Malveaux’s warm invitation, and Clopton, Morley, Trammell, and Wasserman extended that warmth in spirited discussion and collegiality. At the Rothgerber Conference, and a few other roundtables and workshops since then, I engaged with several others about “nationwide injunctions” who also welcomed me to the conversation—Professors Samuel Bray, Charlton Copeland, Doug Rendleman, Mila Sohoni, Russell Weaver, and Ahmed White.

doing so would allow me to express more clearly why I find this debate so deeply problematic, troubling, and wrongly framed.³⁴ As it turned out, a number of scholars and advocates outside of the “nationwide injunctions” debate—as it existed at the time of the conference and as it largely persists today—have expressed shock and confusion upon hearing several common arguments and suggestions that are routine in the debate.

34. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 69 (1987) (“Although members of minority groups have historically felt an obligation to become conversant in the world view of the majority, they have also made an effort to preserve their own.”) (citing W.E.B. DUBOIS, *SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* (Dodd & Mead ed., Fawcett Publ’ns 1979) (1903)); BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* ix (1984) (“Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and [sic] from the inside out. We focused our attention on the center as well as on the margin. We understood both.”).

INTRODUCTION

As the number of scholars,³⁵ nongovernmental litigants,³⁶

35. Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020); 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, 1069 (2018); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 396 (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. 2453, 2499 (2014) [hereinafter *Public Law at the Cathedral*]; Trammell, *supra* note 32; Nicholas Bagley & Samuel Bray, *Judges Shouldn’t Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/> [https://perma.cc/SA6B-LDCP]; Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017) [hereinafter Berger, *Nationwide Injunctions Against the Federal Government*] (arguing that “nationwide injunctions” against the federal government should be limited to the circuit of the enjoining court); Getzel Berger, *Nationwide Injunctions Are Wrong – Even When They Stop Trump*, L.A. TIMES (May 12, 2017), www.latimes.com/opinion/op-ed/la-oe-berger-injunctions-lower-federal-courts-judges-20170512-story.html [https://perma.cc/PB57-B77D] [hereinafter *Nationwide Injunctions Are Wrong*]; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 482 (2017) [hereinafter *Multiple Chancellors*]; Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, (Geo. Mason U. Legal Stud. Res. Paper Series, Legal Studies No. LS 18-22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231456 [https://perma.cc/WV79-JLXK]; Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J. F. 242, 242–43 (2017); Michael Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 657 (2017) [hereinafter *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*]; Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (discussing “nationwide injunctions” in reference to both private and public law cases); Kevin C. Walsh, *Equity, the Judicial Power, and the Problem of the National Injunction*, JOTWELL (Nov. 24, 2016), <https://courtslaw.jotwell.com/equity-the-judicial-power-and-the-problem-of-the-national-injunction/> [https://perma.cc/F73K-TXC8] (reviewing *Multiple Chancellors*, *supra*); Howard Wasserman, “Nationwide” Injunctions are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018); Katherine B. Wheeler, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 200–03 (2017); Jack Beerman, *Two Views on the Nationwide Injunction*, JOTWELL (Aug. 8, 2018) (reviewing *Multiple Chancellors*, *supra*); 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.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts [https://perma.cc/8RAD-ZGWM]; Alexandra D. Lahav, *Go Big or Go Home: The Debate Over National Injunctions*, JOTWELL (Oct. 23, 2018) (reviewing Frost, *supra*); Suzette M. Malveaux, *Preclusion Law as a Model for National Injunctions*, JOTWELL (Dec. 5, 2018) (reviewing Trammell, *supra* note

governmental entities,³⁷ judges,³⁸ and justices³⁹ debating the

32), <https://www.jotwell.com/preclusion-law-as-a-model-for-national-injunctions/> [<https://perma.cc/4MGP-SNWN>]; Samuel Bray, *Does the APA Support National Injunctions?*, 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 [hereinafter Bray, *Does the APA Support National Injunctions?*] [<https://perma.cc/HG4H-EDMZ>]; Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REG. REV. (Sept. 18, 2018), www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/ [<https://perma.cc/8CPY-8PTT>]; Chris Walker, *Quick Reaction to Bray's Argument that the APA Does Not Support Nationwide Injunctions*, YALE J. ON REG.: NOTICE & COMMENT (May 8, 2018), <http://yalejreg.com/nc/quick-reaction-to-brays-argument-that-the-apa-does-not-support-nationwide-injunctions> [<https://perma.cc/MK6F-M286>].

36. See *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015); *City of Chicago v. Sessions*, 888 F.3d 272, 288–89 (7th Cir. 2018); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255–56 (9th Cir. 2018); *Casa De Md. v. United States Dep't of Homeland Sec.*, 924 F.3d 684, 707 (4th Cir. 2019) (Richardson, J., dissenting).

37. Memorandum from the Att'y Gen. to Heads of Civil Litigating Components U.S. Att'ys (Sept. 13, 2018), www.justice.gov/opa/press-release/file/1093881/download [<https://perma.cc/GHV7-ZLUC>]; *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), <https://docs.house.gov/meetings/JU/JU03/20171130/106665/HHRG-115-JU03-Wstate-FrostA-20171130.pdf> [<https://perma.cc/8BUW-YNTW>]; see all cases *supra* note 36.

38. *Texas v. U.S.*, 809 F.3d at 187–88; *Hodgson v. First Fed. Sav. & Loan Assoc.*, 455 F.2d 818, 826 (5th Cir. 1972) (quoting *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962)); *Sessions*, 888 F.3d at 288–89; *Int'l Refugee Assistance Project*, 857 F.3d at 605; *E. Bay Sanctuary Covenant*, 909 F.3d at 1255–56; *Casa De Md.*, 924 F.3d at 707 (Richardson, J., dissenting); *Azar*, 911 F.3d at 583–84; *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408–09 (D.C. Cir. 1998); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 775–76 (9th Cir. 2008) (Wardlaw, J., dissenting) (ADA); *Jones v. DeSantis*, No. 4:19cv300-RH/MJF, 2019 WL 5295192 (N.D. Fla. Oct. 18, 2019) (order granting preliminary injunction); *Texas v. United States*, 328 F. Supp. 3d 662, 680–81 (S.D. Tex. 2018) (DACA); *City of Chicago v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 169518, at *7-8, *15 (N.D. Ill. Oct. 13, 2017); *Saget v. Trump*, 375 F. Supp. 3d 280, 280 (E.D. N.Y. 2019); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 501, 677–78 (2019); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 833–35 (2019); *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 397–98 (2019); *Texas v. United States*, 340 F. Supp. 3d 579, 579 (N.D. Tex. 2018); *New York v. Pruitt*, 18-CV-1030 2018 U.S. Dist. LEXIS 88832, at *16-17 (S.D. N.Y. May 29, 2018) (Clean Water Act); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (2018).

39. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring) (voicing skepticism about federal courts' authority to issue such injunctions); *id.* at 2446 n.13 (Sotomayor, J., dissenting) (opining that providing complete relief to the plaintiffs required a “nationwide injunction”); Transcript of Oral Argument at 22, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965) (Gorsuch, J., noting “this troubling rise of this nationwide injunction, cosmic injunction”). The Supreme Court heard oral argument in *Trump v. Hawaii* on April 25, 2018, and released its opinions on the case on June 26, 2018. 138 S. Ct. 2392 (2018). The Court found it “unnecessary

propriety and even legality of the “nationwide injunction” grows, the definition and understanding of what exactly constitutes a “nationwide injunction” is surprisingly thin. It is not completely clear what anyone means when they use this terminology to refer to an injunction. I realized that, instead of defending these injunctions and making a stronger scholarly case for them than what had been put forth thus far, I needed to first address questions of basic definition. What do scholars, litigants, judges, and justices mean when we say “nationwide,” “national,” “universal,” or “defendant-oriented” injunctions? We need clarification on basic definition before progressing to arguments for evisceration or exoneration of “nationwide injunctions.”

Drawing from the literature, we could define a “nationwide injunction” as an injunction with the following features: (1) no geographic limitations and (2) benefits to people beyond named plaintiffs or plaintiff classes. What if evaluating the two components of this potential definition of “nationwide injunctions” reveals that the targeted injunctions are not unique in the ways that current scholarship presumes? Are the only salient characteristics of these injunctions that they have no geographic limitation on their scope and that they benefit people beyond named plaintiffs or defined plaintiff classes? Or are there other distinctive attributes of the debated injunctions that have been overlooked in discussion so far? If most injunctions that federal judges and justices issue do not have any limitations on their geographical scope, and if there is no requirement that federal judges limit injunctions to ensure that they only benefit named plaintiffs or defined plaintiff classes, then maybe we should figure out what “nationwide injunctions” are.⁴⁰ Indeed, those interested should figure out what is so special about these “nationwide injunctions” before advocating for their demise.

With the understanding that it is futile, at best, and carries potentially dangerous consequences, at worst, to debate the pro-

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. *Id.* at 2423.

40. This type of injunction is not necessarily prophylactic or preventative. A prophylactic injunction prohibits conduct that might otherwise be legal or requires conduct that is not necessarily legally required otherwise. For further exploration of these injunctions, see Portia Pedro, *The Myth of the “Nationwide Injunction”* (2019) (unpublished manuscript) (on file with author) (arguing that there is nearly nothing unique about the so-called “nationwide injunction” beyond that the injunction is for a public law claim and against a governmental defendant).

priety and legality of a remedy without understanding what the remedy at issue *is*, this Essay poses, in Part I, several questions central to figuring out what these so-called “nationwide injunctions” are:

- What characteristics define these targeted injunctions?
- How do these injunctions compare to other injunctions?
- Is there something unique about the actions prohibited or required by these injunctions?

Part II explains that the problem isn’t merely one of nomenclature. Bickering over the term with which we refer to these targeted injunctions does not do much if there is still little agreement as to what is central to these injunctions and what is at stake in allowing courts to continue issuing them or urging courts to stop doing so. Part III argues that continuing to debate injunctions in isolation from any developed, conceptual framework leads to potentially misguided arguments. In the Conclusion, I highlight what may be at stake if there is not a conceptual framework for the debate. In the Afterword, I discuss some of the tensions unearthed as I worked to incorporate a personal component in this scholarly project.

Calling attention to this lack of clarity and defining what is actually at the core of the dispute⁴¹ will likely change the questions that we should ask and the potential paths forward. Before we continue in this “nationwide injunctions” debate, we should define and agree upon what it is that we are debating.

As we do so, it is important to take stock of what types of concerns we are considering as scholars debate “nationwide injunctions.” The balance of criticisms regarding the targeted injunctions involve issues that are structural, jurisprudential, prudential, and formalist in ways that would curtail “nationwide injunctions” to protect Article II actors, to the relative detriment of those injured by Article II actors. There has been compara-

41. Other scholars also are engaging in this quest. See Morley, *Disaggregating Nationwide Injunctions*, *supra* note 32, at 9 (“I hope that scholars engage with figuring out what the salient characteristics and groupings, if any, of the targeted injunctions are.”).

tively little focus on the potential costs of curtailing “nationwide injunctions” for those injured by Article II actors—marginalized communities in particular. What are the downsides of cutting off, or severely limiting access to, meaningful relief? For me, it is worrisome that our scholarly community has begun making recommendations about “nationwide injunctions” without even knowing the costs to marginalized communities, let alone including those concerns as part of this discussion and our analyses.

I. NOT A MERE QUESTION OF NOMENCLATURE

Although courts have issued the targeted injunctions in a wide variety of cases,⁴² most everyone refers to the purportedly problematic type of injunction in a similar way—as “nationwide,” “national,”⁴³ “universal,”⁴⁴ “defendant-oriented,”⁴⁵ or even “cosmic”⁴⁶ injunctions. I am far from the first scholar to take issue with what seems to be the current naming convention for these injunctions. Beginning at the 2018 Junior Faculty Federal Courts Workshop, held at the University of Oklahoma, many started jokingly referring to these injunctions as “Voldemort”⁴⁷ injunctions” because of the seeming elusiveness of a

42. Compare *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), with *Hodgson v. First Fed. Sav. & Loan Assoc.*, 455 F.2d 818 (5th Cir. 1972), and *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).

43. See, e.g., *Bray, Multiple Chancellors*, *supra* note 35.

44. See *Wasserman*, *supra* note 35.

45. See *Morley, Disaggregating Nationwide Injunctions*, *supra* note 32.

46. Transcript of Oral Argument at 73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17–65), (Gorsuch, J.).

47. Voldemort, or “Lord Voldemort,” is a villain in the *Harry Potter* book and movie series to whom other characters often refer by saying “You-Know-Who” or “He-Who-Must-Not-Be-Named.” J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* 456 (Scholastic 2007) [hereinafter *DEATHLY HALLOWS*]; J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 8 (Scholastic 2005); J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* 251 (Scholastic 2003); J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* 141–42, 593, 595 (Scholastic 2000); J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 11, 100 (Scholastic 1997); see also Darby Dickerson, *Professor Dumbledore's Advice for Law Deans*, 39 U. TOL. L. REV. 269, 292 (2008) (noting that many characters in the book did not say Voldemort's name because of their fear of him and that only a few courageous characters said “Voldemort” out loud). Only Voldemort's bravest rivals would dare to speak his name aloud because doing so, through a magic spell, enabled Voldemort's army to track the speaker down for punishment or death. *DEATHLY HALLOWS*, *supra* at 389–90 (a character explains that Voldemort's supporters are using magic to locate anyone who says “Voldemort”). Even though Professor Alan Trammell has insisted that someone should include “Voldemort

proper moniker.⁴⁸ Several scholars have noted that the terms “nationwide injunctions” and “national injunctions” are misleading and inapt⁴⁹ for various reasons,⁵⁰ and some have written extensively about the terminology, saying that this is a question of nomenclature.⁵¹

I agree with Professor Howard Wasserman that the term “nationwide injunction” has a nomenclature problem. But the problem with referring to the geographic scope of the injunction is not repaired by changing “nationwide” to “universal” in order to refer to the beneficiaries.⁵² Instead, I contend 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,” we do not yet have a functional definition of what this type of injunction is or how it differs from other injunctions, so we don’t yet actually know if a “nationwide injunction,” by any name, is actually a “type” of injunction. All discussion of ending these injunctions should pause until we have a clear understanding of what they entail and what might be lost if lower federal courts or all federal courts stopped granting this relief.

injunctions” in a publication (and I think that he is correct about that), he is in no way to blame for my perhaps overly substantial treatment of this subject in citation.

48. No self-respecting *Harry Potter* fan (especially not one who has proudly waited outside of a New York bookstore for the stroke of midnight in order to receive a preordered hardcover copy of the final book in the series) would let it go without saying that calling these injunctions “Voldemort injunctions” would be to misname a misnomer. Unlike the fear of retribution or death for *Harry Potter* characters saying “Voldemort,” the problem here is that “nationwide injunctions” do not yet have a clear definition or accurate title, not that they have a fitting name that people are too scared to utter aloud.

49. Amanda Frost, *supra* note 35; Wasserman, *supra* note 35; Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, *supra* note 35; Bray, *Multiple Chancellors*, *supra* note 35, at 419 n.5.

50. Although Professor Amanda Frost also calls these injunctions “nationwide,” like Professor Samuel Bray calls them “national,” Frost seems to agree with Wasserman that the question of “nationwide” injunctions is really whom they benefit, not their geographical scope. Frost, *supra* note 35, at 1067, 1069 (“[C]ourts 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.”).

51. Wasserman, *supra* note 35, at 338, 349–53.

52. *Id.*

II. DEFINITIONAL QUESTIONS

Does this debate actually center on “nationwide injunctions,” and, if so, is it accurate to define “nationwide injunctions” as injunctions with the following features: (1) no geographic limitations and (2) benefits to people beyond named plaintiffs or defined plaintiff classes, even when the right may be individuated⁵³ or even when the benefits of the injunction may be divisible?⁵⁴ If this is how we define “nationwide injunctions,” then, for over fifty years⁵⁵ and, perhaps, for over one hundred years,⁵⁶ federal judges have been issuing “nationwide injunctions” and the Supreme Court has been affirming as well as issuing “nationwide injunctions.”⁵⁷ Moreover, when the Supreme Court has reversed a lower court decision that could be described as involving a “nationwide injunction,” the reversal has been on

53. That a right is individuated means that one group member may be more or less injured than another group member such that the harm and remedies may be individualized. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681 (2001) (explaining that, in terms of vote dilution, the right to vote is “unindividuated among members of the group; no group member is more or less injured than any other group member”).

54. The *right* could be technically divisible, meaning that the governmental entity could refrain from applying the challenged policy or provision to a named plaintiff and could continue applying the policy or provision to every other person similarly situated. And *enforcement* could be divisible, meaning that only a named plaintiff could bring an enforcement action; other persons similarly situated could not bring an enforcement action unless they filed, litigated, and won their own case (likely without the benefit of preclusion). See Wasserman, *supra* note 35, at 371 (“Divisible rights belong to the plaintiffs alone and can be remedied by a limited injunction protecting the plaintiffs alone. With indivisible rights, the rights of one person cannot be separated from the rights of others, thus a remedy benefitting one person must benefit other people similarly situated.”).

55. Bray, *Multiple Chancellors*, *supra* note 35, at 424–44, 438 (arguing that federal courts declined to issue “national injunctions” prior to 1963, the year in which Bray argues courts issued “the first national injunction in the United States”).

56. Sohoni, *supra* note 35, at 922–26, 973–79 (arguing that courts issued the first “universal injunction” of federal law in 1913 and that courts issued the first injunction that was not limited to named plaintiffs to prevent enforcement of a state law in 1925).

57. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (holding that the grant of a preliminary injunction was an abuse of discretion, but noting that “[o]ur disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court”); *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (granting, in part, the government’s application to stay “nationwide injunctions” and leaving some portions of the injunctions in place); *Lewis v. Casey*, 518 U.S. 343, 358–64 (1996) (holding that the injunction was not supported by the facts presented and was thus too broad in scope); see also Sohoni, *supra* note 35, at 922–26, 973–79.

grounds unrelated to the “nationwide injunction” nature of the remedy.⁵⁸ Although federal courts have been issuing such injunctions for a century (or at least a half a century) without scholars, litigants, and judges questioning their propriety, these orders have recently come under intense fire.

Critics have a broad range of concerns with these injunctions, including that the targeted injunctions are inappropriate or problematic for jurisdictional (which includes historical), jurisprudential, prudential, or substantive reasons. These four categories of criticism can be summarized as follows:

- Jurisdictional Criticism: The core of the jurisdictional criticisms is that none of Article III of the U.S. Constitution, the judiciary’s equitable powers, the Federal Rules of Civil Procedure, or remedial doctrine 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 outside of the defined class and named plaintiffs.
- Jurisprudential Criticism: 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 forum shopping, and matching the scope of relief to the extent of the established violation—counsel against courts using that power to issue “nationwide injunctions.”
- Prudential Criticism: The primary prudential arguments against “nationwide injunctions” include concerns regarding separation of powers; concerns for promoting percolation of cases in the federal judicial 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 gov-

58. See cases cited *supra* note 57.

ernmental entities, or perhaps other entities, across the entire country or beyond.

- Substantive Criticism: 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.⁵⁹

A potential difficulty with defining a “nationwide injunction” as an injunction with no geographic limitation that protects people beyond named plaintiffs or named plaintiff classes is, therefore, that the first portion of the definition (an injunction with no geographic limitation) might aptly describe the majority of injunctions that federal judges and justices issue. Federal courts issue nearly no injunctions with geographic limitations.⁶⁰ Another potential problem in this draft definition of “nationwide injunctions” lies in the second part of the definition—that the injunction protects people beyond named plaintiffs or named plaintiff classes. However, to the extent that there is a litigant-specific characteristic of injunctions (or of a rule limiting injunctions), it is that injunctions are limited to named defendants (not named plaintiffs), if even that.⁶¹

59. See Portia Pedro, *supra* note 40 (citing Bray, *Multiple Chancellors*, *supra* note 35; Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, *supra* note 35; Cass, *supra* note 37 (manuscript at 1); Frost, *supra* note 35; Wasserman, *supra* note 35; Russell L. Weaver, *Nationwide Injunctions* (2019) (unpublished manuscript) (on file with author); Wheeler, *supra* note 35 (argument limited to preliminary injunctions); Berger, *Nationwide Injunctions Against the Federal Government*, *supra* note 35).

60. “[N]o one denies that district courts have the power to enjoin a defendant’s conduct anywhere in the nation (indeed, the world) as it relates to *the plaintiff*; rather, the dispute is about *who* can be included in the scope of the injunction, not *where* the injunction applies or is enforced.” Frost, *supra* note 35, at 1071 (emphasis in original) (citation omitted). There is typically no geographic constraint on where a judgment can be enforced regardless of whether the judgment is for money damages or equitable relief. See U.S. CONST. art. IV, § 1, cl. 3 (“Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State.”).

61. See Fed. R. Civ. P. 65; *Plant v. Does*, 19 F. Supp. 2d 1316, 1319–20 (S.D. Fla. 1998) (holding that the law would not permit plaintiffs to obtain an injunction “to prevent the unknown parties from engaging in what might be illegal behavior in the future” and that the plaintiffs had not established jurisdiction); *Brockum Co., a Div. of Krimson Corp. v. Various John Does*, 685 F. Supp. 476, 478 (E.D. Pa. 1988) (holding that a “nationwide injunction” against unnamed defendants was an inappropriate remedy for merchandise bootlegging); *Rock Tours, Ltd. v. Does*, 507

However we describe the targeted injunctions, they are not monolithic. Yet current discussion does not lay out the various fault lines or their import for the debate. Some of the targeted injunctions are preliminary⁶² while others are permanent.⁶³ Is there a difference in the propriety of these injunctions, or federal court authority to issue them, that depends on whether the injunction is preliminary or permanent?⁶⁴ Similarly, some of the

F. Supp. 63, 66 (N.D. Ala. 1981) (refusing to grant an injunction to the band STYX because the court lacked in personam jurisdiction over unnamed defendants); *cf.* *World Wrestling Entm't v. John & Jane Does 1–100*, No. 6:17-cv-504-Orl-40GJK, 2017 U.S. Dist. LEXIS 223372, at *5–7 (M.D. Fla. Mar. 23, 2017) (granting an injunction against unnamed, unknown bootleggers selling unauthorized merchandise); *SKS Merch, LLC v. Barry*, 233 F. Supp. 2d 841, 851 (E.D. Ky. 2002) (granting the plaintiff's request for a “nationwide injunction” against unnamed defendants after unnamed defendants are provided with service). *But see* *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 388 (1970) (“Rule 65(d) of the Federal Rules of Civil Procedure provides that any order granting an injunction ‘shall be specific in terms’ and ‘shall describe in reasonable detail . . . the act or acts sought to be restrained.’”); *Zepeda v. U.S. Immigration Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983) (“A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court. Under Federal Rule of Civil Procedure 65(d), an injunction binds only ‘the parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order . . .’ The district court must, therefore, tailor the injunction to affect only those persons over which it has power.”).

62. *See* *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015); *City of Chicago v. Sessions*, 888 F.3d 272, 288–89 (7th Cir. 2018); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255–56 (9th Cir. 2018); *California v. Azar*, 911 F.3d 558, 583–84 (9th Cir. 2018); *City of Chicago v. Sessions*, No. 17 C 5720, 2017 U.S. Dist. LEXIS 169518, at *7–8, *15 (N.D. Ill. Oct. 13, 2017); *Saget v. Trump*, 375 F. Supp. 3d 280, 378–79 (E.D.N.Y. 2019); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 615 (S.D.N.Y. 2019); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 797–98 (E.D. Pa. 2019); *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 391–99 (M.D.N.C. May 3, 2019); *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018); *Jones v. DeSantis*, No. 4:19cv300-RH/MJF, 2019 U.S. Dist. LEXIS 180624 (N.D. Fla. Oct. 18, 2019).

63. *See* *Hodgson v. First Fed. Sav. & Loan Assoc.*, 455 F.2d 818, 827 (5th Cir. 1972); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408–09 (D.C. Cir. 1998); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 673.

64. *See* *Wheeler*, *supra* note 35, at 211–15 (discussing the difference between preliminary and permanent injunctions and their role in “nationwide injunctions”); *Bray*, *Multiple Chancellors*, *supra* note 35, at 418–19 (citing to *Texas v. United States* and *Washington v. Trump* as examples of “nationwide preliminary injunctions”); *Shae Yatta Harvey*, *National, Multi-District Preliminary Tour Injunctions: Why the Hesitation?*, 40 IDEA 195, 196–98 (2000) (discussing the use of national, multi-district preliminary injunctions while music groups are on tour in order to protect their trademarks); *Siddique*, *supra* note 35, at 2102; *Frost*, *supra*

targeted injunctions prevent the enforcement of executive actions or orders⁶⁵ while others prevent the enforcement of statutory provisions⁶⁶ or administrative agency actions.⁶⁷ Should federal courts treat injunctions in all of these cases the same way, or is there something unique about federal courts enjoining executive orders, statutory provisions, and agency actions that we should consider in the debate and our proposals?

Many scholars focus on injunctions against the federal executive branch's unilateral actions and injunctions prohibiting the enforcement of federal law as embodied in a congressional statutory provision. Two stated reasons for this focus are that courts issue these types of injunctions more often to prevent the enforcement of federal law or policy⁶⁸ and that most criticism of injunctions is specific to injunctions against the federal executive branch.⁶⁹ However, few scholars explain whether the same concerns and proposals "will also apply to similar injunctions

note 35, at 1069 (discussing both permanent and preliminary injunctions in the context of "nationwide injunctions").

65. See *Texas v. United States*, 809 F.3d at 187–88 (DAPA); *Int'l Refugee Assistance Project*, 857 F.3d at 605 (Executive Order); *E. Bay Sanctuary Covenant*, 909 F.3d at 1255–56 (Executive Order); *Saget*, 375 F. Supp. 3d at 378–79; *Pennsylvania v. Trump*, 351 F. Supp. 3d at 833–35 (ACA); *Batalla Vidal*, 279 F. Supp. 3d at 437–38 (DACA).

66. See *Hodgson*, 455 F.2d at 826 (Age Discrimination in Employment Act); *City of Chicago v. Sessions*, 888 F.3d at 288–89 (34 U.S.C. § 10102); *Azar*, 911 F.3d at 583–84 (ACA); *United States v. AMC Entm't, Inc.*, 549 F. 3d 760, 775–76 (9th Cir. 2008) (Wardlaw, J., dissenting) (ADA); *City of Chicago v. Sessions*, 2017 U.S. Dist. LEXIS 169518, at *7–8, *15 (34 U.S.C. § 10102); *McAleenan*, 389 F. Supp. 3d at 397; *Texas v. United States*, 340 F. Supp. 3d 579 (ACA); *Jones v. DeSantis*, 2019 U.S. Dist. LEXIS 180624, at *1–3 (discussing a Florida constitutional amendment known as "Amendment 4" that would automatically restore the right of most people with felonies to vote).

67. See *Nat'l Mining Ass'n*, 145 F.3d at 1408–09 (Clean Water Act); *New York v. Pruitt*, 18-CV-1030 2018 U.S. Dist. LEXIS 88832 at *16–17 (S.D.N.Y. May 29, 2018) (Clean Water Act); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 677–78 (Census).

68. Frost, *supra* note 35, at 1071; Bray, *Multiple Chancellors*, *supra* note 35, at 419, 419 n.6; Bagley & Bray, *supra* note 35; Berger, *Nationwide Injunctions Are Wrong*, *supra* note 35; Berger, *Nationwide Injunctions Against the Federal Government*, *supra* note 35; Bray, *Does the APA Support National Injunctions?*, *supra* note 35; Wasserman, *supra* note 35; Morley, *Public Law at the Cathedral*, *supra* note 35, at 2460; Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, *supra* note 35; Siddique, *supra* note 35.

69. Frost, *supra* note 35, at 1071, 1071 n.25; Bray, *Multiple Chancellors*, *supra* note 35, at 419 n.6; Wasserman, *supra* note 35; Morley, *Public Law at the Cathedral*, *supra* note 35.

against states and private parties”⁷⁰ or whether their proposals offer the same protections to those entities. But some injunction scholars may share a parallel concern for state governmental defendants in cases of statewide importance.⁷¹ Should injunctions that benefit beyond the named plaintiffs be prohibited only against federal entities and not against state or other local entities?⁷²

In a related discussion of whether “nationwide injunction” concerns are limited to federal courts, Professor Samuel Bray suggests that federal courts should not grant the targeted injunctions against federal or state defendants, but he leaves open the question regarding the authority for, and propriety of, similar state-court injunctions.⁷³ To properly identify the most important features of these types of injunctions—when they originated and why they originated—and to make decisions regarding the propriety of courts issuing these injunctions, it would seem that one would need to have more answers than questions regarding what a “nationwide injunction” is. These questions are rooted in the definitional concerns about nomenclature identified at the beginning of this section and we don’t have answers to these questions yet.

III. A POORLY CONCEPTUALIZED TARGET BEGETS MISGUIDED CRITICISM

It is nearly impossible to have a meaningful debate about proper limits on the scope of injunctive relief without having clearly defined the characteristics of the remedy on the chopping block. I worry that the failure to define and understand what we

70. Frost, *supra* note 35, at 1071; *see also* Amdur & Hausman, *supra* note 35, at 55 (noting that “statewide injunctions are a problem for many of [Samuel Bray’s] rationales”).

71. *See, e.g.* Amdur & Hausman, *supra* note 35, at 54–55 (discussing “statewide injunctions” and injunctions preventing enforcement of state and local policies); Siddique, *supra* note 35, at 2115–16 (discussing the need to preserve state law comity when issuing “nationwide injunctions”); Sohoni, *supra* note 35.

72. Amdur & Hausman, *supra* note 35, at 54–55.

73. Bray, *Multiple Chancellors*, *supra* note 35, at 424 (noting that this “depends on a state’s preference either for speedy resolution of legal questions or for an accumulation of multiple judicial opinions (in hope of epistemic advantages),” but not clarifying what entity decides a state’s preference). *See also* Amdur & Hausman, *supra* note 35, at 55 (discussing shopping regarding state and federal judges issuing conflicting injunctions); Siddique, *supra* note 35, at 2115–16 (discussing the need to preserve state law comity when issuing “nationwide injunctions”); Sohoni, *supra* note 35.

mean when we say “nationwide injunctions” has warped the debate. The potential ideological bias in framing the targeted injunctions as “nationwide injunctions” also serves to make these injunctions seem legally exceptional and controversial even if they aren’t. Continuing to debate a poorly theorized so-called category of injunctions leads to potentially misguided arguments. In his influential article on these injunctions, *Multiple Chancellors: Reforming the National Injunction*,⁷⁴ Professor Samuel Bray discusses the implications of moving from the 1789 one-chancellor system in England’s Court of Chancery to the current U.S. “multiple-chancellor” system, where there are numerous federal judges adjudicating in the equitable realm that once belonged to a single Chancellor in England.⁷⁵ Bray refers to federal judges as “chancellors” and opines that eliminating “national injunctions” “will keep one Chancellor’s foot from stepping on another Chancellor’s toes.”⁷⁶ In a sense, Bray’s argument is to protect federal judges—the “Chancellors”⁷⁷ of equitable relief—by preventing judges from having other judges step on their toes. No other judge could or should issue a “nationwide injunction” that might conflict with a different judge’s decision in similar “nationwide injunction” litigation. But the validity of Bray’s arguments—and all other arguments that build upon Bray’s arguments—depends on what a “nationwide injunction” is and whether such a category exists.

If one were to adopt a different understanding of what a “national injunction” is, one might disagree with Bray’s arguments regarding federal courts not having the equitable power to issue “national injunctions.” In that circumstance, eliminating or restricting federal courts’ ability to require defendants to comply with law would not be a new remedial cloak of power (which protects judges from having other judges step on their toes). Instead, eliminating or curtailing injunctive authority to issue “nationwide injunctions” could strip federal courts of much of their remedial power over defendants in “nationwide injunction” cases. In short, although critics of “nationwide injunctions” may be trying to empower the federal judiciary by preventing one federal judge from stepping on the toes of another federal judge, eliminating the authority of federal judges to issue “nationwide

74. Bray, *Multiple Chancellors*, *supra* note 35.

75. *Id.* at 420.

76. *Id.* at 424.

77. *Id.* at 420.

injunctions” could leave federal judges essentially naked.⁷⁸ And this proposition could go far beyond leaving federal judges with no clothes. It might actually give their clothes—their remedial cloak—to defendants as additional protection in “nationwide injunction” litigation. If federal courts no longer had (or began to choose not to use) remedial authority to prevent defendants from violating the Constitution or statutes and, instead, could only prevent defendants from enforcing unconstitutional provisions against specific plaintiffs or classes, then the only significant restraint on defendants would be whatever limit each defendant chose to put on itself. Defendants in “nationwide injunction” litigation would be able to violate the Constitution or statutes without a judiciary empowered to issue meaningful orders after adjudication.

Moving beyond the stepping-on-toes metaphor, I admit that Bray presents somewhat of a threshold question. In his view, because there were no injunctions that controlled a defendant’s behavior regarding nonparties in the historic tradition of equity “as it existed in the Court of Chancery in 1789,” present-day U.S. federal courts do not have the authority to issue such injunctions unless there is some more recent source of authority.⁷⁹ Perhaps, with a different framing of what the targeted injunctions are, the Federal Rules of Civil Procedure, authorized by Congress, have long given courts the power to issue these targeted injunctions, and instead, critics of “nationwide injunctions” have the burden of proving that no existing rule or doctrine justifies judi-

78. Cf. HANS CHRISTIAN ANDERSEN, *The Emperor’s New Clothes*, in FAIRY TALES 91 (Jackie Wullschlager ed., Tiina Nunnally trans., 2004).

The Emperor’s tailors were clever enough to convince him that they had made him a beautiful, though invisible, new suit of clothes. Unable to believe, or unwilling to admit, that their Emperor had been fooled, his loyal subjects also admired the clothes until an innocent child, heedless of politics and propriety, pointed out that the Emperor was naked.

Id. See also Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL’Y 73, 75 (2011) (discussing ANDERSEN, *supra*) (footnotes omitted). Please note that I am not claiming to be the “innocent child” of this story, but this did inspire the title of another project of mine on “nationwide injunctions.” See Portia Pedro, *The Chancellors’ New Clothes and The Government’s Coronation* (2019) (unpublished manuscript) (on file with author).

79. Bray, *Multiple Chancellors*, *supra* note 35, at 424–28, 469. To be fair, while Bray says that federal courts must trace any current remedial practice to the historic tradition of equity, his inquiry does not stop once he opines that there is no such traditional history for “national injunctions”; he posits that such injunctions are not justified because they create more risk and harm than benefit.

cial authority to issue the targeted injunctions. I argue, moreover, that some portions of Bray's historical arguments about equity are not as ironclad as they might first seem to be.⁸⁰

This Article implores scholars, jurists, and litigants to consider this possibility and engage in an effort to define "nationwide injunctions" before anyone pushes further to eliminate or restrict them. Otherwise, many scholarly objections to "nationwide injunctions" could inaccurately compare cherry-picked portions of our current equitable judicial system with cherry-picked aspects of historical equitable systems, misinterpreting decisions that some consider foundational in determining the authority—and propriety—of federal courts issuing "nationwide injunctions." Taking these potentially misguided arguments to their logical ends would likely strip the federal judiciary of authority to adjudicate the disputes legitimately before the courts, which could create separation of powers and judicial supremacy problems. Debating an under-theorized or incorrectly theorized category of injunctions could lead "nationwide injunction" critics to object to the targeted injunctions due to a misunderstanding of historical equity concerns and misinterpretation of so-called foundational cases. Additionally, reinforcing equitable practice as it existed in England and the Court of Chancery in 1789 could also reinforce structures arguably set up to subordinate—or, at least, structures that operated consistently with the marginalization of—groups such as women, people of color, LGBTQ communities, and others.

A. *Lack of a Conceptual Framework for "Nationwide Injunctions" Could Contribute to Flawed Historical Equity Objections*

In addition to noting that the targeted injunctions emerged in the 1960s, Bray's opposition to these injunctions largely turns on two notions: (1) that while there was only one English Chancellor, there are approximately 870 U.S. federal court judges,⁸¹ and (2) that the English Chancellor did not grant similar injunc-

80. For a full analysis of Bray's arguments, specifically regarding prerogative writs, see James E. Pfander & Jacob Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. (forthcoming 2020).

81. Hence, the possibility and increased likelihood that one federal judge could step on another federal judge's toes even though that was impossible for the one English Chancellor to do to himself. *Id.* at 424.

tions (presumably against the Queen or King, “the Crown”).⁸² But that approach neglects the relationship between the Crown and the Chancellor as well as the way in which the Chancellor’s role differed significantly from that of modern-day U.S. federal district court and court of appeals judges. The Chancellor was the arm of the Queen’s or King’s mercy.⁸³ That means that the Chancellor made decisions with which the Crown would agree and the Chancellor’s power presumably did not extend to deciding against the Crown.⁸⁴

That the federal court system has “multiple chancellors” (in the words of Bray) is not as problematic as it may first sound. Even though England had a single Chancellor, several English courts administered the Chancellor’s equity function,⁸⁵ and, as Bray admits, the Chancellor typically delegated judicial authority to masters and a vice-chancellor.⁸⁶ The common practice of multiple English courts administering the Chancellor’s equitable powers while the Chancellor also delegated those powers to masters and a vice-chancellor raises

82. *Id.* at 420.

83. See Russell Fowler, *A History of Chancery and Its Equity: From Medieval England to Today’s Tennessee*, 48 TENN. B.J. 20, 21 (2012) (“The king . . . referred these petitions to . . . his chief minister, the powerful Lord Chancellor, [who] handled them. The chancellor was England’s top bureaucrat, secretary of state, and Keeper of the Seal. All legal actions in the law courts began with the issuance of writs from his office, the Chancery.”).

84. Bray, *Multiple Chancellors*, *supra* note 35, at 425 (“In English equity before the Founding of the United States, there were no injunctions against the Crown. No doubt part of the explanation was the identification of the Chancellor with the King, an identification that was important in the early development and self-understanding of the Court of Chancery.”).

85. THEODORE F. T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 675–76 (5th ed. 1956). In discussing the history of English “courts of equity,” Plucknett explains:

A century later the spread of equity is still evident: municipal courts of equity begin to appear, such as the Mayor’s court in London and the court of equity in the cinque ports, while a similar process in the great feudal liberties produced the court of chancery in the palatinate of Durham, a court of chancery in Lancashire, and the court of Duchy Chamber which sat in London or Westminster. Indeed, it is already clear that one royal court of equity is not enough. So we find such institutions as the court of requests, and subsidiary councils with equitable powers for the marches and the north.

Id.

86. Bray, *Multiple Chancellors*, *supra*, note 35, at 446 (“[T]he Chancellor was assisted by officers such as ‘masters’ and ‘registers.’”). Bray, however, refers to the Chancery as a unitary system because the Chancellor signed all decrees. *Id.* (“This sense of Chancery as a unitary institution is captured, in this Article, by saying that there was one Chancellor.”).

the question of whether the English High Court of Chancery's "single-chancellor" system was so different from the U.S. system of multiple federal judges after all.

Additionally, while it may be true—in a technical sense—that there were no injunctions against the Crown in eighteenth-century England, individuals could bring lawsuits against, and successfully sue, officials acting in the name of the Crown,⁸⁷ and the Crown's highest ministers could be impeached through a judicial proceeding in the High Court of Parliament.⁸⁸ In the lawsuits against officials acting in the name of the Crown, various types of writs, including writs of mandamus, allowed individuals to challenge actions carried out on behalf of the Crown.⁸⁹ Furthermore, our "chancellors," or federal district court and court of appeals judges, are not intended to be the arm of the Crown (or a President, Congress, administrative agency, or any defendant). Indeed, nothing prevents our modern-day "chancellors" from deciding matters brought properly before them that are filed against the President, Congress, an administrative agency, or any other defendant. We now have numerous "chancellors," in part, because having scores of lower federal court judges is central to the institutional design of the federal court system and to Federal Rule of Civil Procedure 1, which calls for "the just, speedy, and inexpensive determination of every action and proceeding."⁹⁰

Ignoring, for a moment, that the Chancellor was the arm of the Crown's mercy but federal judges are not the arm of the President, Congress, or a federal administrative agency, Bray's view might support the proposition that federal judges should not be able to enjoin the actions of the President, Congress, or federal administrative agencies. But questioning our modern-day "chancellors'" authority to enjoin actions of the President, Congress, federal administrative agencies, or any other defendant also ignores other significant changes in our present-day system for equitable relief. It is an incomplete and flawed analysis to only

87. Ludwig Ehrlich, *Proceedings Against the Crown (1216-1377)*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 9–12 (Paul Vinogradoff ed., 1921).

88. JAMES FRANCILLON, LECTURES, ELEMENTARY AND FAMILIAR, ON ENGLISH LAW 123–25 (1861).

89. See Pfander & Wentzel, *supra* note 80; Glendon A. Jr. Schubert, *Judicial Review of Royal Proclamations and Orders-in-Council*, 9 U. TORONTO L.J. 69, 82–83 (1951) (discussing the "Ship-money" tax and finding that the entire tax could be voided).

90. FED. R. CIV. P. 1.

compare the increase in the number of “chancellors” and the increase in “nationwide injunctions” while acting as though all other aspects of the procedure and design of federal courts have remained the same. Several “nationwide injunctions” skeptics’ analyses overlook that numerous other antiquated practices also have not existed in the United States as common practices for decades.⁹¹

A requirement that modern-day federal court equitable practice have a foundation in the Court of Chancery in 1789 would impose a ceiling: requiring that equitable relief afforded today in the United States can only be the same or less than what existed in England in 1789. This ignores, without theory or explanation, several current U.S. equitable practices that do not have a basis in 1789. Many of these modern “expansions” upon the Court of Chancery’s equitable powers⁹² may stem from statutes establishing private rights of action (especially in the area of civil rights), the institutional design of the U.S. federal

91. One example is that practicing lawyers in the United Kingdom still need to bow to the Royal Coat of Arms every time they enter or leave a courtroom. See *Traditions of the Court*, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/the-justice-system/court-traditions/> (last visited Jan. 13, 2020) [<https://perma.cc/H9SZ-V7UZ>]. In describing a bit of the history behind this practice, *Traditions of the Court* explains:

The Royal Coat of Arms came into being in 1399 under King Henry IV. It is used by the reigning monarch.

The Royal Arms appear in every courtroom in England and Wales (with the exception of the magistrates’ court in the City of London), demonstrating that justice comes from the monarch, and a law court is part of the Royal Court (hence its name).

Judges and magistrates are therefore officially representatives of the Crown.

The presence of the Royal Arms explains why lawyers and court officials bow to the judge or magistrates’ bench when they enter the room. They aren’t bowing to the judge – they are bowing to the coat of arms, to show respect for the Queen’s justice.

Id. To properly account for these types of injunctions, when they originated, and their propriety, it would seem that we would need to look not just at injunctions against federal defendants but also at injunctions against state and municipal defendants. Some of Professor Mila Sohoni’s work attempts to do just that and finds similar injunctions preceding the date that Bray says that federal courts started issuing them. Sohoni, *supra* note 35 (arguing that the Supreme Court has enjoined federal officers from enforcing federal statutes against anyone since 1913 and federal courts have enjoined enforcement of state law against nonparties for over a century).

92. With a particular focus on prophylactic and structural injunctions. See Sohoni, *supra* note 35.

court system, and the separation of powers⁹³—all realities that differ greatly from equitable practice in 1789.

For example, in 1789, only the Crown or his or her one Chancellor in the Court of Chancery could grant equitable relief, and the Court of Chancery was separate from law courts.⁹⁴ Since 1938, all federal district court and court of appeals judges and the Supreme Court justices—approximately 870 federal judges in total—have been able to provide equitable relief and have done so in a merged court of law and equity.⁹⁵ In this way, one of the most fundamental aspects of equitable relief—who can grant injunctions—has changed in a way not necessarily reflected in Bray’s critique of current equitable practice. “Nationwide injunction” critics don’t argue that statutes establishing private rights of action—especially in the area of civil rights—are void because they don’t have a basis in 1789. Thus, Bray’s insistence that “nationwide injunctions” have a basis in 1789 lacks the same realization that times have changed, in part, *because* newer statutes establishing private rights of action *are* the basis for some of the “nationwide injunction” claims. Additionally, the questions turn more on the notion of what constitutes claims, harms, and injuries rather than what potential relief or remedies may be.

B. Lack of a Conceptual Framework for “Nationwide Injunctions” Could Lead to Misinterpreting Foundational Cases

Without a clear understanding of what “nationwide injunctions” are, scholars could mistake decisions irrelevant to the debate as being dispositive. The primary case which Bray describes⁹⁶ as rejecting these types of injunctions as “unthinkable” was not about these types of injunctions at all. Indeed, Bray’s framing of *Massachusetts v. Mellon*⁹⁷ (commonly referred

93. *See id.*

94. Bray, *Multiple Chancellors*, *supra* note 35, at 447 (“As England grew, as the common law courts grew, and as the various other equitable courts grew, there remained only one Chancellor.”).

95. *Id.* at 447–48. *See also* Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U.L. REV. 623, 653 (1990).

96. Bray, *Multiple Chancellors*, *supra* note 35, at 428 (citing Commonwealth of Massachusetts v. Mellon (*Frothingham*), 262 U.S. 447 (1923)).

97. *Frothingham*, 262 U.S. 447.

to as *Frothingham* due to its companion case, *Frothingham v. Mellon*⁹⁸) seems to misapprehend the Court's opinion.

Bray portrays *Frothingham* as an opinion rejecting "nationwide injunctions" as "unthinkable."⁹⁹ He argues that, even though *Frothingham* "is now generally considered to be a case about 'taxpayer standing,'" a more accurate understanding of *Frothingham* is that the Supreme Court, when deciding that case, drew from an equitable perspective to reject the requested "nationwide injunction."¹⁰⁰ Bray claims that Justice Sutherland's opinion in *Frothingham* focused on equitable jurisdiction in a way that is relevant for the "nationwide injunction" debate, but it is not.

For good reason, numerous later opinions describe *Frothingham* as a federal taxpayer standing case or an opinion standing for the proposition that conditional congressional appropriation does not constitute a "discrete harm" against a state.¹⁰¹ The *Frothingham* cases challenged the constitutionality of the Maternity Act,¹⁰² which provided for five years of annual appropriations to compliant states for the purpose of reducing maternal and infant mortality.¹⁰³ One of the plaintiffs, the Commonwealth of Massachusetts, asserted that the Maternity Act unconstitutionally and illegally infringed upon the Commonwealth's constitutional rights and powers as a sovereign state and "invaded" its citizens' rights.¹⁰⁴ Another plaintiff, Harriet Frothingham, alleged that the statute would, through taxation, deprive her of property without due process of law.¹⁰⁵

98. *Id.*

99. Bray, *Multiple Chancellors*, *supra* note 35, at 428.

100. *Id.* at 430–31.

101. *Rohde v. Ann Arbor Pub. Sch.*, 737 N.W.2d 158, 172 (Mich. 2007), *overruled by* *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686 (Mich. 2010); *Am. Civil Liberties Union of Mass. v. Sebelius*, 697 F. Supp. 2d 200, 204 (D. Mass. 2010); *Smith v. Gov't of Virgin Islands*, 329 F.2d 131, 134 (3d Cir. 1964); *Debevoise v. Back*, 359 A.2d 279, 280 (D.C. 1976); *Fla. Audubon Soc'y v. Bentsen*, 54 F.3d 873, 883 (D.C. Cir.), *reh'g en banc granted, judgment vacated*, 64 F.3d 712 (D.C. Cir. 1995), *and on reh'g*, 94 F.3d 658 (D.C. Cir. 1996); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2695 (2015); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 209 (6th Cir. 2011); *Winkler v. Gates*, 481 F.3d 977, 980 (7th Cir. 2007); *Hinrichs v. Speaker of the House of Reps. of the Ind. Gen. Assembly*, 506 F.3d 584, 591 (7th Cir. 2007).

102. Act of November 23, 1921, ch. 135, 42 Stat. 224 (repealed 1927).

103. *Frothingham*, 262 U.S. at 478–79.

104. *Id.* at 479–80.

105. *Id.* at 480.

The *Frothingham* Court stated that “[w]e have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.”¹⁰⁶ The Court most likely said this for two reasons: (1) federal courts have no per se power to review acts of Congress¹⁰⁷ and (2) court orders cannot and do not “annul” Congressional acts.¹⁰⁸ Although a court can order governmental entities not to enforce the provision in question, federal courts do not technically annul those acts or strike down those provisions; the actual act of repeal is left to Congress.¹⁰⁹ Only Congress itself can perform the technicality of striking unconstitutional provisions, even though Congress would not be able to act upon as-of-yet-unstruck provisions or policies when Congress is subject to court-issued injunctions enjoining the enforcement of the provisions or policies. The *Frothingham* Court noted that the Court may review acts of Congress only when an act creates a “direct injury suffered or threatened, presenting a justiciable issue.”¹¹⁰ In *Frothingham*, the Court held that the Act presented no justiciable, direct injury.

106. *Id.* at 488.

107. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598–99 (2007) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)) (citation omitted and brackets omitted). The *Hein* Court further provided that:

The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit “solely, to decide on the rights of individuals,” *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 170, 2 L. Ed. 60 (1803), and must “refrain from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it”

Id. at 598.

108. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145–46 (2011) (“Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them. . . . To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III.”). *See also* *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (“[The Court] has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.”).

109. *McHugh v. Rubin*, 220 F.3d 53, 57 (2d Cir. 2000) (“It is well established that Congress may repeal, amend or suspend a statute by means of an appropriations bill, so long as its intention to do so is clear.”).

110. *Frothingham*, 262 U.S. at 488.

The *Frothingham* Court noted that, when plaintiffs show that they have sustained direct injury as a result of enforcement of an official's act and seek preventive relief, "the court enjoins . . . the acts of the official . . ." ¹¹¹ The opinion does not say that a court can enjoin an official's acts only so far as those acts pertain to the named plaintiffs. Instead, the Court differentiated between "enjoining the execution of the statute"—meaning annulling an act of Congress—and enjoining the acts of an official, which can include those acts that pertain to entities beyond named plaintiffs.

The *Frothingham* plaintiffs, however, did not make the required showing of injury. The Court found, therefore, that the plaintiffs lacked standing and categorized the plaintiffs' claim as a nonjusticiable political question. Yes, the Court rejected the plaintiffs' request for an injunction that would have benefited nonparties. But the reason that the Court rejected the request did not speak to the propriety of the remedy benefitting entities beyond the named plaintiffs; it was based on standing and justiciability. If critics of "nationwide injunctions" misinterpret *Frothingham* to say that plaintiffs cannot suffer harm as a result of governmental action or inaction and, therefore, the cases involving the targeted injunctions raise standing and political question concerns, opponents have much work cut out for them. ¹¹² *Frothingham* almost unquestionably turns on issues of federal taxpayer standing and political questions, not "nationwide injunctions." And "nationwide injunction" critics do not raise concerns ¹¹³ regarding federal taxpayer standing or political questions when discussing the targeted injunctions. *Frothingham* is irrelevant to the "nationwide injunctions" debate. But, perhaps under-theorizing what "nationwide injunctions" are and whether such a category even exists might lead interested parties to mistakenly recast numerous cases decided on other grounds as problems of "nationwide injunctions."

111. *Id.*

112. See Clopton, *supra* note 32, at 36 n.215 (describing scholarship on Article III standing and "nationwide injunctions" and questioning the logic of this scholarship in light of "the rise of nonmutual preclusion"); Trammell, *supra* note 32, at 82–83 (arguing that nationwide injunctions are not beyond the "judicial power" of Article III courts); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020) (arguing that "nationwide injunctions" are consistent with the power of the federal judiciary).

113. See *supra* note 35; see also *supra* notes 58–61 and accompanying text.

Other cases that Bray points to as examples of courts rejecting “nationwide injunctions” due to limits of “equity, remedies, and the judicial power”¹¹⁴ do not support his argument either. In *Adkins v. Children’s Hospital of the District of Columbia*,¹¹⁵ the Court issued an injunction prohibiting enforcement against the plaintiffs. The Court left unasked and unanswered the question of whether it could have issued a broader injunction that required compliance with the law in a way that benefited entities beyond the plaintiffs.¹¹⁶

Bray suggests that the oil-shipping plaintiffs in *Panama Refining Co. v. Ryan*¹¹⁷ asked the Court to prohibit enforcement of the challenged provision against only the plaintiffs and did not ask the Court to prohibit enforcement of the provision generally because of the “traditional pattern” of federal courts rejecting “nationwide injunctions” until the 1960s.¹¹⁸ Bray continues that, if *Panama Refining Co.* were to be litigated now, “[i]t was exactly the kind of case that today would feature a request for a national injunction.”¹¹⁹ But this prediction seems without basis.

There is a much more likely explanation than historical equitable tradition and precedent regarding why the *Panama Refining Co.* plaintiffs did not request a “nationwide injunction.” Those plaintiffs, instead, probably requested an injunction that would benefit only themselves because limiting the injunction in that way would likely have helped their business.¹²⁰ If the Court issued this requested injunction, the President would enforce a

114. Bray, *Multiple Chancellors*, *supra* note 35, at 433.

115. 261 U.S. 525 (1923).

116. *See id.* at 562.

117. 293 U.S. 388 (1935). It is also of note that the Court decided both this case and *Adkins* before the current iteration of the Federal Rules of Civil Procedure and the merger of law and equity in 1938.

118. Bray, *Multiple Chancellors*, *supra* note 35, at 433.

119. *Id.*

120. I have the sense that I didn’t come up with this idea on my own and that I saw something either in the case, in other cases, or in articles discussing *Panama Refining Co. v. Ryan*, or in *Multiple Chancellors* that made me think of this idea. I haven’t been able to figure out if this is my own idea or to find the potential source for this idea yet. A wise senior colleague advised me that this type of lingering concern haunts some portion of nearly every legal scholarly project. I hope to one day either realize that this idea was, in fact, my own or to figure out the source or inspiration and let you know that this citation is for you. For now, I’ll point to a similar idea expressed in another context. *See* Maureen Carroll, *Aggregation for Me, But Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2072 (2015) (“[T]he initial plaintiff would enjoy a competitive advantage because of the selective invalidation of the defendant’s unlawful conduct.”).

statutory provision restricting interstate shipment of oil by the plaintiff's competitors, but not by the plaintiffs. That this set of plaintiffs wanted a limited injunction for strategic purposes does not show that a broader injunction would not have been available, nor did the Court so hold. That these business plaintiffs did not seek the same type of injunction at the center of the present debate suggests only that different types of plaintiffs employ different litigation strategies with different requests for injunctive relief.

In *Panama Refining Co. v. Ryan*, moreover, the portion of the district court's injunction that the Supreme Court affirmed enjoined the defendants "from enforcing any rule or regulation . . . under the National Industrial Recovery Act insofar as the same applies to . . . petroleum."¹²¹ Bray's reasons for saying that no one at the time understood this part of the injunction to reach beyond the plaintiff seems poorly supported at best.

C. Not All Things That Came into Practice After 1789 Are Wrong or Bad

Regardless of the potential misunderstandings and misinterpretations described in the prior subparts, the fact that a practice happened with increasing frequency beginning in the mid-twentieth century is not a per se condemnation of the practice's propriety. Indeed, to many who believe in ending the subordination of people of color, women, members of LGBTQ communities, immigrants, and others, not much good happened for members of these groups in U.S. federal courts *prior to the 1960s*.¹²² If one were to actually turn back equitable practice to be that of the Court of Chancery in 1789, we should be much more mindful in regards to what conditions we would be committing ourselves and various subordinated communities.

121. Bray, *Multiple Chancellors*, *supra* note 35, at 433 (citing Transcript of Record at 133, *Panama Refining Co.* (No. 135)) (omissions in original).

122. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10–11 (1994) ("To say that transformative racial change was ultimately inevitable, though, is not to say that it had to transpire when it did—largely in the 1960s. Judged from a narrower time horizon, *Brown* did play a vital role in the enactment of landmark civil rights legislation in the mid-1960s.").

CONCLUSION

In a perhaps unconventional way, this Article picks up on the intuition of many scholars and jurists that something is different about “nationwide injunctions.” I suggest that we explore as well as define these injunctions and that we determine how these targeted injunctions are similar to or different from other injunctions. Although this Article only begins down that path and does not present a perspective on whether “nationwide injunctions” are constitutional or appropriate, I take a first step—if not make a crucial intervention—toward exposing several outstanding questions surrounding what we mean when we say “nationwide injunction.” If the only problem in the current debate is not having a conceptual or functional understanding of “nationwide injunctions,” then heeding the call of this Article could correct that mistake.

Yet a larger predicament may be looming. If something is different about these injunctions, then, before we eliminate or curtail the availability of “nationwide injunctions” as a remedy, we should define and understand what a “nationwide injunction” is. Although the current “nationwide injunctions” literature does not frame it this way,¹²³ the debate should turn on whether federal judges or justices can and should employ general injunctive power over governmental defendants exercising general legislative or executive power. Given that there has been a decades-long struggle over what protections federal courts must or should afford to whom and under what circumstances, it alarms me that scholars and jurists are contemplating what may be this generation’s most significant change to available remedies without understanding and discussing the potential deleterious consequences of eliminating “nationwide injunctions” for subordinated communities. I hope to, at least, put the potential effects of this “nationwide injunctions” debate for important social issues and marginalized communities squarely on the table for discussion and consideration.

AFTERWORD

Several legal scholars—all much more advanced and accomplished in their careers as well as, arguably, wiser than I am,

123. See *supra* note 35; see also *supra* notes 58–61 and accompanying text.

and many of whom I trust have my best interests at heart—have warned me not to write or publish any of the personal narrative portions of this Article until after I receive tenure. But, for every one of those scholars, at least four other scholars have told me that I *have* to write this. Fortunately (or unfortunately for my career as it may be), I think I *do have to write this*. And I don't think it can wait. If I waited to tell this story, my story, I cannot be sure that I would have the scholarly courage to write about the subjects closest to my heart or that, by the time I was "ready" to tell my story, there would be a pulse left of the story to tell. By telling this story as a very junior scholar, I make a serious attempt to do this well and honestly. I welcome your engagement as I perfect my craft. I have simply spectacular colleagues (both at my institution and around the country), and I, perhaps naively, have faith that, by and large, they will support and reward rigorous intellectual endeavor.

The number of women scholars—many of whom were among the first women in their legal area or in their respective law schools—who have approached me when I've talked about this project to tell me that they heard their untold story somehow within mine floored me. It is an honor that the story that felt like it was bursting from my chest might share anything in common with the stories of our professors and mentors who, in our lifetimes, busted institutional doors open for women, people of color, those in the LGBT community, and so many other groups and who have been fighting to hold those doors open for all that time since. It is because of these trailblazers that I, and many other scholars of my generation, (perhaps) have the luxury of writing things that are bold and that take risks. During a campus visit when I was on the market pursuing a career in legal academia, a law professor—who was one of the first law professors I knew and who taught the first law-related course I ever took—warned me that she had seen junior scholars let certain segments of academia water down their scholarship or whittle them into making only uninteresting arguments. I am taking that advice and attempting to give you full-strength, undiluted me.

One experience that I had not expected was how much of being new to legal academia is learning about the political, cultural, and ideological histories and presents of the scholarly spaces we enter: the feeling of wondering if you are in the space in which you thought you were or if you know to whom you are

speaking and of wondering what the consequences might be for being wrong about or unaware of those types of contexts. Some legal scholars wear their politics and ideologies on their sleeves while others can be much harder to read and assess. At times, these characteristics can seem to matter immensely while, at other times, with other people or in other circumstances, the importance of ideology, politics, and culture can seem or be insignificant in comparison to characteristics like collegial style and personality.

I could say that I considered not writing the personal narrative portions of this project because I didn't want to risk offense to colleagues in the field and others whom I now consider professional acquaintances (if not friends). But that would be a lie. From the moment I felt the urge to write about "nationwide injunctions," I also felt the urge to tell the story of how I thought I maybe didn't belong at a conference, didn't belong in my field, and why maybe I should never write something on a subject about which I felt so passionately and, simultaneously, on which I agreed with other scholars as little as it can sometimes seem that I agree with many others on "nationwide injunctions." But I know no other way. The stories are intertwined, and I'm not sure that their disentangled parts—if I could separate them in my mind and on paper—would add up to anything nearly as meaningful as the whole. Additionally, I have hope, perhaps naively so, that my federal courts, remedies, and civil procedure colleagues will not perceive my attempt to share my story as though it is me shaming their own. Like many other scholars, I hope to continue discussing this search for ways to illuminate areas of agreement and remaining disagreement in a manner that leads us in a productive direction.