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THE CHANCELLORS ARE ALRIGHT: NATIONWIDE INJUNCTIONS AND AN ABSTENTION DOCTRINE TO SALVE WHAT AILS US

EZRA ISHMAEL YOUNG*

ABSTRACT

This Article endeavors to reclaim the nationwide injunction as a valid exercise of federal equity power within the jurisdictional limits set by Article III. It posits that federal equity is expansive—it extends as far as necessary to provide a remedy where there is no adequate one at law. Historical and doctrinal context and critique are deployed to demonstrate that nationwide injunctions are not constitutionally ultra vires. This Article also posits that despite having expansive equity jurisdiction and powers, federal courts can and should in many cases exercise their constitutional discretion when sitting in equity to abstain in certain nationwide injunction suits. It goes on to propose a prudential, discretionary kind of abstention with factors calibrated to deter abusive litigation tactics, prevent untoward interference with non-party rights and forum-shopping, promote comity between district courts, and encourage percolation of issues.

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I. INTRODUCTION

Nationwide injunctions are broad, enjoining defendants from engaging in particular acts both in and outside of the geographic territory of the issuing court and often govern the defendants' conduct as to both parties and nonparties.¹ The remedy has been part of federal practice for at least a century, and for much of its history has been both rarely awarded and normatively unproblematic.²

Public narratives about nationwide injunctions shifted dramatically at the tail end of the Obama administration and public outcry reached a fever pitch under the Trump administration. With increasing frequency, federal district courts issued nationwide injunctions enjoining federal programs, rules, and policies in cases touching on the most heated political issues of the day—immigration,³ contraception,⁴ transgender rights,⁵ and labor,⁶ to name a few. This spurred outcries that lone wolf activist federal judges are running roughshod over the rule of law.⁷

¹ Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018) (defining the remedy); see also Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. COLO. L. REV. 847, 867–68 (2020) (taking a critical view of alternative definitions of the remedy percolating in scholarly literature).

² See discussion *infra* Section II.A.

³ See, e.g., *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 755 (9th Cir. 2018) (affirming nationwide injunction against regulation establishing additional limits and conditions rendering certain aliens ineligible for asylum); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 486 (9th Cir. 2018) (affirming nationwide injunction against government's rescission of the Deferred Action for Childhood Arrivals (DACA) program based in part on "the need for uniformity in immigration policy"), *rev'd in part and vacated in part*, 140 S. Ct. 1891 (2020); *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) (affirming nationwide preliminary injunction against government's expansion of DACA), *aff'd by equally divided court*, 136 S. Ct. 2271 (2016) (Mem.).

⁴ See, e.g., *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 798 (E.D. Pa. 2019), *aff'd sub nom. Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019), *cert. granted sub nom. Trump v. Pennsylvania*, 140 S. Ct. 918 (2020) (Mem.); see also *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1271 (N.D. Cal. 2019), *aff'd sub nom. California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019), *vacated sub nom.*, *Little Sisters of the Poor Jeane Jugan Residence v. California*, 141 S. Ct. 192 (2020) (Mem.).

⁵ *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (O'Connor, J.) (enjoining federal enforcement of Title VII and Title IX's sex discrimination proscriptions as to transgender workers and students); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016) (O'Connor, J.) (enjoining provision of Obama-era Department of Health and Human Services regulation defining sex discrimination to reach "gender identity").

⁶ See, e.g., *Nevada v. U.S. Dep't of Lab.*, 321 F. Supp. 3d 709, 713 (E.D. Tex. 2018) (holding nonparty employee and counsel in contempt after they brought separate action to recover overtime wages based on earlier issued nationwide injunction against the same regulation), *rev'd sub nom. Texas v. U.S. Dep't of Lab.*, 929 F.3d 205 (5th Cir. 2019).

⁷ See, e.g., Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, THE ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471/>

Recently, critics of the nationwide injunction have argued that the remedy is unconstitutional. Their argument comes in two parts. First, they insist nationwide injunctions are inherently problematic because, among other things, they incentivize forum- and judge-shopping, can give rise to conflicting injunctions and orders, impinge nonparty rights, depress percolation of issues in lower courts, and weaken the certiorari process. Second, they urge that these problems arise because nationwide injunctions violate any of three supposed limits on Article III's equity—the remedy is beyond the powers of the English Chancellor at the time the Constitution was ratified in 1789, broader than traditionally permitted because it affects the rights of nonparties, or is otherwise antithetical to federal equity tradition.⁸ The common thread of these attacks is that the nationwide injunction's supposed novelty gives rise to problems that are otherwise inexplicable and necessarily renders the remedy illegitimate.

The historical argument is perhaps most infamously espoused by Samuel Bray in his article *Multiple Chancellors: Reforming the National Injunction*.⁹ Pointing to Justice Antonin Scalia's majority opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,¹⁰ Bray argues that the metes and bounds of the equity powers vested in Article III judges are limited to those traditionally exercised by the

[<https://perma.cc/2TMP-XR23>] (“National injunctions are equal-opportunity offenders. . . . [T]he United States is a fractious, complicated democracy, and it’s disconcerting how much authority we’ve ceded to lone, unelected judges.”); Joseph Digenova, *Governance by Court injunction is No Way to Run a Country*, L.A. TIMES (Dec. 4, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-digenova-federal-injunctions-20181204-story.html> (“The spate of judicial bullying has laid bare a major structural problem with our federal courts: When nationwide injunctions are too easily obtained, the country is essentially ruled by a judicial dictatorship. . . . This isn’t about politics; it’s about returning the courts to their proper constitutional role. The executive branch cannot function if activist lawyers—without winning a single election—can set policy for months or years just by shopping around for a federal judge sympathetic to their cause.”); Associated Press, *Federal Judge Orders Halt to ‘Don’t Ask, Don’t Tell’ Enforcement*, FOX NEWS (Oct. 12, 2010), <https://www.foxnews.com/politics/federal-judge-orders-halt-to-dont-ask-dont-tell-enforcement> [<https://perma.cc/X2X7-JKBL>] (“For a single federal judge to tell the government to stop enforcing this policy worldwide, this afternoon, with no time to think about it or plan for it, is almost unprecedented.” (quoting Richard Socarides, former Clinton White House adviser on gay rights)).

⁸ Michael Dorf has characterized this “antiquarian objection” as “ridiculous.” Michael C. Dorf, *Promo for My Travel Ban Column—And a Thought About Justice Thomas’s Potshot at Nationwide Injunctions*, DORF ON L. (June 27, 2018), <http://www.dorfonlaw.org/2018/06/promo-for-my-travel-ban-column-and.html> [<https://perma.cc/R9CF-B3VP>].

⁹ See generally Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

¹⁰ See generally *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999).

English Chancellor at the turn of the eighteenth century.¹¹ That is, on a purportedly originalist account, Bray construes Article III to vest federal courts with equity powers concomitant with those of the English Chancellor at the time of ratification of the Constitution. At that point in time, Bray contends, because the English Chancellor was unitary—there was only one chancellor, not multiple—the Chancellor had no need and thus no power to issue anything like the overlapping and sometimes conflicting nationwide injunctions we see today.¹² Then, focusing narrowly on American federal equity practice, Bray claims that because nationwide injunctions did not issue before the 1960s, their recent lineage evidences they are a perversion of traditional equity powers.¹³

Other commentators simply conclude that the problems concomitant to the power to issue nationwide injunctions—forum shopping, competing injunctions, stifling the percolation of issues before they reach the Supreme Court, to name a few—weigh against legitimating them as proper exercises of remedial equity power.¹⁴ Some split the baby and simply suggest that we tame the nationwide injunction by prescribing formal limits on issuance, implying that if federal trial judges had more rigid guides fewer purportedly problematic injunctions would issue.¹⁵

There are some defenders of the nationwide injunction. Most in this camp insist that the broad reach of nationwide injunctions is a necessary remedy in exceptional cases. For instance, Amanda Frost and Suzette Malveaux separately argue that certain issues are of such national import that cross-jurisdictional relief is necessary.¹⁶ Most defenders of the remedy focus narrowly on why it is needed, rather than whether it is within the jurisdiction and powers of our federal chancellors.¹⁷ For example, civil

¹¹ Bray, *supra* note 9, at 425 (“The equitable doctrines and remedies of the federal courts must find some warrant in the traditional practice of equity, especially as it existed in the Court of Chancery in 1789.”).

¹² *Id.* at 446–48.

¹³ *Id.* at 467–69.

¹⁴ See, e.g., Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 363–65 (2018).

¹⁵ Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2139–47 (2017) (suggesting an amendment to Fed. R. Civ. P. 65 that would codify the “complete relief principle”); Matthew Erickson, Note, *Who, What, Where: A Case for a Multifactor Balancing Test As a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 359–60 (2018) (arguing that courts should adopt a three-factor test that takes into account “who” benefits from injunction sought and if there are a large number of nonparty beneficiaries a nationwide injunction is improper).

¹⁶ Frost, *supra* note 1, at 1090–94; Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 64 (2018).

¹⁷ One notable exception is Mila Sohoni. In her *Harvard Law Review* article, Sohoni argues that the remedy has been unfairly categorized as novel. Mila Sohoni, *The Lost History of the “Universal Injunction,”* 133 HARV. L. REV. 920, 924 (2020). Even if “traditional” practice limits federal equity, Sohoni points out that the Supreme Court and lower courts have issued injunctions that reach beyond the plaintiff, including injunctions against the enforcement of federal law, for more than a century. While Sohoni’s work has uncovered a useful historical

rights lawyers, like Spencer Amdur and David Hausman, point out that the serious injuries that typically give rise to suits seeking nationwide injunctions can only be prevented if sweeping relief is afforded.¹⁸

The Supreme Court has had the opportunity to speak to the propriety of nationwide injunctions on several occasions.¹⁹ But a recent exchange between Justices Gorsuch and Sotomayor in early 2020 suggests the Court is poised to soon decide whether nationwide injunctions are constitutional.

record that refutes the empirical novelty critique of nationwide injunctions, it does not explain why the novelty critique strikes a chord with critiques of the remedy let alone how it operates in the current political climate. This Article endeavors to build off of Sohoni's work and tackle those exact questions.

¹⁸ Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51–53 (2017).

¹⁹ See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2393, 2423 (2018) (reversing on the merits a lower court decision finding the Trump Administration's so-called "Muslim Ban" illicit and, as a consequence, vacating the nationwide injunction issued below); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (declining federal government's request to stay preliminary nationwide injunctions extending to "respondents and those similarly situated"); *Texas v. United States*, 136 S. Ct. 2271, 2272 (2016) (Mem.) (affirming nationwide injunction blocking the Obama-era Deferred Action for Parents of Americans (DAPA) program with an equally divided Court); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010) (Alito, J.) (holding that lower court's nationwide injunction enjoining the Department of Agriculture's decision to deregulate the Roundup Ready Alfalfa plant should be vacated because the district court abused its discretion in enjoining the agency's partial deregulation, not because the remedy itself was categorically infirm); *Summers v. Earth Inst.*, 555 U.S. 488, 500–01 (2009) (Scalia, J.); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 16 (2006) (Breyer, J.) (holding in context of alleged national conspiracy to shut down abortion clinics nationwide that threatening or committing physical violence unrelated to robbery or extortion which obstructs, delays, or affects commerce falls outside the scope of the Hobbs Act; reversing on liability and, as a result, overturning nationwide injunction restricting protest activities of defendants and those acting in concert with them); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411 (2003) (Rehnquist, C.J.) (holding that interference with operation of abortion clinics was not extortion, as would be necessary to support a RICO violation, reversing on merits and vacating nationwide injunction restricting protest activities of defendants and those acting in concert with them); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (Rehnquist, J.) (explaining that nationwide preliminary injunction of federal law imposing limit on attorneys' fees in Department of Veterans Affairs proceedings warranted expedited review by the Court given the remedy's breadth), *Walters*, 473 U.S. at 336 (O'Connor, J., concurring) (explaining expedited review "is appropriate in the rare case such as this where a district court has issued a nationwide injunction that in practical effect invalidates a federal law"); *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 859 (1984) (Burger, J.) (holding statute denying federal financial aid to male students who fail to register for draft constitutional, reversing on the merits and vacating nationwide injunction of federal statute); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 123, 132 (1940) (reversing lower courts' nationwide injunction on finding that the plaintiffs lacked standing, but stopping short of deeming the scope of the remedy per se problematic). See generally *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (Scalia, J.) (holding that national wildlife group's challenge of "land withdrawal review program" by the Bureau of Land Management unviable for a variety of reasons, despite trial and intermediate appellate court concluding claims were sufficiently substantial to warrant entry of a nationwide injunction).

The exchange arose amidst a series of extraordinary stays requested by the Trump administration. At issue was the administration's new public charge rule, a test that seeks to determine whether an immigrant applying to enter the United States, extend their visa, or convert their temporary immigration status into a green card is likely to end up relying on public benefits in the future.²⁰ The rule had been enjoined on a nationwide basis by several district courts²¹ and limitedly in the state of Illinois only by another district court.²² Initially, the Court granted the Trump administration emergency stays over all the public-charge rule nationwide injunctions in *Department of Homeland Security v. New York*, leaving in place the injunction covering only Illinois.²³ Concurring with that order, Justice Gorsuch, joined by Justice Thomas, claimed the nationwide injunction is a fundamentally new remedy, framed problems like forum-shopping and conflicting orders as being precipitated by the fact that the remedy is a new one, and urged that the chaos sown by nationwide injunctions might soon make it necessary for the Court to "take up some of the underlying equitable and constitutional questions raised by the rise of nationwide injunctions."²⁴ But just a month later, the Court stayed the Illinois-only injunction in *Wolf v. Cook County*. Dissenting from that order, Justice Sotomayor urged that the Court had been duped—nationwide injunctions were not the real problem.²⁵ Incisively, she explained how the Trump administration had, with the Court's help, repeatedly sought and won

²⁰ The public charge rule is controversial. For the last 20 years, the federal government has defined as a "public charge" as a person "primarily dependent on the government for subsistence." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999). Under that same guidance, immigration officers were not to consider non-cash public benefits in deciding whether noncitizens met that definition. The new rule redefined "public charge" as an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,295 (Aug. 14, 2019), *reversed by* Inadmissibility on Public Charge Grounds: Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). This redefinition would have dramatically expanded the type of benefits that render a noncitizen inadmissible, including non-cash benefits such as Supplemental Nutrition Assistance Program, most forms of Medicaid, and various forms of housing assistance. *Id.*

²¹ *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 654 (S.D.N.Y. 2019) (granting nationwide preliminary injunction); *Make the Road N.Y. v. Cuccinelli*, No. 19 Civ. 7993, 2019 WL 6498283, at *3 (S.D.N.Y. Dec. 2, 2019) (denying stay pending appeal); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 340 (S.D.N.Y. 2019) (granting nationwide preliminary injunction); *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777, 2019 WL 6498250, at *3 (S.D.N.Y. Dec. 2, 2019) (denying stay pending appeal); *aff'd*, No. 19-3595, 2020 WL 95815, at *1 (2d Cir. Jan. 8, 2020).

²² *Cook Cnty. v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019) (granting preliminary injunction of public charge rule solely within the boundaries of the State of Illinois).

²³ *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020).

²⁴ *Id.* at 601.

²⁵ *Wolf v. Cook Cnty.*, 140 S. Ct. 681, 682 (2020) (Sotomayor, J., dissenting).

extraordinary stays in ways that caused the very abuses of process Gorsuch had claimed nationwide injunctions sow.²⁶

Initially, conservatives rushed to support Gorsuch's attack on nationwide injunctions with some liberals joining.²⁷ But critiques were limited from the left before Sotomayor's dissent.²⁸ Once Sotomayor issued her dissent in *Wolf*, things escalated. Pundits on the right questioned the sincerity of Sotomayor's arguments and accused her of being partisan.²⁹ Predictably, President Trump joined the fray on Twitter, calling for Sotomayor's recusal on the premise that her dissent in *Wolf* was tantamount to accusing the conservative justices of being "biased in favor of Trump," which he claimed reflected her own anti-Trump proclivities.³⁰ While pundits on the left rushed

²⁶ *Id.* at 683–84; see also *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 53 (D.D.C. 2020) (characterizing similarly that the chaos Gorsuch described "was a product not of a nationwide injunction, which would quickly settle legal issues at play once and for all potential plaintiffs, but of emergency appeals by the federal government seeking stays of nationwide injunctions entered by district courts").

²⁷ See, e.g., Ian Millhiser, *Democrats Need to Listen to Neil Gorsuch's Surprisingly Good Idea*, VOX (Jan. 29, 2020, 8:10 AM), <https://www.vox.com/2020/1/29/21094603/supreme-court-decision-on-immigration-neil-gorsuch-democrats> [<https://perma.cc/MV6K-FJPW>] (framing Gorsuch's call to end nationwide injunctions as bipartisan).

²⁸ *But see* Linda Greenhouse, Opinion, *The Supreme Court in the Mean Season*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/opinion/supreme-court-immigration-trump.html> [<https://perma.cc/7VDA-8SQJ>] (pointing out hypocrisy of conservative justices decrying "the rise of nationwide injunctions"—"I don't remember such hand-wringing a few years back when anti-immigrant states found a friendly judge in South Texas to issue a nationwide injunction against President Barack Obama's expansion of the DACA program to include parents of the 'Dreamers'. The Supreme Court let that injunction stand.").

²⁹ See, e.g., Carrie Campbell Severino, *Ginsburg and Sotomayor Are the Most Political Jurists*, NAT'L REV. (Mar. 4, 2020), <https://www.nationalreview.com/bench-memos/ginsburg-and-sotomayor-are-the-most-political-justices/> [<https://perma.cc/BQ9D-86XU>] (decrying Sotomayor's *Wolf* dissent as creating "a national spectacle" and claiming Sotomayor's critique evidences she and those like her are "ideologues willing to put their thumbs on the scale for liberal causes").

³⁰ Donald Trump (@realDonaldTrump), TWITTER (Feb. 24, 2020, 11:09 PM), <https://twitter.com/realDonaldTrump/status/1232155591537254400?s=20> [<https://web.archive.org/web/20200225195212/https://twitter.com/realDonaldTrump/status/1232155591537254400?s=20>] (quoting conservative commentator Laura Ingraham's claim that Justice Sotomayor's dissent in *Wolf* is tantamount to "accus[ing] appointed Justices of being biased in favor of Trump" and reflecting that "[t]his is a terrible thing to say. Trying to 'shame' some into voting her way? She never criticized Justice Ginsburg when she called me a 'faker'. Both should recuse themselves."); Bobby Lewis, *Fox & Friends Rewrites History to Defend Trump's Attack on the Supreme Court*, MEDIA MATTERS (Mar. 5, 2020, 11:02 AM), <https://www.mediamatters.org/supreme-court/fox-friends-rewrites-history-defend-trumps-attack-supreme-court> [<https://perma.cc/6WSV-ME7J>] (arguing that hosts of "Fox and Friends" "falsely suggested that an earlier attack from President Donald Trump on Justices Sonia Sotomayor and Ruth Bader Ginsburg was justified" in part based on accusation that Sotomayor's dissent in *Wolf* amounted to "political, biased remarks about [Trump]"); see also Robert Barnes & Ashley Parker, *Trump Dials up His Unusual Battle with the Judiciary*, WASH. POST (Feb 25, 2020, 7:08 PM), [<https://engagedscholarship.csuohio.edu/clevstrev/vol69/iss4/7>](https://www.washingtonpost.com/politics/courts_law/trump-</p>
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to label the conservative response as yet another product of Trumpism, few deigned to substantively speak to the propriety of nationwide injunctions.³¹ While some did try to make sense of these attacks,³² few appreciated the stakes for the Court, our modern day chancellors, and federal equity.

This Article endeavors to reclaim the nationwide injunction as a valid exercise of federal equity. I posit that federal equity is quite expansive—in exceptional cases, it extends as far as necessary to provide a remedy where there is no adequate one at law. These clear, simple limits were set by Article III and the Judiciary Act of 1789 and are evidenced by writings of the Framers and have been readily recognized by the Supreme Court, albeit with some equivocation, from the earliest days of the Republic to present.

Even though federal equity jurisdiction is quite expansive, there are important limits on its exercise. Courts sitting in equity are empowered to abstain from exercising jurisdiction granted to them and, I contend, in some cases when faced with a request for a nationwide injunction abstention is absolutely necessary. In fact, I venture that many of the most pressing problems raised by nationwide injunctions can be remedied if a new kind of abstention is recognized by the Supreme Court.

My proposal envisions a prudential, discretionary kind of abstention, akin to *Colorado River*³³ abstention, that can be invoked by a federal trial judge when a party moves for a nationwide injunction. The factors are calibrated to deter abusive litigation

dials-up-his-unusual-battle-with-the-judiciary/2020/02/25/fd930eb4-5803-11ea-9000-f3cffe23036_story.html [https://perma.cc/KUB3-KTHB] (reporting on Trump’s tweet calling for Sotomayor to recuse herself in cases involving the Administration); Adam Liptak, *In Case on Wealth Test for Green Cards, a Scathing Sotomayor Dissent*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/us/wealth-test-supreme-court-sotomayor.html [https://perma.cc/EB6D-JQ6V] (describing Sotomayor’s dissent as “scathing” rebuke of Trump Administration).

³¹ See, e.g., Garrett Epps, *Trump Is at War With the Whole Idea of an Independent Judiciary*, THE ATLANTIC (Mar. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/03/trump-independent-judiciary/607375/ [https://perma.cc/3Q4B-TXXX] (contextualizing Trump’s attack on Sotomayor as illustrative of an overarching “theme,” explaining that “[w]hen Trump or his friends are concerned with a case, the president wants to choose, or intimidate, both judge and jury; participants in the nominally independent judicial process must now fear not only his criticism but threats or even violence from his supporters”); Aaron Rupar, *Trump’s Demand for Ginsburg and Sotomayor to Recuse Themselves, Briefly Explained*, VOX (Feb. 25, 2020, 11:45 AM), https://www.vox.com/2020/2/25/21152567/trump-sotomayor-ginsburg-supreme-court-indian-news-conference [https://perma.cc/8CSH-2BQQ] (“Trump’s attacks on Supreme Court justices he perceives as being insufficiently loyal to him point to how, following his impeachment acquittal, he’s feeling increasingly emboldened to attack any and all checks on his power. They also illustrate his conviction that anybody who has said a critical word about him, even indirectly, is disqualified from involvement in cases pertaining to his interests.”).

³² Daily News Editorial Board, *Supreme Hypocrisy: Trump’s Selective Umbrage High Court Justices*, N.Y. DAILY NEWS (Feb. 26, 2020), https://www.nydailynews.com/opinion/ny-edit-scotus-20200226-ed6m7hzc2bgdjif4n74kviq7za-story.html [https://perma.cc/6EC3-V3R9] (arguing Trump’s comments are hypocritical in light of his valorization of the late Justice Antonin Scalia who openly attacked the Obama Administration’s DACA policy in public fora but declined to recuse himself from immigration cases).

³³ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814–17 (1976).

tactics, prevent untoward interference with non-party rights and forum-shopping, and should promote horizontal comity between the district courts as well as percolation of issues. District Courts would, under this proposal, be empowered to dispose of these suits in some instances and in others simply to decline to consider the relief sought.

This Article has three parts. Part II presents the terrain of the nationwide injunction debate. It recounts the lost history of nationwide injunctions which reveals they are not a new remedy, unpacks how and why the Trump administration embraced and made the novelty critique a driving feature of its litigation strategy and public messaging against the remedy, and concludes by arguing that the problems we encounter with nationwide injunctions are not necessarily unique to the remedy let alone caused by its supposed novelty.

Part III explores the metes and bounds of Article III's equity. It posits that federal equity is quite expansive, extending as far as necessary to give justice to the parties. Though, in some respects, federal equity is informed by tradition, a long line of Supreme Court decisions reflects that Article III's equity is dynamic and, most certainly, its metes and bounds are not delimited by those of the historic English Chancellor. It ultimately concludes that nationwide injunctions are constitutional.

Part IV presents the nationwide injunction abstention proposal. It suggests that one means of inoculating against abuses of nationwide injunctions is for courts to embrace their abstention power. When sitting in equity, federal courts are well within their Article III powers to abstain from exercising jurisdiction over certain nationwide injunction cases. This Part goes on to suggest factors and balancing considerations. It closes by exploring the benefits of an abstention approach to nationwide injunction suits and explores likely objections to the proposal.

One contribution of this Article is its contextualization of the Trump administration's crusade against nationwide injunctions as being part of its larger campaign to deflate the judiciary's capacity to meaningfully check the executive. While some commentators are concerned that more nationwide injunctions are being issued today than in the past,³⁴ this is not in and of itself evidence of judicial overreach.³⁵ Rather, it might simply reflect that the judiciary is actively checking executive overreach,³⁶ just as the Framers intended. Reframed thusly, we can see that claims that federal courts lack the authority to enjoin executive overreach even where proven as a "call for the federal courts to abdicate [the] judicial check on the executive

³⁴ See discussion *infra* Section II.B.

³⁵ *But see* Tessa Berenson, *Inside the Trump Administration's Fight to End Nationwide Injunctions*, TIME (Nov. 4, 2019, 3:12 PM), <https://time.com/5717541/nationwide-injunctions-trump-administration/> [<https://perma.cc/BQ6P-ZCUU>] (characterizing the frequency critique as confusing "cause and effect").

³⁶ Judge Rovner of the Seventh Circuit suggested as much in his panel opinion in *City of Chicago v. Barr*, there dryly observing that while many scholars were concerned by "the perceived increase in the utilization of universal injunctions in the past few decades," that perhaps "another forum" could assess "whether any such increase signals an expanding judicial overreach or an increasing executive autocracy." *City of Chicago v. Barr*, 957 F.3d 772, 803 (7th Cir. 2020).

branch.”³⁷ This Article goes on to argue that while power grabs are not totally unexpected, the prospect of the judiciary acquiescing to the executive’s calls to abdicate its check endangers the maintenance of our constitutional order.

Additionally, this Article also makes an important contribution to literature speaking to the constitutional limits of federal equity. Federal equity jurisdiction and powers are set by Article III.³⁸ However, the exact limits are not well understood. Supreme Court cases explaining the metes and bounds of federal equity are all over the map. Some appear to say that federal equity is concomitant with that of the English Chancellor at the birth of the Republic. Others seem to disavow that limit. This Article reconciles these decisions by explaining that federal courts invoke the English Chancellor not because he sets historic limits on our equity but rather because he symbolically manifests equity’s aspirational aims. This ahistoric chancellor embodies equity’s overarching commitments to justice and fairness. He also represents a promise by our modern-day chancellors that their conscience is guided by a measure of stability and capacity for change that are characteristic of equity’s long tradition.

Another key contribution of this Article is its suggestion that federal courts use their inherent power to abstain from exercising jurisdiction over equitable matters as a means to inoculate against potential abuses sowed by nationwide injunctions.³⁹ There are several benefits to deploying abstention to the nationwide injunction problem. One key advantage of this approach, as opposed to other proposed solutions,⁴⁰ is that abstention helps shore up the institutional legitimacy problems imprudently granted nationwide injunctions lay bare.

II. THE TERRAIN

This Part sketches out the nationwide injunction debate. It begins by elevating the lost history of nationwide injunctions in courts and public discourse, revealing that the remedy is not novel. From there, it unpacks how and why the Trump administration has embraced the novelty critique and made it a driving feature of its litigation strategy and public messaging against the remedy. It concludes by arguing that the problems we encounter with nationwide injunctions are not necessarily unique to the remedy let alone caused by its supposed novelty.

³⁷ Benjamin Spencer, *First, We’ll Neuter the All the Judges*, THE HILL (Feb. 14, 2020, 2:00 PM), <https://thehill.com/opinion/judiciary/482788-first-well-neuter-all-the-judges> [<https://perma.cc/U9BU-QJNJ>].

³⁸ Article III vests the Supreme Court with the full judicial power in cases arising under both law and equity. *See* U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .”). It also confers Congress with the sole power to create inferior courts and set their jurisdiction by statute. *See id.* § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

³⁹ *See* discussion *infra* Section IV.A.

⁴⁰ *See infra* Section IV.E (discussing why other proposed solutions are a poor fit).

A. Nationwide Injunctions Are Not Novel

In recent years, a pernicious myth about nationwide injunctions has taken on a life of itself—that the remedy is novel, and that its novelty evidences its impropriety if not its outright unconstitutionality.

The Trump administration not only embraced the novelty critique but made it a driving feature of its litigation strategy and public messaging against nationwide injunctions. For instance, Department of Justice guidance issued in 2018 directed attorneys to oppose nationwide injunctions in virtually every case justifies the move on the theory that there are no known examples of nationwide injunctions issued in the United States prior to 1963.⁴¹ The remedy’s novelty, the guidance claims, evidences that nationwide injunctions are an “extreme remedy.”⁴² It goes on to suggest that federal judges of the past must not have issued nationwide injunctions because they understood the remedy to be beyond the judicial power.⁴³ The novelty critique also featured prominently in then-Attorney General Jeff Sessions’s remarks publicly announcing the guidance’s issuance:

In the first 175 years of this Republic, not a single judge issued one of those orders. It’s not as though there weren’t legal controversies before 1963. There were many. But nobody issued a nationwide injunction[.] We’re going to fight them all the way to the Supreme Court. I am confident that the law is on our side. History is on our side.⁴⁴

Sessions hammered the nationwide injunction’s novelty again in remarks to the Heritage Foundation a month later, then insisting that “[s]cholars have not found a single example of any judge issuing this type of extreme remedy before the 1960s.”⁴⁵ In the months that followed, the Trump administration and its supporters’ messaging sharpened, increasingly insisting that nationwide injunctions are a recent invention and that the remedy’s novelty evidences its unconstitutionality.⁴⁶

⁴¹ Memorandum from Jeff Sessions, U.S. Att’y Gen., to Heads of Civil Litigating Components, U.S. Att’y’s 3 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/J9VQ-FZH8>].

⁴² *Id.* at 4.

⁴³ *Id.* at 3 (“They were unknown in the English courts of equity and so were not part of the jurisdictional grant made by the Judiciary Act.”).

⁴⁴ Jeff Sessions, U.S. Dep’t of Justice, Att’y Gen. Sessions Delivers Remarks Announcing New Memo on Nationwide Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-new-memo-nationwide-injunctions> [<https://perma.cc/ZNP3-WKXY>].

⁴⁵ Jeff Sessions, U.S. Dep’t of Justice, Att’y Gen. Sessions Delivers Remarks at the Heritage Foundation’s Legal Strategy Forum (Oct. 26, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-heritage-foundation-s-legal-strategy-forum> [<https://perma.cc/7PAA-H32W>].

⁴⁶ See discussion and notes *infra* Section II.B.

The novelty critique is increasingly popular with some ideologically conservative federal judges. For instance, in his concurrence to *Trump v. Hawaii*, Justice Thomas characterizes nationwide injunctions as being “legally and historically dubious.”⁴⁷ To Thomas’s eye, nationwide injunctions break with the historic practice and understanding of federal judges that the “judicial power” is “fundamentally the power to render judgments in individual cases.”⁴⁸ The novelty critique is also featured in Justice Gorsuch’s concurrence in *Department of Homeland Security v. New York*. There, Gorsuch lambasts the remedy as having “little basis in traditional equitable practice,” “an innovation we should [not] rush to embrace,” a stranger to the “traditional system,” and a “a sign of our impatient times.”⁴⁹ The cure, Gorsuch urges, is a return to the past—“good judicial decisions are usually tempered by older virtues.”⁵⁰

But nationwide injunctions are not exactly novel.

There are plenty of precursors to the nationwide injunction. Equity courts have historically granted broad injunctions protecting the rights of non-parties. Bills of peace were used to resolve claims where many individuals shared a common interest.⁵¹ Ordinary bills for injunctions also frequently protected individuals with a common interest.⁵² Equity courts have also historically granted broad injunctions to protect the rights of groups of individuals.⁵³ Legal historians point out that some of these injunctions protected upwards of hundreds of thousands of nonparties.⁵⁴

The nationwide injunction as we know it today is not even particularly new. While it is difficult to precisely identify when the nationwide injunction came on the scene,⁵⁵ it has been part of federal equity practice for more than a century. Mila Sohoni’s *Lost History of the “Universal” Injunction* points to nationwide injunctions issued by the Supreme Court in the 1910s and 1920s⁵⁶ as well as a slew of other sweeping

⁴⁷ *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018).

⁴⁸ *Id.* at 2427.

⁴⁹ *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Mem.).

⁵⁰ *Id.*

⁵¹ Brief of Amici Curiae Legal Historians in Support of Plaintiff and Appellee the City of Chicago at 8–12, *City of Chicago v. Whitaker, sub nom. City of Chicago v. Barr*, 957 F.3d 772 (7th Cir. 2020) (No. 18-2885), 2018 WL 6173238, at *8–12.

⁵² *Id.* at 12–15.

⁵³ *Id.* at 15–18.

⁵⁴ *Id.* at 15.

⁵⁵ Sohoni, *supra* note 17, at 943–44 (explaining evidence points to the Supreme Court issuing nationwide type injunctions as early as 1913, but that it is possible if not probable that the remedy had been used by the Court or lower courts earlier than that).

⁵⁶ For instance, in the run-up to its decision in *Lewis Publishing Co. v. Morgan*, 229 U.S. 228 (1913), the Supreme Court issued an order in 1916 that, pending its disposition of the case, barred a federal law from being applied not just to the plaintiffs, but to anyone. See Sohoni, *supra* note 17, at 944–46 (providing background and discussing significance of the order). The

injunctions issued by lower courts that directly and intentionally benefitted nonparties.⁵⁷

One consequence of mistakenly thinking of nationwide injunctions as new is that we miss the rich history of how federal courts have squared the remedy with their judicial power, made sense of the remedy's breadth, and how the public has responded.

Until recently, nationwide injunctions do not seem to have raised difficult questions about the metes and bounds of federal judicial power. For a long time, federal courts simply assumed nationwide injunctions to be within the metes and bounds of federal equity. For instance, high-profile Supreme Court cases on lightning rod issues of the day, like a challenge to compulsory male selective service registration,⁵⁸ dryly reference the fact that a nationwide injunction was issued and go on to address the merits of the underlying decision. When pressed to justify the remedy, federal courts reasoned that they have inherent judicial authority to issue nationwide injunctions even in the absence of a specific authorizing statute.⁵⁹ An early representative example is the 1939 nationwide injunction issued in *Lukens Steel Co. v. Perkins*.⁶⁰ There, the D.C. Circuit reasoned that federal courts have the power to enjoin a federal official and agency from engaging in certain purchasing activities with respect to iron and steel industries and ultimately deemed it of no moment that there was no legislation expressly authorizing such an injunction.⁶¹

Court issued a similar order enjoining enforcement of a federal law beyond the plaintiffs in 1921, pending its final disposition in *Hill v. Wallace*, 259 U.S. 44 (1922), a challenge to the Future Trading Act. See Sohoni, *supra* note 17, at 946–52 (providing background and discussing significance of the order).

Additionally, in 1935 the Supreme Court issued a discretionary stay order in *Landis v. North American Co.*, 299 U.S. 248 (1936), halting all but one suit challenging the constitutionality of the Public Utility Holding Company Act of 1935. *Id.* at 250–51. The *Landis* discretionary stay operated as a kind of self-imposed nationwide injunction, approved in exchange for the Securities and Exchange Commission, which feared a multiplicity of suits, promising to stay enforcement of the challenged federal law as to anyone during the pendency of the suit.

⁵⁷ Sohoni, *supra* note 17, at 959–73.

⁵⁸ *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 846 (1984) (Burger, C.J.) (noting district court's issuance of nationwide injunction).

⁵⁹ See Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 789 & n.188 (2008) (“Federal courts generally relief upon the All Writs Act, 28 U.S.C. § 1651 (1994), for the authority to enter injunctions not otherwise expressly authorized by statute.”); 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

⁶⁰ *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 629 (D.C. Cir. 1939).

⁶¹ *Id.* at 638. Although the Supreme Court later reversed the D.C. Circuit, the reversal hinged on its finding that the plaintiffs lacked standing, it did not deem the scope of the injunction *per se* problematic. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (“[N]o legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based.”); see also Sohoni, *supra* note 17, at 926 (characterizing *Perkins* as leaving “intact the propriety of injunctions reaching beyond plaintiffs with standing”). But see Samuel Bray, *A Response to The Lost History of the “Universal”*

The Supreme Court has had several opportunities to reject the nationwide injunction and declined to do so. As recently as 2017, the Court declined the federal government's request in *Trump v. International Refugee Assistance Project*⁶² to stay preliminary injunctions extending to "respondents and those similarly situated."⁶³ The Fourth Circuit has since construed this as "affirm[ing] the equitable power of district courts, in appropriate cases, to issue nationwide injunctions."⁶⁴

Where the Supreme Court has disturbed nationwide injunctions, it has identified infirmities in the suits that obviate the remedy. For example, the Court reversed the nationwide injunction issued in *Lukens*, but its decision hinged on finding the plaintiffs lacked standing rather than finding the remedy is categorically infirm.⁶⁵ Similarly, in *Monsanto Co. v. Geertson Seed Farms*,⁶⁶ a challenge to a nationwide injunction enjoining the Department of Agriculture's decision to deregulate the Roundup Ready Alfalfa plant, the Court explains that the remedy should be vacated because the district court abused its discretion in enjoining the agency's partial deregulation, not because the remedy was categorically infirm.⁶⁷ And in *Summers v. Earth Island Institute*,⁶⁸ a challenge to a nationwide injunction enjoining the Forest Service's approval of salvage sales of timber on fire damaged federal lands, the Court reasoned that the remedy should be vacated because the plaintiffs failed to establish standing, mooting the question as to whether in that specific case "a nationwide injunction would be appropriate."⁶⁹

This is not to say that the courts have not been weary of breadth generally and the nationwide injunction's breadth specifically.

The Supreme Court has urged that remedies be no broader than necessary. However, the Court has not ever taught that a remedy's breadth renders it categorically

Injunction, YALE J. REGUL.: NOTICE & COMMENT (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/> [<https://perma.cc/4GED-PJDK>] (arguing otherwise).

⁶² *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (per curiam).

⁶³ *Id.* at 2087.

⁶⁴ *Roe v. Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020); see also *City of Chicago v. Sessions*, 888 F.3d 272, 288–89 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2017) (construing *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, as signaling validity of nationwide injunctions).

⁶⁵ *Perkins*, 310 U.S. at 125 ("[N]o legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based."); see also *Sohoni*, *supra* note 17, at 926 (characterizing *Perkins* as leaving "intact the propriety of injunctions reaching beyond plaintiffs with standing"). *But see* *Bray*, *supra* note 61 (arguing otherwise).

⁶⁶ *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 144 (2010) (Alito, J.).

⁶⁷ *Id.* at 165 ("[T]he impropriety of the District Court's broad injunction against planting flows from the impropriety of its injunction against partial deregulation.").

⁶⁸ *Summers v. Earth Island Inst.*, 555 U.S. 488, 490 (2009) (Scalia, J.).

⁶⁹ *Id.* at 500–01.

infirm. For instance, in *Califano v. Yamasaki*, the Court teaches that when crafting remedies courts must take heed of equity's "rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."⁷⁰ It goes on to explain, that in the context of a nationwide class action, the size of the class of plaintiffs does not make a remedy impossible.⁷¹

As to nationwide injunctions specifically, the Supreme Court has long suggested that the remedy's breadth may warrant special consideration on review. For instance, in *Walters v. National Ass'n of Radiation Survivors*,⁷² Justice Rehnquist, writing for the majority, explains that a nationwide preliminary injunction enjoining a federal law that imposed a limit on attorneys' fees in Department of Veterans Affairs proceedings warranted immediate review by the Supreme Court under a since repealed procedural mechanism because such a broad injunction, if left in place, frustrates the will of Congress.⁷³ Rehnquist's point does not seem to be that nationwide injunctions are *ultra vires*, but rather, that their breadth can sometimes justify expedited review given how much more disruptive they are than more narrow injunctions. Justice O'Connor's concurrence in *Walters* echoes that sentiment, explaining that expedited review "is appropriate in the rare case such as this where a district court has issued a nationwide injunction that in practical effect invalidates a federal law."⁷⁴ Similarly, in *Lujan v. National Wildlife Federation*,⁷⁵ Justice Blackman, writing "in dissent but apparently expressing the view of all nine justices,"⁷⁶ suggests that the fact that the district court issued a nationwide preliminary injunction enjoining a federal agency's efforts to sell public lands, warranted special consideration by the Court. Blackmun explains that the fact that the district court and circuit court both had concluded that the underlying claims were "sufficiently substantial to warrant the entry of a nationwide injunction" should heavily weigh against deeming the plaintiffs insufficiently aggrieved to challenge the land sale in the first instance.⁷⁷

While some critics urge that the lower federal courts have simply failed to appreciate the remedy's breadth, many decisions reflect just the opposite. Public law opinions underscore that nationwide injunctions are only warranted in truly

⁷⁰ *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

⁷¹ *Id.* ("Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.").

⁷² *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985) (Rehnquist, J.).

⁷³ *Id.* at 319.

⁷⁴ *Id.* at 336 (O'Connor, J., concurring).

⁷⁵ *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

⁷⁶ *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

⁷⁷ *Lujan*, 497 U.S. at 913.

extraordinary circumstances.⁷⁸ Where nationwide injunctions are issued pursuant to inherent judicial authority, courts appear to take considerable effort to tailor the remedy in light of traditional equitable principles.⁷⁹ Some otherwise justify nationwide injunctions where regulations are challenged on the theory that courts are both expressly authorized to act⁸⁰ and reason that it is otherwise necessary to broadly enjoin unlawful agency actions in total.⁸¹ Others reason that nationwide scope is reasonable where there is a nationwide class, believing anything short of a nationwide injunction would be insufficient to protect the class.⁸² Private law decisions similarly reflect careful consideration of nationwide injunction's breadth. It should be noted that in the vast majority of private law cases where nationwide injunctions are issued, the remedy is expressly authorized by statute, which raises fewer concerns about judicial overreach.⁸³ And yet, many courts approach even those cases with caution. As one example, lower courts routinely decline to issue nationwide injunctions in suits

⁷⁸ See, e.g., *City of Chicago v. Barr*, 961 F.3d 882, 938 (7th Cir. 2020) (Manion, J., concurring) (“An injunction is a drastic and extraordinary remedy, outdone only by an injunction issued on a national scale. This type of relief should be issued only when absolutely necessary and the court rightly recognizes it is far from necessary here.”).

⁷⁹ See, e.g., *Bregal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (“[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.”).

⁸⁰ This principle flows, in part, from the text of section 706 of the Administrative Procedures Act, 5 U.S.C. § 706 (reviewing courts “shall” “set aside” unlawful agency actions). See, e.g., *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283 (9th Cir. 2020) (“Singular equitable relief is commonplace in APA cases, and is often necessary to provide the plaintiffs with complete redress.”); *Pennsylvania v. President of the U.S.*, 930 F.3d 543, 575 (3d Cir. 2019) (“[C]ourts invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action.”); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (observing “the text of the” APA’s section 706 “compel[s]” nationwide injunctions of invalid rules), *aff’d in part, rev’d in part sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (“When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”).

⁸¹ See, e.g., *Make the Rd. N.Y. v. McAleenan.*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019) (entering national injunction against agency rule where plaintiff proved rule unlawfully promulgated on the logic that merely halting the rule’s application to the plaintiff may lessen the real-world impact of the unlawful rule as to the plaintiff but does not fully redress “the violation established”—the promulgation of an unlawful rule); see also *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 18–19 (D.D.C. 2004) (entering a permanent injunction of the Department of Defense’s “involuntary anthrax inoculation program” as to “all persons” not just the plaintiffs).

⁸² See, e.g., *Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020) (“[A] provisionally certified nationwide class is sufficient justification for a nationwide injunction.”).

⁸³ See, e.g., *Price*, *supra* note 59 at 789–90 (pointing out that when federal courts exercising federal question jurisdiction in certain areas no comity concerns; also points out that some federal IP statutes expressly authorize nationwide injunctions as forms of relief).

brought under state law where the remedy would have applied the law of one state beyond its borders.⁸⁴

Given the foregoing, it is perhaps unsurprising that public reception to the nationwide injunction was relatively neutral up through the 2010s. Legal commentators and popular press dryly reported on nationwide injunctions against the federal government and even natural persons⁸⁵ for decades expressing no concern about the remedy's constitutionality. For instance, though somewhat unorthodox at the time, the *Landis* order was not deemed problematic by legal commentators.⁸⁶ Popular press in the 1970s through the early 2000s took a similar approach—recognizing the breath of the remedy is significant, but not questioning its constitutionality.⁸⁷

⁸⁴ In these decisions, courts head the rule that one state cannot legislate for others or project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it. *Pac. Emps. Ins. v. Indus. Accident Comm'n*, 306 U.S. 493, 504–05 (1939); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1104–08 (2009); see, e.g., *Nissan Motor Co. v. Nissan Comput. Corp.*, 378 F.3d 1002, 1015 (9th Cir. 2004) (“While California courts have repeatedly held that they have authority to issue injunctions which have effect beyond the borders of California, this remains an open question in this circuit. As we have no ruling before us, we leave the constitutionality of a nationwide injunction based on state law for another day and remand to the district court to consider, if necessary, whether it would grant injunctive relief, or later its scope, if the dilution were based solely on California law.”); *Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 385 (N.D. Ill. 1985) (concluding that nationwide injunction of advertising practices would place an “excessive burden on commerce in light of the interest sought to be protected”).

⁸⁵ See, e.g., Jane Fritsch, *Cover Story: The Man Who Sued Too Much Acting as His Own Lawyer, Anthony R. Martin-Trigona Flooded Several Courts with Hundreds of Lawsuits, Motions and Appeals. Frustrated Judges Struck Back by Taking an Extraordinary Action: They Imposed a Nationwide Curb on His Right to Sue*, NEWSDAY, Feb. 1, 1987, 1987 WLNR 141540 (“Before the session ended close to 7 p.m., Cabranes had dismissed nearly all of Martin-Trigona's federal cases in Connecticut and entered a nationwide injunction barring Martin-Trigona from ever again suing any of the people involved in the Connecticut litigation or, for that matter, anyone at all in any state or federal court without first getting court permission. Cabranes instructed a Justice Department lawyer to inform court clerks across the country of the injunction. . . . MARTIN-TRIGONA is believed to be the first person whose actions have provoked a nationwide injunction.”).

⁸⁶ See, e.g., Note, *The Discretionary Stay as a Strategic Device in Constitutional Litigation*, 46 YALE L.J. 897, 902 (1937) (“But the fact that the stay in the present case may be unorthodox as compared with stays regarded as proper in private law cases, does not seem to be an urgent objection in the perspective of constitutional politics.”).

⁸⁷ See, e.g., Keith B. Richburg, *Title I in Chaos After Ruling on Religious-School Funding*, WASH. POST, Aug. 14, 1985, at A21, 1985 WLNR 1496412 (“A federal judge in Missouri ordered the Education Department last week to stop using public money to provide remedial instruction to children in religious schools, in light of the Supreme Court's decision last month that such programs violate the constitutional doctrine of separation of church and state. In Kentucky, another group of plaintiffs is citing the Supreme Court decision and asking a federal judge there to impose a nationwide injunction, barring the use of Title I money in religious schools. With schoolhouse doors set to open in a few weeks, these court cases and others have thrown the Title I program, under which federal money is provided to local school districts for

The public narrative about nationwide injunctions shifted dramatically at the tail end of the Obama administration and public outcry reached a fever pitch under the Trump administration.

B. *The Novelty Critique*

Since the early 2010s, there has been a considerable uptick in public speeches, congressional testimony, and op-eds urging that we do away with nationwide injunctions.⁸⁸ By the late aughts, much of the public messaging criticizing nationwide injunctions coalesced around the talking point that the remedy is new, cooked up by activist federal judges to interfere with the executive's policy agenda.⁸⁹

disadvantaged students, into chaos.”); David Phelps, *Attorneys General Seek More Power in Consumer-Fraud Cases*, MINNEAPOLIS STAR & TRIB., July 27, 1987, at M4, 1987 WLNR 1360097 (“Members of the National Association of Attorneys General last week recommended that states be granted the authority to take consumer-protection cases into federal court, where they could seek nationwide injunctions against fraudulent practices. During a congressional hearing, a panel of give attorneys general testified that federal efforts were ineffective in protecting consumers from deceptive marketing practices, retail fraud and defective products.”); Minn. Att’y Gen. Hubert Humphrey III: “As individual states, we are hamstrung to solve nationwide problems.”); *U.S. Drops Enforcement of New Abortion Rules*, ST. LOUIS POST-DISPATCH, Mar. 4, 1988, at 8F, 1988 WLNR 341834 (“The administration acted Thursday, hours after a federal district judge in Boston issued a nationwide injunction permanently barring enforcement of the restriction. A rule enforcing it was to take effect Thursday.”); Matt O’Connor, *NOW Seeks Court Curb on Protests at Clinics*, CHICAGO TRIB., July 1, 1998 (§ 2), at 8, 1998 WLNR 6481497 (“Crain also said that injunctions have been imposed in at least 14 locations around the country as a result of the law [Freedom of Access to Clinic Entrances Act], making any nationwide injunction in this case an unneeded ‘layer of protection’. But lawyers for NOW and abortion clinics put on evidence that violence and threats have continued to be used by activists in anti-abortion protests in the four years since the law was enacted.”); Bob Egelko, *Forrest Service Rebuked on Logging: Public Must be Able to Comment Without Suing*, *U.S. Court Says*, S.F. CHRON., Aug. 11, 2006, at A2, 2006 WLNR 13886507 (construing nationwide injunction as pro-public access to government insofar as it is rebuke of Bush administration attempts to thwart public notice and comment on agency action).

⁸⁸ See, e.g., News Release, U.S. Dep’t of Just., Assistant Attorney General Beth Williams Delivers Remarks on Nationwide Injunctions at the Heritage Foundation (Feb. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-beth-williams-delivers-remarks-nationwide-injunctions-heritage> [<https://perma.cc/8B5S-AGQS>] (“The entry of nationwide injunctions is a relatively rare phenomenon: nationwide injunctions did not exist even sixty years ago. Before 1963, no court in the country had issued such a broad injunction, and they were exceedingly rare until President Regan took office. Even after that, by Justice Department estimates, courts issued an average of only 1.5 nationwide injunctions per year against the Reagan, Clinton, and George W. Bush administrations, and 2.5 per year against the Obama administration. In President Trump’s first year in office, however, judges issued a whopping 20 nationwide injunctions—an eightfold increase. This matches the entire eight-year total of such injunctions issued against President Obama during his two terms. We are now at 30, matching the total number of injunctions issued against the first 42 presidents.”).

⁸⁹ See, e.g., GianCarlo Canapara, *Time to End the Tyranny of District Court Judges’ Nationwide Injunctions*, HERITAGE FOUND. (Feb. 18, 2020), <https://www.heritage.org/courts/commentary/time-end-the-tyranny-district-court-judges-nationwide-injunctions> [<https://perma.cc/NKW7-9ZYD>] (claiming “the judiciary has grown more powerful than America’s Founders intended and, since the 1960s, this has included issuing

So, where did the novelty critique come from? It appears to have first been floated by remedies scholar Samuel Bray in his 2017 article *Multiple Chancellors: Reforming the National Injunction*.⁹⁰ There, Bray claims that “[t]hrough the middle of the twentieth century, there do not appear to have been any national injunctions.”⁹¹ Critics of the remedy have seemingly just taken Bray’s account and ran with it. This is curious because Bray’s argument has some serious problems. Among others, it is premised on a dubious history of the nationwide injunction. Not only does Bray erroneously claim that the remedy emerged for the first time in the 1960s—a point that Sohoni’s research reflects is off by at least five decades—but he also fails to take into account the existence of historically equivalent remedies that have long been considered part of traditional equity practice. These errors are significant because Bray’s proposed solution—that we do away with the nationwide injunction entirely—turns on the premise that eliminating the remedy returns equity to its historic limits.⁹²

To date, the reason why the novelty critique has been seized upon, despite its dubious underpinnings, has been under-interrogated. I would like to suggest that the novelty critique was deployed by the Trump administration as part of its overarching strategy to smear the judiciary, with the end goal of deflating the judiciary’s capacity to meaningfully check the executive. Other commentators have observed that Trump’s aggressive attacks on the judiciary are not only unprecedented in modern times,⁹³ but instead appear to be calibrated to “rally a fearful public into accepting his disregard of judicial authority.”⁹⁴ I believe that the Trump administration’s escalating assaults were

universal injunctions” and going on to argue that this improperly facilitates activist judges’ interference with Executive governance); David French, *The Nationwide Dysfunction of the District-Court Injunction*, NAT’L REV. (June 6, 2019), <https://www.nationalreview.com/magazine/2019/06/24/the-nationwide-dysfunction-of-the-district-court-injunction/> [<https://perma.cc/292K-T4VG>] (“[T]hese judges have started to take for themselves a staggering amount of power.”).

⁹⁰ Bray, *supra* note 9.

⁹¹ *Id.* at 437.

⁹² *Id.* at 481–82.

⁹³ See, e.g., Peter Baker, *Trump Clashes Early with Courts, Portending Years of Legal Battles*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html> [<https://perma.cc/L3Y5-B63B>] (“Trump’s serial attacks on judges and the judiciary take us into new territory.” (quoting Jack Goldsmith, head of the Justice Department’s Office of Legal Counsel under President George W. Bush)); Julie Hirschfeld Davis, *Supreme Court Nominee Calls Trump’s Attacks on Judiciary ‘Demoralizing,’* N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html> [<https://perma.cc/QRE4-F7YA>] (“Mr. Trump is shredding longstanding norms of etiquette and interbranch comity.” (quoting former George W. Bush judicial appointee Michael McConnell)).

⁹⁴ Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1245 (2017).

less about the specific subject-matter and more about creating public pressure to weaken the judiciary's legitimacy and with that, authority.⁹⁵

The Trump administration's crusade against nationwide injunctions is but one example of how it strategically attacked the judiciary with the aim of subordinating the courts' authority within our constitutional scheme.⁹⁶ Labeling the nationwide injunction as novel helped the Trump administration craft a narrative of judicial overreach. This is helpful, because it covers up the fact that we are actually witnessing a moment of unprecedented executive overreach and herculean efforts by the judiciary to check it.

One way novelty is used as cover is as an explanatory account of why the federal courts issue more nationwide injunctions against the federal government today than in the past. Trump and his surrogates claimed the uptick in nationwide injunctions evidenced judicial overreach.⁹⁷ This is sleight of hand. A more plausible explanation is that more nationwide injunctions are issued today than in the past because the executive branch has, for decades, been overreaching Article II's limits.⁹⁸ The

⁹⁵ See, e.g., Paul Krugman, Opinion, *When the Fire Comes*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/opinion/when-the-fire-comes.html> [<https://perma.cc/GX9R-B9S8>] (warning in the early days of the Administration that the court might very well be the only institution capable of checking Trump but that he is "doing all he can to delegitimize judicial oversight in advance," citing as one example Trump's attack on Judge James Robart, who issued a stay on one of the Muslim bans, calling him a "so-called judge").

⁹⁶ This tack is well explored in the literature. See, e.g., Christopher D. Kromphardt & Michael F. Salamone, "Unprecedented!" Or: *What Happens When the President Attacks the Federal Judiciary on Twitter*, 18 J. INFO. TECH. & POL'Y 1, 84 (2020) (presenting survey experiment finding specific, but not diffuse, support for the proposition that public support in the Supreme Court changes in response to Trump attacks, but that changes are conditioned on respondents' preexisting support for democratic values). But see Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. ONLINE 32, 34–40 (2018) (presenting and discussing results of nationally-representative survey of Americans reflecting that Trump's criticisms of the court, regardless of content, had little effect on respondent's support for the institution, but that there was a significant decline in support for the Court where respondents learned of criticism by law professors that the Court's decisions are politicized).

⁹⁷ See, e.g., Katie Benner, *Nationwide Injunctions Speak to Judiciary's Growing Power*, *Barr Says*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/politics/barr-nationwide-injunctions.html> [<https://perma.cc/Z9QG-HQFG>] (quoting Barr: "Rather than an orderly pattern of litigation in which the government loses some cases and wins others, with issues percolating their way through the appellate courts, we have an interdistrict battle fought with all-or-nothing injunctions. . . . Nationwide injunctions undermine the democratic process, depart from history and tradition, violate constitutional principles, and impede sound judicial administration, all at the cost of public confidence in our institutions and particularly in our courts as apolitical decision makers.").

⁹⁸ This trend has been well explored in a variety of areas. See, e.g., Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 487–521 (2010) (arguing that relatively recent phenomenon of "presidential exclusivity" in the realm of national security arose as a result of Congress ceding authority to the Executive overtime, its political appeal for both branches, and how it operates as a shell game ultimately depriving the public of meaningful accountability from either branch).

Constitution vests Congress and the executive with joint power to frame and implement policy goals. When our system functions, the political branches are incentivized to broker policy compromises together. But our system has not been functional for decades. Congress has been unable to enact bipartisan legislation for a long time. This precipitous decline in congressional authority has perversely incentivized the executive to take unilateral actions—ever more dubious executive actions and regulations that push beyond Article II’s limits—to implement its policy goals.⁹⁹ Because these executive power grabs have disrupted the Constitution’s vision of public policy being jointly determined by the executive with the legislature,¹⁰⁰ stakeholders turned to the judiciary, our third branch, to try to correct course,¹⁰¹ just as the Framers intended.¹⁰² Another possibility is that there are more nationwide injunctions today because there is far more public law litigation by well-funded nonprofits seeking the remedy. The increased aggressiveness of states’ attorneys general is another potential factor. Many states routinely turn to nationwide injunction suits to check, largely on partisan lines,¹⁰³ the executive’s signature policies, rules, and regulations.¹⁰⁴ Nationwide injunctions might be more common today than they were in the 1960s for another reason—Congress drastically limited the availability of three-judge courts in 1976, pushing many cases of national import to single judges.¹⁰⁵

⁹⁹ See Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. LEGAL STUD. 369, 369–70 (2017) (arguing increased polarization and a decline in legislative capacity have acted as reinforcing influences that, under a divided government and parity of strength of parties at the national level, have fueled the expansion of executive authority at the expense of a national legislature).

¹⁰⁰ Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 50 (Nathaniel Persily ed., 2015).

¹⁰¹ See Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 897 (2020) (“National government injunctions respond to a paralyzed Congress as well as the federal executive’s practice of issuing executive orders and administrative regulations to make major unilateral policy changes that bypass the legislative process.”).

¹⁰² See, e.g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”).

¹⁰³ Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 46 (2018).

¹⁰⁴ See Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 225 (2020) (observing that rise of nationwide injunction litigations has dramatically shifted power at state level, with the remedy allowing attorneys general to have “more immediate effects on nationwide policy than can governors and state legislatures”).

¹⁰⁵ Thanks to Maggie Gardner for suggesting that the rise and fall of three judge panels might, in part, explain why early nationwide injunctions were fewer farer between. For much of the twentieth century, three-judge courts were available for constitutional challenges to state laws and administrative orders and Acts of Congress. During that period, it seems likely that three-

Attacks premised on novelty also helped the Trump administration shift blame for the executive's political failures onto the judiciary. For instance, Trump and his surrogates charged that nationwide injunctions are problematic because they disincentivize the political branches from working out disputes amongst themselves. Former Attorney General Barr floated this objection in a *Wall Street Journal* opinion piece, complaining there that nationwide injunctions force a resolution to disputes that would otherwise be resolved by compromises struck between the executive and Congress.¹⁰⁶ In Barr's telling, the judiciary is an interloper, disrupting the natural allocation of responsibility for policy setting vested in the political branches.¹⁰⁷ Key to this argument is that nationwide injunctions are new, and this is a problem that other administrations did not have to grapple with. Once again, this is sleight of hand. The executive bears blame for disrupting normal channels of political accountability. The executive has repeatedly used nationwide injunction suits for political cover. Collusive litigations are one example. The executive both outright invited suits against it and, in legacy cases, filed against a previous administration with policy preferences diametrically opposed to its own, capitulated to the "opposition's" demands. Nationwide injunctions that issued in these cases are subterfuge—they simply help the executive make a policy call it could not otherwise make through normal political channels.¹⁰⁸ A less discussed but no less concerning phenomena is the executive using

judge courts adjudicated contentious issues that often take the form of nationwide injunction suits today. Cf. Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 YALE L.J. 564 (1976) (describing the rise and fall of the three-judge court in federal practice and suggesting, in part, that declaratory judgments issued by a single judge instead); Comment, Stone v. Philbrook: *Another Word on Three-Judge Courts and Declaratory Judgments*, 124 U. PA. L. REV. 1448 (1976) (similar). The precipitous increase in nationwide injunctions, roughly, corresponds with Congress's elimination of three-judge courts in all but a handful of cases. In 1976, Congress repealed 28 U.S.C. §§ 2281, 2282, which used to prescribe the composition and procedure for three-judge courts. The replacement, 28 U.S.C. § 2284, now delineates more narrow parameters for when a three-judge court can be convened—only where "required by Act of Congress" or "when an action is filed challenging the constitutionality of the appointment of congressional districts or the apportionment of any statewide legislative body."

¹⁰⁶ William P. Barr, Opinion, *End Nationwide Injunctions*, WALL ST. J. (Sept. 5, 2019), <https://www.wsj.com/articles/end-nationwide-injunctions-11567723072> [<https://perma.cc/9JF6-58CJ>] (arguing nationwide injunctions ruin the chance for political compromise).

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., Edward Whelan, *Don't Defend, Don't Appeal?*, WASH. EXAM'R (Nov. 8, 2010), <https://www.washingtonexaminer.com/weekly-standard/dont-defend-dont-appeal> [<https://perma.cc/242L-QDAM>] (expressing concern by an ideological conservative that Obama administration would for policy reasons decline to appeal nationwide injunction of DOMA); Erwin Chemerinsky, Opinion, *Why Fight It?*, L.A. TIMES, Oct. 21, 2010, at A21, 2010 WLNR 21028195 (observing that if the Obama administration allows DOMA nationwide injunction to stand that it could "provide the political cover necessary for Congress to repeal this law because it would then be doing no more than changing the law to be in compliance with a federal court order").

the threat of nationwide injunctions as cover for adopting extreme and otherwise legally specious regulations.¹⁰⁹

Novelty also helped the Trump administration publicly justify its unprecedented campaign of personal attacks on sitting federal judges. Trump and his surrogates claimed that individual federal judges who dare to check the administration are acting as arms of the party that nominated them,¹¹⁰ fanning the narrative that federal judges are illegitimate political actors that should be rebuked by political means.¹¹¹ Key to this argument is that these judges are acting in ways judges did not in the past—as political actors¹¹²—which their use of the nationwide injunction evidences.¹¹³

Novelty was also used to delegitimize judicial review of executive action. Former Attorney General Sessions's rhetoric in the first years of the Trump administration well illustrates this. In a particularly caustic statement in April 2017, made just a few weeks after Judge Derick K. Watson of the District of Hawaii issued a nationwide

¹⁰⁹ See generally Timothy G. Duncheon, *Litigation Risk as Justification for Agency Action*, 95 N.Y.U. L. REV. 193, 194–234 (2020) (arguing that agencies should not be able to cite bare litigation risk as a justification for rescinding or making a new rule under the Administrative Procedures Act).

¹¹⁰ See, e.g., Craig Trainor, *Nationwide Injunctions: Obstruction by Other Means*, WASH. EXAM'R (May 31, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/nationwide-injunctions-obstruction-by-other-means> [<https://perma.cc/W6VR-VHBV>] (“[T]he nationwide injunctions serve the political interests of the modern Democratic Party. The judiciary can ill afford such a naked partisan impression because it calls into question its legitimacy as a neutral arbiter of cases and controversies.”).

¹¹¹ See, e.g., Jordan Fabian & Jacqueline Thomsen, *Courts Become Turbocharged Battleground in Trump Era*, THE HILL (July 22, 2019), <https://thehill.com/homenews/administration/453881-courts-become-turbocharged-battleground-in-trump-era> [<https://perma.cc/NVH8-MRFT>] (Mike Davis, former Republican Senate and White House aide: “The more these judges weigh into these political matters . . . they undermine the legitimacy of the court and make it more likely that the president or Congress will make a political attack on the courts. . . . Don’t go into the political arena if you don’t want to take political punches.”).

¹¹² Federal judges have been accused of activism outside the context of nationwide injunctions. More generally, accusations of activism proceed on the premise that “unelected judges have usurped the functions of the political branches when they have used legal principles to effectuate their own preferred policy aims.” Jane S. Schacter, *Politics of “Judicial Activism,”* SUP. CT. REV. 209, 215 (2017).

¹¹³ Charlton Copeland offers a different take. He argues:

Understanding the context in which courts issue nationwide injunctions requires understanding courts as institutions embedded in an ecosystem that includes more than simply “rogue” judges or judicial doctrine. Courts are political institutions with their own agendas for building capacity to resolve societal challenges. This dynamic forces us to consider the ways that courts exist as both competitors to and allies with other political institutions.

Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 794 (2020).

injunction¹¹⁴ against the Second Muslim Ban, Sessions opined, “I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from what appears to be clearly his statutory and constitutional power.”¹¹⁵ Key to this account is that the nationwide injunction is a new, unprecedented remedy that threatens the constitutional order. This is, again, sleight of hand. Claims that federal courts lack the authority to enjoin executive overreach even where proven are, as Benjamin Spencer argues, a “call for the federal courts to abdicate [the] judicial check on the executive branch.”¹¹⁶

Ironically, the novelty critique also helped the Trump administration make superficially bipartisan overtures¹¹⁷ aimed at uniting left and right against the nationwide injunction and, ultimately, the judiciary. Citing the fact that the Obama administration also encountered more nationwide injunctions than its predecessors, Trump and his surrogates claimed that nationwide injunctions are a “bipartisan problem,” symptomatic of judicial rather than executive overreach.¹¹⁸ The supposed novelty of the remedy does a lot of work here—it creates fictive common ground between Obama and Trump’s most ardent supporters, groups that are politically dissimilar, but united in seeing the nationwide injunction as the calling card of activist judges run amok.¹¹⁹

The novelty critique also helped the Trump administration blame nationwide injunctions for sowing chaos in the courts, covering up the fact that the true culprit was the administration’s abusive litigation tactics. As Stephen Vladeck has documented, Trump’s longest-serving Solicitor General, Noel Francisco, aggressively asked the Supreme Court for an unprecedented number of emergency stays where nationwide injunctions have issued on the pretense that there is a mounting crisis caused by the new nationwide injunction remedy.¹²⁰ For the most part, the Court

¹¹⁴ *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1122–23 (D. Haw. 2017), *aff’d in part, vacated in part*, 859 F.3d 741, 761 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018) (Mem.).

¹¹⁵ Charlie Savage, *Jeff Sessions Dismisses Hawaii as ‘an Island in the Pacific,’* N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html> [https://perma.cc/86HR-AYVF].

¹¹⁶ Spencer, *supra* note 37.

¹¹⁷ See Rendleman, *supra* note 101, at 900 (“Litigants’ views of national government injunctions usually depend on their views of the substantive merits in the lawsuit and whether they are a winning plaintiff or losing defendant. Because politicians are on both winning and losing sides of lawsuits, the national government injunction is bipartisan.”).

¹¹⁸ See, e.g., Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT’L REV. (Mar. 10, 2018), <https://www.nationalreview.com/2018/03/nationwide-injunctions-stop-elected-branches-enforcing-law/> [https://perma.cc/96L8-G5RR] (“This is not a political or partisan issue. After all, this has been a problem for administrations of both parties. Until President Trump, the President with the most nationwide injunctions was President Obama. Before him, it was President Clinton.”).

¹¹⁹ See, e.g., Millhisser, *supra* note 27.

¹²⁰ See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 153–55 (2019).

acquiesced to Francisco's demands.¹²¹ Justice Gorsuch's concurrence in *Department of Homeland Security* shows how novelty shifts blame for litigation from the Trump administration, where it properly belongs, onto the judiciary. To refresh, Gorsuch supported staying the nationwide injunctions at issue because, to his eye, the new nationwide injunction remedy had caused chaos below.¹²² But Gorsuch misdiagnoses the problem—as the District of Columbia later explained, the chaos Justice Gorsuch decried “was a product not of a nationwide injunction, which would quickly settle legal issues at play once and for all potential plaintiffs, but of emergency appeals by the federal government seeking stays of nationwide injunctions entered by district courts.”¹²³

C. *How Novelty Fails to Explain Problems with Nationwide Injunctions*

There is one critical respect in which the novelty critique fails—the problems we encounter with nationwide injunctions are not necessarily unique to the remedy let alone caused by its supposed novelty.

In his concurrence in *Department of Homeland Security v. New York*, Justice Gorsuch makes an empirical claim about the remedy—that the nationwide injunction's novelty explains why they create problems that are otherwise not tolerable in federal litigation.¹²⁴ Specifically, he argues that nationwide injunctions perversely incentivize forum-shopping,¹²⁵ can give rise to conflicting injunctions,¹²⁶ interfere with non-party rights,¹²⁷ depress percolation of issues in lower courts,¹²⁸ and weaken

¹²¹ *Id.* at 134 (“Of the twenty-one stay applications, twelve sought to allow a policy that had been subjected to a nationwide injunction to remain in place, and six of the nine petitions for certiorari before judgment invoked the unique harm caused by nationwide relief as the reason the Court should bypass the courts of appeals.”).

¹²² *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (“[T]he routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by . . . conflicting decisions.”).

¹²³ *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 53 (D.D.C. 2020).

¹²⁴ *Dep't of Homeland Sec.*, 140 S. Ct. at 600–01 (Gorsuch, J., concurring).

¹²⁵ *Id.* at 601 (“Because plaintiffs generally are not bound by adverse decisions to which they were not a party, there is nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.”).

¹²⁶ *Id.* (“The risk of winning conflicting nationwide injunctions is real too.”).

¹²⁷ *Id.* at 600 (claiming nationwide injunctions are atypical insofar as they afford relief not “limited to the parties”).

¹²⁸ *Id.* (“By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low information decisions. The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own.”).

the certiorari process.¹²⁹ However, these problems are not unique to nationwide injunctions.

In some nationwide injunction suits there is clear evidence that plaintiffs forum- or judge-shopped their way to an injunction.¹³⁰ Both tactics are problematic because they undermine the legitimacy of judicial proceedings and threaten public confidence in the courts.¹³¹ But these abuses are made possible not by the remedy but by background rules that govern federal litigation more broadly. Forum-shopping is facilitated in part by our belief that plaintiffs should be masters of their cases, entitling them, within some limits, to openly jury- and law-shop.¹³² And federal rules already permit forum-shopping where civil suits are brought against federal officers or the government.¹³³ Judge-shopping is facilitated by the power our federal system gives to district courts to manage their internal affairs. As Alex Botoman explains, fifty-five of the nation's ninety-four federal district courts are subdivided into geographic divisions that are used for judge-assignment.¹³⁴ This creates mini district courts within a district, each with its own judges. In these districts, litigants can select the pool of judges eligible to be assigned to their cases by strategically choosing the division in which they file.¹³⁵

Nationwide injunctions also sometimes lead to conflicting injunctions and orders, both of which are problematic because they sow confusion for the litigants, imperil the orderly administration of justice and waste precious judicial resources,¹³⁶ and put

¹²⁹ *Id.* (construing the normal practice as encouraging the “airing of competing views that aids this Court’s own decision-making process”).

¹³⁰ *See, e.g.*, Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297 (2018) (discussing how the State of Texas exploited divisional judge-assignment systems to secure favorable judges in three cases challenging Obama administrative initiatives).

¹³¹ Kimberly Jade Norwood, *Shopping for Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 304–05 (1996); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 971 (1999) (noting that judge shopping “undermines the aphorism that ‘ours is a government of laws, not men’”).

¹³² *See, e.g.*, Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1680 (1990) (“Despite the widespread availability of forum shopping, courts and legislatures routinely denounce it. In fact, however, courts tolerate forum shopping in some types of cases more than in others. Thus, courts may be troubled not so much by the practice of forum shopping per se as by its results or its implications about society and the judicial system.”); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) (“The lack of uniformity in state and substantive law, compounded by proliferation of state long-arm statutes, has made forum-shopping, among both federal and state courts, a national legal pastime.”).

¹³³ 28 U.S.C. §1391(e)(1).

¹³⁴ Botoman, *supra* note 130, at 299.

¹³⁵ *Id.*

¹³⁶ *Cf.* M. Devon Moore, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 960 (2019).

parties in the position of being held in contempt of court no matter which injunction or order they obey.¹³⁷ But these problems are not unique to nationwide injunction suits. Both problems arise in non-nationwide injunction suits where two or more district courts exercise jurisdiction over the same issue and there is an overlap of at least some of the parties. Moreover, nationwide injunctions do not always give fruit to conflicting injunctions and orders. Other commentators have noted that despite the increased issuance of nationwide injunctions in the last few decades, conflicting injunctions have proved to be rare “in part because the comity doctrine requires judges to avoid issuing such injunctions when possible, and in part because courts can and do alter their injunctions when they learn of such conflicts.”¹³⁸

Due to their breadth, nationwide injunction suits can also sometimes infringe on the rights of non-parties. But their breadth is not always problematic. As Spencer Amdur and David Hausman point out, broad remedies seeking relief for large, dispersed victim classes are sometimes the only meaningful way to prevent serious injuries of a nationwide scale.¹³⁹ Moreover, nationwide injunctions’ breadth is not a new innovation. Equity has long permitted actions that settle the rights of upwards of tens of thousands of similarly situated persons.¹⁴⁰

There is some merit to the critique that nationwide injunctions can stifle the percolation of issues in the lower courts. The Seventh Circuit pointed to this problem in *City of Chicago v. Sessions*, and reflected:

When relief is limited in geographic scope, multiple cases may be filed in numerous jurisdictions, and the reviewing courts may therefore gain a wider range of perspectives and the opportunity to explore the impact of those legal issues in other

¹³⁷ Frost, *supra* note 1, at 1106.

¹³⁸ See Bray, *supra* note 9, at 463 (noting that typically one of the judges who issued conflicting injunctions “backs down, narrowing or staying one of the issued injunctions, or else an appellate court reverses one of them”); see also *W. Gulf Mar. Ass’n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 728 (5th Cir. 1985) (principle of comity requires that courts of “coordinate jurisdiction and equal rank . . . exercise care to avoid interference with each other’s affairs”); *United States v. AMC Ent., Inc.*, 549 F.3d 760, 771–73 (9th Cir. 2008) (describing policy rationale of limiting injunctions to geographic jurisdiction in cases in which other circuits have issued conflicting rulings).

¹³⁹ David Hausman & Spencer Amdur, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51 (2017) (“Some government policies, like President Trump’s travel ban, threaten immediate and lasting damage. They go into effect quickly, and their impact cannot be reversed at the end of a lawsuit. Anyone who does not or cannot bring her own case can only be protected if a court concludes the policy is illegal and fully enjoins it. Preventing widespread and illegal injuries is a good thing, especially when the government and others would not be much harmed in the process.”).

¹⁴⁰ Brief of Amici Curiae Legal Historians in Support of Plaintiff and Appellee the City of Chicago, *supra* note 51, at 27–28 (discussing, as one example, the Rail Strike Injunction issued by a federal judge in Chicago in 1922, which enjoined “all railway employees, attorneys, servants, union agents, associates and members and all persons acting in aid or in conjunction with them” nationwide—at least 400,000 people—from doing anything that could possibly support the then-ongoing railroad strike, including “loitering,” “picketing,” and “encouraging” anyone to interfere with the functioning of the railroads).

factual contexts. That process may be truncated, however, if a district court issues a nationwide injunction.¹⁴¹

But this problem is not necessarily unique to nationwide injunctions. For instance, suits brought against the federal government seeking a declaratory judgment interpreting a federal statute similarly depress percolation of issues. Similarly, suits with large plaintiff classes can similarly depress the percolation of issues across lower courts.¹⁴²

There is also some merit to the proposition that nationwide injunctions weaken the certiorari process. Nationwide injunctions can send the Court a false signal, making it seem as if there is uniformity between the circuits on a particular legal issue. Depressed percolation of issues in the lower courts can deprive the court of a robust body of decisions to inform its own decision-making and, as a result, weaken the certiorari process.¹⁴³ But these problems are not necessarily unique to nationwide injunctions. Among other things, the Court can weaken the process itself if it takes too many petitions for certiorari before judgment, as it has with nationwide injunction suits recently.¹⁴⁴

In sum, the disconnect between the novelty critique and claimed problems with nationwide injunctions matters. Among other things, it suggests something else was at play driving the Trump administration's crusade against the nationwide injunction; flimsy problems do not justify overcorrection of eliminating the remedy. There is also a common theme among these not real problems—all seem to speak to anxiety about the judiciary's legitimacy and capacity of our modern-day chancellors to make the right call when sitting in equity. Even if the supposed problems are blown out of proportion, the judiciary might need to be attentive to the anxiety to shore up its institutional legitimacy.

¹⁴¹ *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018).

¹⁴² *Califano v. Yamasaki*, 442 U.S. 682, 702 (1972) (noting that nationwide classes “have a detrimental effect by foreclosing adjudication by a number of different courts and judges”).

¹⁴³ See Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1087–88 (2017); see also SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 48 (1986) (explaining that the Court benefits from the experience of the lower courts—by virtue of encountering the same issues in wildly different contexts, they communicate “concrete information about how a particular rule will ‘write,’ its capacity for dealing with varying fact patterns, and the merits of alternative approaches”); Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 790 (1993) (observing that percolation allows the Court to “take advantage of a wide spectrum of reasoning and analysis on the subject as well as a variety of factual settings in which the issue may have arisen”); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“[W]hen frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

¹⁴⁴ *Trump v. Hawaii*, 138 S. Ct. 923 (2018).

III. FEDERAL EQUITY POWER AND NATIONWIDE INJUNCTIONS

This Part endeavors to reclaim the nationwide injunction as a valid exercise of federal equity. In service of that goal, I explore the source and scope of federal equity jurisdiction and powers and Supreme Court caselaw expounding upon the same. Ultimately, historical and doctrinal context and critique show why nationwide injunctions are constitutional.

A. *Article III's Equity*

I would like to suggest that federal equity is quite expansive—in exceptional cases, it extends as far as necessary to give justice to the parties. This clear, simple limit is set by Article III and evidenced by contemporary writings of the Framers and has been readily recognized by the Supreme Court, albeit with some equivocation, from the early Republic to present.

The expansiveness of our equity may seem surprising given present anxieties about the appropriate role of federal judges. Somewhat ironically, in our turbulent times, the notion that our equity is dynamic enough to meet the exigencies of the moment may seem untoward to some. Unfortunately, a growing number of commentators prescribe a radical, historically dubious, and doctrinally unsound measure to guard against potential abuses of the equity power—they invented a fiction that our equity is now and always has been rigidly delimited by the equity of the English Chancellor circa 1789. Some commentators are even so bold as to suggest that the Supreme Court has recognized as much in an unbroken set of precedents since the founding of the Republic.¹⁴⁵ To put a very fine point on it, these commentators' arguments are utterly ridiculous.

Let us begin by assessing evidence reflecting federal equity's limits.

Article III's text is a good starting place. Article III unqualifiedly vests the judiciary with the power to hear cases arising in "equity."¹⁴⁶ Aside from granting Congress the power to create and set the jurisdiction of the lower courts, the Constitution does not expressly delineate the remedies courts may award or set hard procedural limits. Textually, it is strange to read Article III's broad, unencumbered grant as being limited by the kind of equity practiced in the English Chancery Court circa 1789. Article III does not make any express reference to the English Chancellor or the Chancery Court, or any other equity tradition for that matter.

For what it's worth, evidence of the Framers' intent similarly weighs against construing Article III as importing idiosyncratic limits of the English Chancellor onto

¹⁴⁵ See, e.g., Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 224 (2018).

¹⁴⁶ U.S. CONST. art. III, § 2, cl. 1. ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."); see also *Ankenbrandt v. Richards*, 504 U.S. 689, 695 (1992) ("This section delineates the absolute limits on the federal courts' jurisdiction.").

federal equity.¹⁴⁷ The Framers designed the federal judiciary to serve the unique needs of our Republic. While each state retained the power to create local law and, at its option, could maintain courts of law and equity, the national courts were calibrated to promote the interests of the American people and mediate disputes of national import between and among the states and their citizens.¹⁴⁸ In this vein, Constitutional Convention delegate William Samuel Johnson, a Connecticut lawyer and skilled equity practitioner, proposed that the judiciary be vested with both legal and equitable jurisdiction and the contours of the lower courts' equity jurisdiction be undefined, left to Congress to delimit.¹⁴⁹ Johnson's proposal was ultimately adopted and incorporated into Article III.¹⁵⁰ The available historical record reflects that the Framers intended that the national courts have the requisite powers in extraordinary cases, where positive law fell short, to ensure justice could be done by the parties.¹⁵¹ They understood that Article III would confer the judiciary with expansive equity jurisdiction and powers, entrusting the federal courts to decree equitable remedies, thus enlarging their discretion when sitting in equity.¹⁵²

¹⁴⁷ Thank you to Michael Dorf for pointing out that this observation harmonizes with the Supreme Court's construction of the Seventh Amendment. As one example, in *Galloway v. United States*, the Court rejected the notion that directed verdicts are unconstitutional. There, the Court reasons that the availability of directed verdicts in English practice at the time of ratification is not dispositive because the Seventh Amendment did not import wholecloth English common law procedure, standards of proof, or evidentiary rules. 319 U.S. 372, 388–92 (1943).

¹⁴⁸ In Federalist Paper 80, Hamilton further elucidates the necessity of and inherent limits of federal equity. THE FEDERALIST NO. 80 (Alexander Hamilton). There, he explains that some lawsuits brought under the Constitution and federal laws that do not “involve those ingredients of FRAUD, ACCIDENT, TRUST, or HARDSHIP” may contain inequity, therefore federal courts need equitable jurisdiction. *Id.*

¹⁴⁹ PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 95 (1990).

¹⁵⁰ *Id.*

¹⁵¹ Alexander Hamilton said as much in Federalist Paper No. 83, where he signals that the animating purpose of federal equity is to temper against the harsh results of rote application of positive law. In that vein, Hamilton explains “[t]he great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules.” THE FEDERALIST NO. 83 (Alexander Hamilton). Hamilton's commentary echoes Aristotle's understanding of equity being a justice that goes beyond written law necessary because positive law is always a general statement, yet there are cases which it is not possible to cover in a general statement. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 313, 315 (T.E. Page et al. eds., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 350 B.C.E.). Aristotle spoke of the need for “rectification of legal justice.” *Id.* at 315. Equity thus complements positive laws' virtues, they are not in competition. Both are necessary to achieve Justice. For a superb exposition of Aristotle's conception of equity, see Anton-Hermann Chroust, *Aristotle's Conception of Equity (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942).

¹⁵² HOFFER, *supra* note 149, at 94.

Supreme Court caselaw also reflects that federal equity is expansive. Though, in some respects, the Court has said that federal equity is informed by tradition, it is not strictly delimited by the idiosyncratic limits of the historic English Chancellor.

The Court's earliest cases, decided between 1789 and 1801, teach that Article III vests the judiciary with expansive equity jurisdiction and powers. Though at times the Court acknowledges federal equity draws upon English Chancery practices as they existed at the time of ratification, it is steadfast that this is not constitutionally compelled. For instance, in *Georgia v. Brailsford*, the Court describes English equity as "affording outlines for the practice of this court" but clarifies the Court has the power to "make such alterations . . . as circumstances may render necessary."¹⁵³ *Grayson v. Virginia* teaches that it is within the "powers vested in this Court" to "adapt" general process and rules of equity inherited from England "to the peculiar circumstances of this country, subject to the interposition, alternation, and control, of the Legislature."¹⁵⁴

As the Court's equity jurisprudence matures, a through-line emerges—federal equity extends as far as necessary to ensure justice to the parties. In case after case, the Court hammers that federal equity is dynamic. For instance, the Court holds in *Seymour v. Freer* that "a court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."¹⁵⁵ This dynamic conception of federal equity crops up again in *Union Pacific Railway v. Chicago, Rock Island & Pacific Railway*, which teaches that equity evolves overtime "in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."¹⁵⁶ And again in *Hecht Co. v. Bowles*, which underscores that "[f]lexibility rather than rigidity has distinguished [federal equity jurisdiction]."¹⁵⁷

When justice demands it, the Court finds itself free to construe federal equity as reaching injuries and affording remedies that were beyond the historic English Chancellor. One example is injunctions against executive officers. Historically, the English Chancellor derived his authority from the Crown and consequently had no power to enjoin the Crown.¹⁵⁸ Despite that limit in the English tradition, the Court has repeatedly held federal courts are empowered to issue injunctions against executive branch officers.¹⁵⁹ The Court has also approved innovative uses of old remedies. One

¹⁵³ *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 414 (1792).

¹⁵⁴ *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320, 320 (1796).

¹⁵⁵ *Seymour v. Freer*, 75 U.S. (8 Wall.) 202, 218 (1869); *see also* *Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 807 (1870) (noting that federal courts must rely on their "flexible jurisdiction in equity . . . to protect all rights and do justice to all concerned").

¹⁵⁶ *Union P. Ry. Co. v. Chi., Rock Island & P. Ry. Co.*, 163 U.S. 564, 601 (1896).

¹⁵⁷ *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

¹⁵⁸ Sohoni, *supra* note 17, at 1003.

¹⁵⁹ *See, e.g.*, *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183–84 (1938) (holding railway could sue for injunction against federal officers to restrain prosecution for violation of federal law); *Miguel v. McCarl*, 291 U.S. 442, 455–56 (1934) (enjoining federal officers from

example is the antisuit injunction against enforcement made famous in *Ex Parte Young*.¹⁶⁰ As Mila Sohini explains, that remedy was “heralded as an innovation precisely because it used ‘a traditional tool of equity—the antisuit injunction—in a highly nontraditional way: to bar the bringing of an enforcement action, which is to say, the *non*-tortious filing of a complaint by an attorney general of a state.”¹⁶¹

There are some opinions where the Supreme Court invokes the English Chancellor in a curious way that merits some explanation. In these cases, the Court goes so far as to say, expressly, that a particular result is compelled because it was the practice of the historic Chancellor or part of the English tradition. These kinds of statements, however, should not be taken literally. Additional context reflects that, in many instances where this happens, the Court invokes the Chancellor to help legitimize an innovation in federal equity, not to usher in some constitutionally mandated return to English equity circa 1789.

As one example, in the early nineteenth century, the Court issued a series of opinions establishing a uniform body of nonstate equity principles covering procedure, remedies, and even some primary rights and liabilities. This was a drastic change, and a much-needed innovation at the time. Kristen Collins does a superb job fleshing out how the Court saw a need for a uniform body of federal equity law, realized reform was not forthcoming through legislation, and ultimately indulged in a bit of self-help, crafting a uniform single body of federal equity law informed by federal and English sources, and details how repeated congressional acquiescence made this possible.¹⁶² For my purposes, I want to focus narrowly on how the Court went about rhetorically legitimizing this move in its opinions. Curiously enough, the Court repeatedly invokes the English Chancellor. For instance, in *Payne v. Hook*, by way of explaining that federal equity is national and cannot be encumbered by variances of state equity, the Court proffers that the “equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses.”¹⁶³ Historic English distinctions between law and equity are also invoked in *Robinson v. Campbell*,¹⁶⁴

withholding retired military pay and allowances); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110–11 (1902) (enjoining the Postmaster General from withholding mail).

¹⁶⁰ *Ex parte Young*, 209 U.S. 123 (1908).

¹⁶¹ Sohoni, *supra* note 17, at 1003–04.

¹⁶² See generally Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249 (2010).

¹⁶³ *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869); see also *Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 138 (1887) (invoking *Payne v. Hook* and further pointing to the holding’s explanatory power vis-à-vis the uniformity of federal equity, noting that “[u]pon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles alike in every state”).

¹⁶⁴ *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222–23 (1818) (Marshall, C.J.) (holding defendant could not assert equitable title to land in common-law ejectment action in federal court because “remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles”).

Mississippi Mills v. Cohn,¹⁶⁵ and *Sheffield Furnace Co. v. Witherow*¹⁶⁶ to similar effect—to drive home that federal equity jurisdiction is set by the Constitution, which recognizes a distinction between law and equity as was the practice in England and vests federal courts with jurisdiction over both such that it cannot be encumbered by states extending legal or equitable jurisdiction to local tribunals.

The Court has resorted to artificial histories of equity on several other occasions. For instance, the Court condoned the antilabor injunction challenged in *In re Debs*, a remedy foreign to both English and American practice,¹⁶⁷ on the rationale that it was of a kind “recognized from ancient time and by indubitable authority.”¹⁶⁸ Similarly, in *York v. Guaranty Trust*, the Court announced the “outcome determinative” test, extending the *Erie* principle to federal cases in which equitable remedies were sought,¹⁶⁹ which eviscerated the uniform federal equity doctrine established by *Payne* and its progeny. *Guaranty Trust* makes this move, in part, by disavowing the existence of a long history of federal judicial “power [in equity] to deny substantive rights created by State law or to create substantive rights denied by State law.”¹⁷⁰ As Collins

¹⁶⁵ *Miss. Mills v. Cohn*, 150 U.S. 202, 206 (1893) (holding the plaintiff’s equity claim could be heard in federal court even though state statutes vested local courts with concomitant jurisdiction; referencing in part that the historic distinction between law and equity “as distinguished and defined in the mother country at the time of the adoption of the constitution of the United States,” as a means to explain that federal equity jurisdiction cannot be impaired by state legislatures’ vesting of law jurisdiction over the same matters in state courts).

¹⁶⁶ *Sheffield Furnace Co. v. Witherow*, 149 U.S. 574, 579 (1893) (holding federal court could hear bill in equity to hear mechanic’s lien even though state statutes vested local courts with concomitant jurisdiction).

¹⁶⁷ As one commentator explains:

Labor injunctions broke the traditional rules governing injunctions in several notable ways. The labor injunctions expanded the notion of property well beyond its traditional confines. Also, while injunctions traditionally were narrow remedies, the labor injunctions were very broad in terms of the acts proscribed, and the number of people bound. Furthermore, equitable remedies traditionally could not be obtained where there would be adequate remedy available at law. Nonetheless, the labor injunctions generally drew upon the authority of criminal statutes, so that criminal prosecution could have addressed many of the strikes. [Seemingly], courts were willing to expand these injunctions beyond their historical confines because the injunction’s power, flexibility, and prospectivity made the device uniquely suited to protect the interests of business from disruptive labor movements.

Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1131 (2005).

¹⁶⁸ *In re Debs*, 158 U.S. 564, 599 (1895).

¹⁶⁹ *York v. Guar. Tr.*, 326 U.S. 99, 109 (1945).

¹⁷⁰ *Id.* at 105.

explains, this was done, largely, to “craft a story of continuity concerning the metes and bounds of nonstate, judge made law in federal courts.”¹⁷¹

On balance, it appears that the Court has invoked the Chancellor at times when it needs to rhetorically legitimize innovations in equity. These cases reflect a curious but consistent deployment of the English Chancellor, not as a historical figure demarcating the metes and bounds of federal equity, but rather as a figure embodying equity’s aspirational aims.¹⁷² The English Chancellor operates as a symbol of equity’s overarching commitments to justice and fairness. He represents a promise by our modern-day chancellors that their conscience is guided by a measure of stability and a capacity for change that are characteristic of equity’s long tradition.¹⁷³

Despite the rhetorical force of invoking the English Chancellor, the Court has on several occasions clarified that federal equity is informed by, but not starkly delimited by English practice. For instance, in *Atlas Life Insurance Co. v. Wisconsin Southern, Inc.*,¹⁷⁴ where an insurer tried to avail itself of federal equity jurisdiction to raise a defense to a policy not available in state court, the Court explains that federal equity jurisdiction is informed by the “principles” of the “system of judicial remedies” “devised [and] administered” by the English Court of Chancery at the birth of the Republic.¹⁷⁵ But the Court softens the English connection, clarifying that it “guide[s] their decisions and enable[s] them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity.”¹⁷⁶

In *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, the Court also recognizes that the limits of federal equity are informed by tradition but clarifies that English practice is but one consideration.¹⁷⁷ In holding that federal courts lack the equity jurisdiction to award asset-freezing injunctions before judgment, also known as *Mareva*-type injunctions, Justice Scalia explains that the limits of Article III’s equity are divined by looking at historic English practice *and* that of the federal courts

¹⁷¹ Collins, *supra* note 162, at 338.

¹⁷² Cf. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1018–19 (2015) (“What the Court is constructing might be called an artificial history of equity. . . . It glosses, and glosses over, the real complexity of equity’s past.”).

¹⁷³ *Id.* at 1023.

¹⁷⁴ *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939) (“The ‘jurisdiction’ thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. [The Judiciary Act of 1789] does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity.”).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Grupo Mexicano De Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999).

as well as the equitable ramifications of extending federal equity to a previously unknown remedy.¹⁷⁸ Thus, though the practices of the historic English Chancellor has some bearing on how Article III's limits are construed, it is but one factor and not itself dispositive. In recognizing that the contours of federal equity are informed by historic English practice but adapted to the unique needs of our Republic,¹⁷⁹ *Grupo Mexicano* falls in line with *Grayson*¹⁸⁰ and its progeny. (This insight also explains why Justice Scalia reasoned *Mareva* injunctions were beyond the limits of Article III despite the fact that, decades earlier, English courts had found them within the limits of English equity.¹⁸¹)

The limited influence of English practice on the metes and bounds of federal equity is more strikingly apparent in the Court's domestic relations and probate cases. Over the last century, the Court has taken pains to clarify in these cases that federal equity jurisdiction is not exclusively defined by the historic limits of the English Chancellor. Context helps explain why this was necessary in the first place. Starting in the mid-nineteenth century, the Court issued several decisions approving of lower federal courts abstaining from exercising jurisdiction over probate and domestic relations cases that raised important federalism concerns when sitting in equity.¹⁸² However, the Court's equivocation about two distinct concepts—the ancient power of courts

¹⁷⁸ Three factors thus inform the analysis: (a) whether the remedy was unknown to the English Chancellor of 1789, (b) whether federal and state courts had consistently denied *Mareva*-type relief throughout the twentieth-century, and (c) whether *Mareva*-type injunctions, if allowed, would alter the procedural and substantive rights of creditors relative to debtors. *See id.* at 322–23.

¹⁷⁹ Sohoni, *supra* note 17, at 1006 n.554 (observing the same).

¹⁸⁰ *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320, 320 (1796).

¹⁸¹ *See Mareva Compania Naviera SA v. Int'l Bulkcarriers SA* [1980] 1 All ER 213 (CA). For in-depth accounts of the emergence of the *Mareva* injunction, see John Stevens, *Equity's Manhattan Project: The Creation and Evolution of the Mareva Injunction*, 14 DENNING L.J. 25 (1999) and David Capper, *The Mareva Injunction — From Birth to Adulthood*, in LEADING CASES OF THE TWENTIETH CENTURY 255 (Eoin O'Dell ed., 2000). It should be noted that lawyers in common law jurisdictions have long critiqued Scalia's understanding of the *Mareva* case and the history of the remedy set forth in *Grupo Mexicano*. *See, e.g.*, Lawrence Collins, *United States Supreme Court Rejects Mareva Jurisdiction*, 115 L.Q. REV. 601, 604 (1999) (noting that “from an English viewpoint, the discussion . . . of the *Mareva* jurisdiction seems to be superficial and based on obsolete material”); David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2166–76 (1999) (pointing to several errors and omissions in Scalia's analysis in *Grupo Mexicano*).

¹⁸² *See, e.g.*, *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.”); *De la Rama v. De la Rama*, 201 U.S. 303, 307 (1906) (claiming “long established rule” that federal courts lack jurisdiction over certain domestic relations matters premised on the assumptions that “husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value”).

sitting in equity to decline to exercise jurisdiction in certain circumstances¹⁸³ and the historic English Chancellor as a symbol to legitimize new equity decisions—sowed confusion. For a period, the Court’s decisions intimated that Article III, informed by “misty understandings of English legal history,” did not extend to either probate or domestic relations cases.¹⁸⁴ The Court later corrected course, rejecting the notion that implicit historic limits should be read onto Article III’s otherwise expansive grant of jurisdiction. In *Ankenbrandt v. Richards*,¹⁸⁵ the Court recognized that because Article III does not expressly reserve jurisdiction over domestic relations matters, the exception is not constitutionally mandated¹⁸⁶ and deemed the “historical debate over whether the English court of chancery had jurisdiction to handle certain domestic relations matters” irrelevant.¹⁸⁷ Similarly, in *Marshall v. Marshall*, the Court deemed the “historical debate” over the practices of the “English Court of Chancery” irrelevant to assessing whether, constitutionally, federal courts had jurisdiction over equitable claims arising in the probate context.¹⁸⁸

Other aspects of the Court’s jurisprudence reflect that Article III’s equity is in some important respects totally different from that of the historic English Chancellor. One example is the so-called adequacy requirement. In traditional English practice, the Chancellor inherently lacked jurisdiction over matters in which there was an “adequate” legal remedy available.¹⁸⁹ Not so with Article III’s equity. The Constitution extends unencumbered equitable jurisdiction to the federal courts. We do have an adequacy requirement, but it is statutory. Shortly after the Constitution was ratified, Congress enacted the Judiciary Act of 1789, which created the lower federal courts and conditioned their jurisdiction over equity matters such that it could only be exercised where there is no adequate legal remedy available.¹⁹⁰ Sometimes, the federal adequacy requirement, because it is very old, is spoken of as if it is constitutional. But that is not quite right. Congress enacted the adequacy requirement pursuant to its

¹⁸³ The abstention power is a narrow but important exception to the general rule that federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colo. River Water Conservation v. United States*, 424 U.S. 800, 817–18 (1976) (citing *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415 (1964); then citing *McClellan v. Carland*, 217 U.S. 268, 281 (1910); and then citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

¹⁸⁴ *Marshall v. Marshall*, 547 U.S. 293, 299 (2006) (Ginsburg, J.) (characterizing error).

¹⁸⁵ *Ankenbrandt v. Richards*, 504 U.S. 689, 695–96 (1992).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 699–700.

¹⁸⁸ *Marshall*, 547 U.S. at 308–09.

¹⁸⁹ F. MAITLAND, *EQUITY* 4–7 (2d rev. ed. 1936) (tracing requirement to early English Chancery practice).

¹⁹⁰ *See Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568–69 (1939) (discussing statutory origins of adequacy requirement under federal law).

Constitutional power to set the lower courts' jurisdiction; it could exercise that same power at any time to lift or alter it, just like any other statute.¹⁹¹

Another key difference is the role the Supreme Court plays in shaping federal equity. When the Constitution was ratified in 1789, there was one English Chancellor who had jurisdiction over all equity cases in the realm.¹⁹² Appeals, if heard, were brought directly to the Crown, as famously occurred in 1616 when King James I issued a prerogative ostensibly affirming Lord Chancellor Ellesmere's 1515 opinion in the *Earl of Oxford's Case*.¹⁹³ Article III sets up a totally different kind of system. It vests all federal courts with the same equity powers, giving us multiple chancellors hearing equity cases concurrently. Additionally, as Justice Iredell explains in his concurrence to *Sims' Lessee*, Article III's election to vest both law and equity powers "in the very same Courts" puts unique pressures on our national judiciary requiring, at times, the Supreme Court to play a coordinating role as our Chief Chancellor.¹⁹⁴

Owing to its positional authority as the Chief Chancellor, the Supreme Court from time to time creates uniform rules to help guide the discretion of the inferior chancellors. These rules are, more often than not, fashioned to promote uniformity across the national equity courts, a problem that did not arise in England's unitary system. Given this unique need, the Court's cases that aim to promote uniformity in federal equity practice often have no real connection to historic English practice. As one example, in the early aughts the Supreme Court introduced new, uniform multi-factor tests to guide the lower courts' exercise of discretion in issuing preliminary injunctions in *Winter v. Natural Resources Defense Council*¹⁹⁵ and permanent injunctions in *eBay Inc. v. MercExchange, LLC*.¹⁹⁶ Though both preliminary and

¹⁹¹ John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 209 (1997) ("Congress may give [inferior federal courts] all the jurisdiction the Constitution permits, or none at all, or anything in between, as far as Article III is concerned.").

¹⁹² Bray, *supra* note 9, at 420.

¹⁹³ Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 6; David Ibetson, *The Earl of Oxford's Case (1615)*, in LANDMARK CASES IN EQUITY 1, 1–3 (Charles Mitchell & Paul Mitchell eds., 2012) (exploring in depth the underlying land dispute as well as the convoluted litigation that eventually gave fruit to Lord Chancellor Ellesmere's 1515 decision in the *Earl of Oxford's Case* that equity court decisions could override conflicting decisions issued by law courts, which created direct conflict with an earlier issued disposition of the same land dispute by Chief Justice Coke of the King's Bench); GARY WATT, TRUSTS AND EQUITY 6 (2020) (describing how in 1616 the dispute between Chancellor Ellesmere and Chief Justice Coke was ostensibly appealed to King James I and, on the advice of his Attorney General, Sir Francis Bacon, James issued a prerogative approving of Ellesmere's decision in the *Earl of Oxford's Case*).

¹⁹⁴ *Sims v. Irvine*, 3 U.S. (3 Dall.) 425 (1799).

¹⁹⁵ *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

¹⁹⁶ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

permanent injunctions have roots in English practice, the multi-factor tests adopted by the Court are not of English origin.¹⁹⁷

The Supreme Court also construes its equity powers to be expansive enough to permit the creation of totally new remedies unknown in English practice where they are necessary to salve unique needs arising in our Republic. One example is the structural injunction. The Court created the structural injunction in the mid-twentieth century as a tool to redress racial segregation in large public institutions in the wake of *Brown v. Board of Education*.¹⁹⁸ The Warren Court's commitment to racial justice moved it to engage in a transformational process, urging changes in core social institutions and in so doing revolutionized equity. As Owen Fiss explains:

In time it was understood that desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution. Desegregation required a revision of familiar conceptions about party structure, new norms governing judicial behavior, and new ways of looking at the relationship between rights and remedies. No one had a road map at the outset. No one had a clear vision of all that would be involved in trying to eradicate the caste system embedded in a state bureaucracy, or how the attempt would transform the mode of adjudication. It delegated the reconstructive task to the lower federal judges They, in turn, discovered what the task required and adjusted traditional procedural forms to meet the felt necessities. Legitimacy was equated with need, and, in that sense, procedure became dependent upon substance. It was the overriding commitment to racial equality that motivated the procedural innovation and that was seen as the justification for the departures from tradition.¹⁹⁹

Though structural injunctions issue far less frequently than they did in the 1960s and 1970s, the Court has signaled its unwillingness to do-away with the remedy. And, the Court has continued to innovate the remedy to solve other, large-scale institutional problems. For instance, in *Brown v. Plata*, the Court upheld a structural injunction

¹⁹⁷ See, e.g., Caprice L. Roberts, *Restitution Rollout: The Restatement (Third) of Restitution & Unjust Enrichment: The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1037 (2011) (“It was news to remedies and injunctions scholars that the four-factor test [in *eBay* and *Winter*] was the required, ‘traditional,’ ordinarily applied familiar test.”); Mark P. Gergen et al., *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205–06 (2012) (pointing out that traditional equitable practice embraces principles and concerns beyond the four factors articulated in *eBay*); Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 492 (2010) (pointing out that *Winter*'s insistence that courts balance remedies is a nineteenth century creation, and that both “English and American courts in the seventeenth, eighteenth, and early nineteenth centuries neither spoke of balancing the equities nor employed a balancing approach in deciding whether to grant injunctions.”).

¹⁹⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁹⁹ Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979).

ordering the State of California's prison system to reduce its population to remedy systemic Eighth Amendment violations.²⁰⁰

In sum, the suggestion that Article III's equity is strictly defined by the limits of the historic English Chancellor has no support in the Constitution's text, the Framers' intent, let alone Supreme Court caselaw. Those who insist otherwise are not urging that we return equity to its roots, but rather wish that we place a curious limit on federal equity and hope that an artificial history will give it the patina of legitimacy. Appeals to history, even untrue ones, rhetorically ease "the stultifying task of marking the limits of judicial power."²⁰¹ But, as James Pfander and Jacob Wentzel explain,

A jurisprudence of constitutional remedies that measures the legitimate scope of modern federal equity by looking to the practices of the High Court of Chancery, circa 1789, will capture only a partial view of the remedies available to suitors in the early republic. More troubling[,] it may deprive equity of its characteristic ability to adapt to changes in the remedial system as a whole.²⁰²

The costs of these disingenuous histories are simply too great.

B. *Nationwide Injunctions Are Constitutional*

Critics of nationwide injunctions raise three primary challenges, any one of which they insist reflects that nationwide injunctions are unconstitutional. I address each challenge and ultimately conclude that nationwide injunctions are constitutional.

1. English Chancellor Objection

The most popular challenge to the constitutionality of nationwide injunctions proffers that because the nationwide injunction is a remedy unknown to the English Chancellor at the time the Constitution was ratified in 1789, federal courts lack the power to issue the remedy today. Justice Thomas's concurrence in *Trump v. Hawaii* embraces a version of this argument. Because, Thomas asserts, no statute expressly gives federal courts the power to issue nationwide injunctions, the authority to do so must be located in Article III's grant of inherent authority to issue equitable relief.²⁰³ He goes on to reason that Article III only vests federal courts with the power to issue remedies that accord with the "traditional rules of equity that existed at the founding."²⁰⁴ Because, on Thomas's view, the "English system of equity did not contemplate [nationwide] injunctions," Article III does not vest federal courts with the power to issue the remedy today.²⁰⁵

However, the fact that the historic English Chancellor did not issue nationwide injunctions does not evidence the remedy's unconstitutionality. As discussed at length

²⁰⁰ *Brown v. Plata*, 563 U.S. 493 (2011).

²⁰¹ Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1294 (2000).

²⁰² James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1282 (2020).

²⁰³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018).

²⁰⁴ *Id.* at 2425–26.

²⁰⁵ *Id.* at 2427.

supra Section III.A, the metes and bounds of Article III’s equity is not exactly concomitant with that of the historic English Chancellor. And, as *Grupo Mexicano* recognizes, at most, historic English practice informs, but does not singularly delimit the metes and bounds of Article III’s equity.²⁰⁶ This is why the Court has a long tradition of permitting remedies that were absolutely unavailable to the Chancellor, such as injunctions enjoining executive branch officers.

2. Breadth Objection

Another constitutional challenge has also been floated—that, irrespective of origin, federal courts are without the power to issue injunctions that reach beyond the plaintiffs. Justice Gorsuch’s concurrence to *Department of Homeland Security v. New York*, the order staying nationwide injunctions of the public-charge rule, embraces a version of this argument. There, Gorsuch argues that the fact that nationwide injunctions “direct how the defendant must act toward persons who are not parties to the case . . . raise[s] serious questions about the scope of courts’ equitable powers under Article III.”²⁰⁷ The problem, Gorsuch suggests, is that “[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.”²⁰⁸

While the breadth of nationwide injunctions may at times prove administratively problematic and even invite abusive litigation tactics, it does not render the remedy unconstitutional. Precedents already establish that equitable remedies can be broad so long as they are tailored to the violation sown and need not be limited by the geographic extent of the plaintiff class. This flows from *Califano v. Yamasaki*, a case addressing a question about nationwide class actions.²⁰⁹ There the Court observed it is equity’s rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.²¹⁰ Ultimately, the Court concluded that nationwide class actions were not “inconsistent with the principles of equity jurisprudence, since the scope of the injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.”²¹¹

Similarly, equitable remedies are not constitutionally infirm simply because they reach nonparties. “Fashioning equitable relief is not and has never been an exercise in formalistic matching, of formulaically ordering relief scoped precisely to the injury the plaintiff has asserted and proven.”²¹² In allowing an equitable remedy affecting non-parties, the Court has explained that “[c]rafting a preliminary injunction,” or any other form of equitable relief, “is an exercise of discretion and judgment, often

²⁰⁶ Sohoni, *supra* note 17, at 1006 n.554 (observing the same).

²⁰⁷ *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

²⁰⁸ *Id.*

²⁰⁹ *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *District of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 55 (D.D.C. 2020).

dependent as much on the equities of a given case as the substance of the legal issues it presents.”²¹³

3. Tradition Objection

A hybrid challenge, combining the first two described above, posits that nationwide injunctions are unconstitutional because, pursuant to *Grupo Mexicano*, federal courts lack the power to issue remedies that were both unavailable to the English Chancellor *and* which lack a connection to traditional federal equity practice.²¹⁴ Justice Thomas’ concurrence in *Trump v. Hawaii* also embraces a version of this argument. In addition to deeming the nationwide injunction foreign to historic English practice, Thomas argues that it is alternatively infirm because it is insufficiently grounded in federal equity practice.²¹⁵ Because, Thomas urges, the remedy was first deployed in the 1960s and has only been increasingly issued in the last few decades, he claims it is insufficiently grounded in federal equity practice.²¹⁶ The novelty of the nationwide injunction, to Thomas’s eye, evidences its unconstitutionality.

This “tradition” objection to nationwide injunctions is also infirm. Even if federal equity should be tempered by traditional practice in the federal courts, the nationwide injunction still survives. As Justice Scalia explains in *Grupo Mexicano*, to divine whether a remedy falls sufficiently within the “traditional” practice of federal courts one must look at three factors: (a) whether the remedy was unknown to the English Chancellor of 1789, (b) whether federal and state courts had consistently denied this kind of relief throughout the twentieth-century, and (c) whether the remedy, if allowed, would alter the procedural and substantive rights of the parties.²¹⁷ The nationwide injunction passes muster. Although nationwide injunctions would be foreign to the historic English Chancellor, they are neither foreign to American equity practice nor do they inexorably alter the procedural or substantive rights of the parties.

Nationwide injunctions are not totally foreign to American equity practice. They are not even particularly new.²¹⁸ Mila Sohini’s “lost history” of nationwide injunctions reflects that they have existed for the better part of a century, bringing the remedy well within the contours of traditional practice as defined in *Grupo Mexicano*, which surveyed cases and treatises spanning through the mid twentieth century to ascertain whether the remedy had *ever* been issued by federal or state courts.²¹⁹ Additionally, the Supreme Court’s treatment of nationwide injunctions to date supports an inference of the remedy’s constitutionality. The Court encountered nationwide injunctions on

²¹³ *Id.* (quoting *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)).

²¹⁴ *Grupo Mexicano De Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999).

²¹⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018).

²¹⁶ *Id.* at 2426.

²¹⁷ *Grupo Mexicano*, 527 U.S. at 322–33.

²¹⁸ See discussion *supra* Section II.B.

²¹⁹ *Grupo Mexicano*, 527 U.S. at 324–25; Sohoni, *supra* note 17, at 924.

several occasions from the 1910s to present and has never intimated that the remedy violates Article III, giving rise to an inference of the remedy's constitutionality.²²⁰

Even if the nationwide injunction were a truly new remedy, that would not make it unconstitutional. The Court has, on plenty of occasions, condoned using old remedies in new ways to respond to urgent problems, as was the case with the antisuit injunction against enforcement made famous in *Ex Parte Young*.²²¹ The Court has also approved totally new kinds of injunctions, such as the anti-labor injunction at the heart of *In re Debs*.²²² On occasion, the Court has even played a direct role in creating new remedies, as it did in the mid-twentieth century with the structural injunction. This is all well within Article III's tradition limits because equity jurisdiction of the federal courts has long been understood to extend as far as necessary to give justice to the parties.²²³ At bottom, this means that if there is no adequate remedy available at law, then parties can resort to equity and, guided by equitable principles, courts are empowered to grant relief.²²⁴ Because nationwide injunctions align with this longstanding principle of American equity, they are sufficiently traditional.

Lastly, nationwide injunctions are constitutional because they do not inexorably alter the procedural or substantive rights of the parties. As discussed above, the Court has long condoned broad equitable remedies, including those that reach nonparties, thus the existence of nationwide injunctions does not inexorably alter the rights of defendants in nationwide injunction suits. And, the government's complaint—that nationwide injunctions uniquely impair their rights since they allow a single federal court to enjoin it across all jurisdictions—is also infirm. It is the ordinary practice to enjoin federal agencies from engaging in unlawful conduct in total, not simply as to individual petitioners.²²⁵

C. *The Stakes*

As the foregoing reflects, the constitutional question is fairly easily answered in the affirmative—the nationwide injunction is not categorically barred by Article III. Even though the constitutional question is easily answered, the stakes are exceedingly high. The difficulty here is with the proxy fight over what that answer means. If the remedy is permitted, the judiciary signals it is holding ground, continuing to act when necessary to check executive overreach.

²²⁰ *Grupo Mexicano*, 527 U.S. at 324–25.

²²¹ *Ex parte Young*, 209 U.S. 123 (1908).

²²² See *supra* note 167 and accompanying text.

²²³ See, e.g., *Seymour v. Freer*, 75 U.S. (8 Wall.) 202, 218 (1869) (“[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties.”); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (“Flexibility rather than rigidity has distinguished [federal equity jurisdiction].”).

²²⁴ See, e.g., *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74, 79 (1867) (district courts properly exercise their equitable jurisdiction where “the remedy in equity could alone furnish relief, and . . . the ends of justice require[] the injunction to be issued.”).

²²⁵ See discussion *supra* Section II.C.

I do not believe that the Trump administration urged the Court to assess the constitutionality of nationwide injunctions in good faith. The administration hoped that, with public pressure mounting, the Court would cede the federal courts' power to issue the remedy, and with it, the authority to check the executive in and outside of suits seeking nationwide relief. While power grabs are not totally unexpected, the prospect of the judiciary acquiescing to the executive's calls to abdicate its judicial check endangers the maintenance of our constitutional order.²²⁶ The judiciary cannot serve its constitutional function if it allows the executive to neuter it. Allowing the political branches the power to categorically strip courts of the power to issue nationwide injunctions would, as the Supreme Court has warned in other contexts, "permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not th[e] [c]ourt[s], say 'what the law is'."²²⁷ The Trump administration's crusade against nationwide injunctions was an attack on Article III that the judiciary cannot shy away from.

Given these stakes, the Supreme Court should do something more than simply hold that nationwide injunctions are constitutional. The Court must do some repair work to restore the public's confidence in the judiciary as an institution. As I explore in Part IV, one means to do this could be to introduce a new kind of abstention calibrated to prevent abuses of the nationwide injunction.

IV. ABSTENTION PROPOSAL

This Part presents the nationwide injunction abstention proposal. It opens by setting out key premises undergirding the proposal. From there, it introduces the abstention proposal, a prudential, discretionary kind of abstention modeled in part off of *Colorado River* abstention, consisting of seven disjunctive factors. The factors are calibrated to deter abusive litigation tactics, prevent untoward interference with non-party rights and forum-shopping, and should promote horizontal comity between the district courts as well as percolation of issues. District courts would, under this proposal, be empowered to dispose of these suits in some instances and in others simply decline to consider the relief sought. It then proceeds to explain how district courts should go about balancing the abstention factors. It concludes by analyzing advantages of using abstention to tame the nationwide injunction and briefly identifies and responds to likely objections.

A. Premises

At the outset I think it important to identify key premises that undergird my abstention proposal. At the threshold, I presume that nationwide injunctions are not always problematic and thus any solution that would categorically bar the remedy is at best an overcorrection. As discussed at length *supra* Section II.A, nationwide

²²⁶ District of Columbia v. U.S. Dep't of Agric., 444 F. Supp. 3d 1, 53 (D.D.C. 2020) ("Any recent chaos stemming from nationwide injunctions is the product of an executive branch aggressive in pursuit of appeals and in advancing its present arguments in derogation of judicial power. Perhaps that sort of power grab is to be expected from the executive branch. What is unexpected, and dangerous to the maintenance of our constitutional order, is that instead of fighting back, some courts have rolled over.").

²²⁷ Boumediene v. Bush, 553 U.S. 723, 765 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

injunctions have existed in one form or another for more than a century in both public and private law contexts. While the frequency with which district courts issue these injunctions has increased overtime, the remedy itself has not proved to be inappropriate in all contexts. I took this to heart when trying to devise a solution to outlier situations where some kind of course correction is necessary. Rather than categorically bar the remedy, it seemed to me that we needed a solution that permits nationwide injunctions to be issued.

A related premise is that the lower federal courts have the institutional competency and incentive to self-police against many of the problems nationwide injunctions can sow. By this I mean that federal judges are capable of spotting potential abuses in their midst early on in some of the most problematic nationwide injunction suits. While there will perhaps be some judges who relish opportunities to overreach, they are outliers. This is key because it opens up the possibility that we might guard against many nationwide injunction abuses by simply giving our federal judges tools to flush out abuses at early stages in the litigation.

Another premise is that just as nationwide injunctions are not a new remedy, the solution itself need not be new—old tools likely can help. Much of the discourse about nationwide injunctions has assumed that the novelty of the remedy is a large part of why the courts have struggled to tame it. That is, they think the system is flummoxed by nationwide injunctions because the courts simply lack the necessary tools to accommodate the remedy in a system not designed for it. I do not think that is quite right. Nationwide injunctions have existed for the better part of a century and have only put serious pressure on the courts in the last decade or so. Moreover, the problems nationwide injunctions currently present are quite similar to ones that have arisen throughout the history of federal equity practice. For instance, the prospect of conflicting remedies arising in the context of concurrent jurisdiction is nothing new—federal courts have long dealt with that by invoking abstention.

An additional consideration is that the proposed remedy should not favor any particular party.²²⁸ I think this point is particularly important for two reasons. First, it is a bedrock principle that equity be equally accessible to all who invoke it.²²⁹ While my proposal aims to temper access to nationwide injunctions, I think it wrongheaded to single out any party for special treatment or disability. Doing otherwise would be incongruous with hundreds of years of equity jurisprudence.²³⁰ Second, as Justice Sotomayor²³¹ and Stephen Vladeck²³² have argued, the Supreme Court has up to this

²²⁸ See, e.g., *Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 807 (1870) (federal courts must rely on their “flexible jurisdiction in equity . . . to protect all rights and do justice to all concerned.”).

²²⁹ See, e.g., *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 26 (1823) (“It is not only a maxim of the Court of Chancery, but of every wise legislator, that equality is equity.”).

²³⁰ See, e.g., *Brown-Crummer Inv. Co. v. City of Purcell*, 128 F.2d 400, 404 (10th Cir. 1942) (“A court of equity is a forum of conscience. It acts when and as conscience commands. It exacts of those coming within its portals and applying for relief that they come with clean hands and right conduct.”).

²³¹ *Wolf v. Cook Cnty.*, 140 S. Ct. 681, 684 (2020).

²³² Vladeck, *supra* note 120, at 155 (“[T]he true justification for emergency or extraordinary relief there is *not* that the lower courts have unduly hamstrung the executive branch from the

point inordinately privileged the federal government's position in nationwide injunction suits. This is normatively problematic. But, more urgently still, it too often leads to the very abuses of process that opponents of nationwide injunctions decry in the first instance. For those reasons, my proposal puts the federal government on equal footing with other parties.

Another premise is more practical—the solution should facilitate information gathering from the district court and reviewing court. As discussed *supra* Section II.B, one of the key problems sown by nationwide injunctions is that they shoot up important legal questions too quickly to the courts of appeals and the Supreme Court, depriving both of varied, well-reasoned opinions exploring the metes and bounds of the legal issue and public interests at stake. Nationwide injunction suits too often position individual district court judges as if they are a Supreme Court of one deciding important issues for the whole nation with little briefing and little input from stakeholders. One means of correcting against that is to require district courts to gather information about the legal landscape in the first instance—for example, identifying other similar suits, taking into account nonparties who will be impacted if jurisdiction is exercised, and being in active dialogue with co-equal courts wrestling with the same or similar issues, among other things.

Additionally, I believe that the solution should ultimately afford district courts some flexibility. Equity should not be so rigid as to be unable to meet novel problems head-on.²³³ District courts need to be able to pivot to address unique situations that bright-line rules might otherwise miss. At bottom, our solution should permit district courts to be responsive to evolving conditions, urgent needs, and new kinds of injuries.

Lastly, the formalist fix—freezing our equity in time—is no fix at all. It elevates predictability above justice, is legally conservative, and otherwise antithetical to equity.²³⁴ We can begin by telling the truth about what work history is and is not doing here. We can tell a different history of federal equity and, in doing so, accommodate our current concerns about its scope and our chancellors' discretion.²³⁵ Where new remedies emerge, legitimacy can be earned by consent. The constitutional legitimacy of a class of equitable remedy does not necessarily turn on its lineage. If legitimacy is the true concern, trying to divine hard, ahistoric limits is the wrong approach.

beginning; it's that the government has seen the error of its ways, and should be let off the hook for its original sin.”).

²³³ See Malveaux, *supra* note 16, at 56 (“Although national injunctions are imperfect and crude forms of justice, they are better than no justice at all—which for some actions, may be the alternative.”).

²³⁴ Randolph Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451, 479–85 (2014).

²³⁵ Cf. Burbank, *supra* note 201, at 1346 (“In meeting the challenge of progress in a world that is in every respect more accessible than before, we cannot allow our traditions to hold us hostage. Neither can we afford to neglect them. Honoring our legal traditions sometimes requires a change in the rules to reflect the changed circumstances in which they operate. Honoring any legal tradition requires that claims of changed circumstances be filtered through an understanding of the reasons for the rules tradition bequeaths, both those that are formal and, to the extent implicated, those that reflect the social context in which the rules were born or nourished. It also requires that attention be given, in both dimensions, to traditional rules about who should decide.”).

B. The Proposal

Given the aforementioned premises, it seems to me that the best solution is to turn to abstention. I submit that a prudential, discretionary kind of abstention, that can be invoked sua sponte or on the motion of any party or intervening movant with a real interest in the suit at any point after a complaint seeking a nationwide injunction is filed. Ideally, abstention will be considered before or shortly after a party moves for a preliminary or permanent nationwide injunction.

The abstention power is a narrow but important exception to the general rule that federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.”²³⁶ The contours of the abstention power are well illuminated in *Quackenbush v. Allstate Insurance*, where the Court explains the “authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief,” clarifying that the “power to abstain” is located “in the historic discretion exercised by federal courts sitting in equity” but is not a “technical rule of equity procedure.”²³⁷

Presently, the Supreme Court recognizes five discrete kinds of abstention in equity matters.²³⁸ *Pullman* abstention permits a federal court to stay a plaintiff’s claim that a state law violates the Constitution until the state’s judiciary has had an opportunity to apply the law to the plaintiff’s particular case.²³⁹ *Younger* abstention bars federal courts from hearing civil rights tort claims brought by a person currently being prosecuted for a matter arising from that claim in state court.²⁴⁰ *Burford* abstention allows a federal court sitting in diversity to abstain from exercising jurisdiction where state courts are likely to have greater expertise in a particularly complex area of state law.²⁴¹ *Thibodaux* abstention allows a federal court sitting in diversity to allow a state to decide issues of state law that are of great public importance to the state where the federal court finds that exercising jurisdiction would infringe on state sovereignty.²⁴² And *Colorado River* abstention allows a federal court to abstain where there are

²³⁶ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976) (first citing *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415 (1964); then citing *McClellan v. Carland*, 217 U.S. 268, 281 (1910); and then citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

²³⁷ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996).

²³⁸ Five is an oversimplification. Maggie Gardner and others make a convincing case that the Court has approved of other kinds of abstention that are unique but are poorly defined. *See, e.g.*, Maggie Gardner, *Abstention at the Boarder*, 105 VA. L. REV. 63 (2019) (critiquing international comity abstention).

²³⁹ *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

²⁴⁰ *Younger v. Harris*, 401 U.S. 37 (1971). Though beyond the scope of my Article, I think it important to point out Fred O. Smith, Jr.’s inspired and timely article urging that the Supreme Court recognize an exception to *Younger* abstention when litigants challenge structural or systemic constitutional violations. Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2284 (2018).

²⁴¹ *Burford v. Sun Oil Co.*, 319 U.S. 315, 339 (1943).

²⁴² *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

parallel litigations in state and federal courts being carried out to determine the rights of parties with respect to the same issues of law.²⁴³

My proposal is modeled in part off of *Colorado River* abstention. It is a prudential and discretionary doctrine. But there are some differences. One key difference is the abstention factors. The *Colorado River* factors are calibrated to inoculate against the problems raised by parallel litigations in state and federal courts carried out to determine the rights of parties with respect to the same issues of law.²⁴⁴ Courts weigh different factors, including but not limited to: the order in which the courts assumed jurisdiction over the property or parties;²⁴⁵ relative inconvenience of the fora;²⁴⁶ relative progress of the two actions;²⁴⁷ desire to avoid piecemeal litigation;²⁴⁸ whether federal law provides the rule of decision;²⁴⁹ whether the state court will adequately

²⁴³ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

²⁴⁴ *See, e.g., R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978 (9th Cir. 2011).

²⁴⁵ *See, e.g., Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 650 (5th Cir. 2000).

²⁴⁶ *Ambrosia Coal & Constr. Co. v. Morales*, 368 F.3d 1320, 1332 (11th Cir. 2004) (characterizing factor as focusing “primarily on the physical proximity of the federal forum to the evidence and witnesses”); *see also Jackson-Platts v. Gen. Elec. Cap. Corp.*, 727 F.3d 1127, 1141 (11th Cir. 2013) (where federal forum and state forum are “equally convenient,” this factor cuts against abstention); *Niagara Mohawk Power Corp. v. Hudson River-Black River Regul. Dist.*, 673 F.3d 84, 101 (2d Cir. 2012) (similar); *Stewart v. W. Heritage Ins.*, 438 F.3d 488, 492 (5th Cir. 2006) (similar); *PainWebber, Inc. v. Cohen*, 276 F.3d 197, 207 (6th Cir. 2001) (similar).

²⁴⁷ *See, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983) (“[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.”); *Transouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1295 (11th Cir. 1998) (“[T]his factor requires the court to consider not only the chronological order in which the parties initiated the concurrent proceedings, but the progress of the proceedings and whether the party availing itself of the federal forum should have acted earlier . . .”).

²⁴⁸ *See, e.g., Ryan v. Johnson*, 115 F.3d 193, 198 (3d Cir. 1997) (“mere possibility of piecemeal litigation” does not justify *Colorado River* abstention; rather, there must be a strongly articulated congressional policy against piecemeal litigation in the specific context of the case under review”); *Burns v. Walter*, 931 F.2d 140, 146 (1st Cir. 1991) (concern for avoiding piecemeal adjudication is met only where it “gives rise to special complications” not present in straightforward state law negligence case). *But see Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*, 751 F.2d 475, 477 (1st Cir. 1985) (affirming stay of federal action under *Colorado River*, in favor of state court action, to avoid piecemeal litigation and the possibility of divergent interpretations of insurance policy language, and where state court action was filed first and involved all insurers as parties).

²⁴⁹ *See, e.g., Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1193 (5th Cir. 1988) (“The presence of a federal law issue ‘must always be a major consideration weighing against surrender [of jurisdiction],’ but the presence of state law issues weighs in favor of surrender only in rare circumstances.”) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 26); *Village of Westfield v. Welch’s*, 170 F.3d 116, 124 (2d Cir. 1999) (“[W]hen the applicable substantive law is federal, abstention is disfavored.”); *Noonan S., Inc. v. Cnty. of Volusia*, 841 F.2d 380, 383 (11th Cir. 1988) (“[F]act that both forums are adequate to protect the parties’ rights merely renders this factor neutral.”); *Woodford v. Cmty. Action Agency of Greene Cnty., Inc.*, 239

protect the rights of all parties;²⁵⁰ and whether the federal filing was vexatious (intended to harass the other party) or reactive (in response to adverse rulings in the state court).²⁵¹ Of course, nationwide injunctions raise similar but slightly different problems than those at issue in *Colorado River* abstention cases. For that reason, *infra* Section IV.C, I suggest seven disjunctive factors, several informed by the *Colorado River* factors, others unique to the nationwide injunction context.

Another key difference is how courts should go about balancing the abstention factors. In *Colorado River* abstention, the factors must be heavily weighed in favor of the exercise of jurisdiction.²⁵² The metrics used in *Colorado River* abstention are informed by two overarching interests: the rationalization that it makes little sense for two courts to expend the time and effort to achieve a resolution to a common question²⁵³ and sense that abstention is an appropriate means to promote regard for proper constitutional adjudication and regard for federal-state relations.²⁵⁴ Because different interests inform my nationwide injunction abstention proposal, I suggest a different approach towards balancing *infra* Part IV.D.

C. Factors

Before discussing the factors individually, I will explain how the factors relate to one another and how district courts could go about gathering the information necessary to apply the factors.

Under the proposal, the first four factors—whether nationwide injunctions have issued in similar cases (factor 1), whether there is a circuit split on a common core issue of law (factor 2), the representativeness of the parties (factor 3), whether there are suits involving at least two common parties and one common core issue of law (factor 4)—should always be considered by the district court. These factors are calibrated to guard against suppressing percolation of legal issues, guard against

F.3d 517, 525 (2d Cir. 2001) (“Nor may abstention be based simply on an aversion to deciding an issue prior to a state court’s adjudication.”).

²⁵⁰ See, e.g., *Niagara Mohawk*, 673 F.3d at 103.

²⁵¹ See, e.g., *Calvert Fire Ins. Co. v. Am. Mut. Reins. Co.*, 600 F.2d 1228, 1234 (7th Cir. 1979) (finding interest in preventing vexatiousness clearly justifies federal deferral to a parallel state proceeding unless there exists strong countervailing reasons for the federal court to decide the federal suit without further delay), noted with approval in *Cone Mem’l Hosp.*, 460 U.S. at 17 n.20 (“[T]he vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River* . . .”).

²⁵² See *Cone Mem’l Hosp.*, 460 U.S. at 16.

²⁵³ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (noting that “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of the litigation” favors abstention (citations omitted)).

²⁵⁴ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 725 (1996) (alternatively characterizing abstention in *Colorado River* as being justified on premise that ‘exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern’ (quoting *Colo. River*, 424 U.S. at 814–16)).

forum- and judge-shopping, and encourage horizontal comity between co-equal district courts with concomitant jurisdiction over similar cases.

The remaining factors—whether the other suits were earlier filed (factor 5), the relative progress of the suits (factor 6), and whether the instant suit was reactively filed in response to adverse rulings in other suits (factor 7)—are only pertinent where the district court has found there are similar suits pursuant to the fourth factor. Factors five through seven are calibrated to promote comity between co-equal district courts with concomitant jurisdiction over the same or similar suits and guard against forum- and judge-shopping. They operate sort of like the first-filed rule, modified for the nationwide injunction context. To refresh, the first-filed rule is a judicial doctrine developed to address the problem of duplicative federal litigation. Under the rule, where there are successively filed federal suits in different district courts with concurrent jurisdiction, the court which has first possession of the subject must typically decide it.²⁵⁵ Courts generally apply the first-filed rule after evaluating three factors: (a) the chronology of events, (b) the similarity of the parties, and (c) the similarity of the issues or claims at stake.²⁵⁶ My proposal modifies the traditional first-filed factors in a few important ways. For instance, while the fourth factor focuses on the commonality of parties, it does not require that all parties are similar—instead, it directs the district court to assess whether there are two common parties and at least one common core issue of law.²⁵⁷ This looser standard is a better fit for the nationwide injunction context given how the most problematic of these cases tend to be litigated—large consortiums of states suing several federal actors and agencies simultaneously in different district courts.

Insofar as factors five through seven are concerned, district courts will need to do considerable information gathering to get a grasp of the universe of potentially same or similar suits.²⁵⁸ This can likely be achieved in a few ways. One approach could be to direct the parties to the instant suit to disclose to the court all suits it is currently engaged in in federal court with the opposing parties and to make a representation to the court as to whether those suits involve at least one overlapping core common legal issue. These disclosures would include the case name, case number, date filed, short statement identifying the core legal issues of that case, and a brief description of the

²⁵⁵ *EEOC v. Univ. of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988).

²⁵⁶ *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991).

²⁵⁷ The Sixth Circuit has adopted a similar approach in other contexts. *See Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 551 (6th Cir. 2007) (holding the first-filed rule can be applied “when actions involving nearly identical parties and issues have been filed in two different district courts”).

²⁵⁸ Amanda Frost has similarly suggested that district courts undertake significant information gathering before they issue a nationwide injunction. *See Frost, supra* note 1, at 1116 (“The best practice is for a federal district court to establish procedures to ensure that it has all the relevant information about the costs and benefits of the proposed scope of an injunction before issuing it. The court should hold a hearing at which the parties to the litigation, as well as interested third parties, can present evidence and make arguments about the proper scope of the remedy. The court should then issue a written ruling addressing the costs and benefits of an injunction in the case at hand that will provide a guide to the appellate courts, which may be asked to review the scope of the injunctive relief.” (citations omitted)).

current status of the case. This approach would require some labor on the part of the parties but is justified because they are in the best position to advise the district court of the universe of disputes. District courts would be free to scrutinize these disclosures and need not defer to parties' representations that other cases are or are not dissimilar.

With this foundation, we will explore each of the factors in further depth.

1. Have Nationwide Injunctions Issued in Similar Cases

This factor is calibrated to guard against the risk that a nationwide injunction will depress percolation of legal issues and otherwise encourages horizontal comity between co-equal district courts with concomitant jurisdiction over similar cases. For the purposes of this factor, a case is similar if there is at least one common core legal issue and it is more likely than not that if all the courts hearing similar cases were to grant the relief requested that the remedies would conflict. In most cases, this factor will lend some weight to support abstention.

Ensuring that important legal issues can percolate in the lower courts is vitally important, as discussed *supra* Section II.C. Among other things, district courts reviewing this factor should take into account whether the common core issue of law is a matter of first impression in its own circuit and whether there is no circuit split on a core issue of law underlying the request for injunction. If the answer to either of those questions is yes, this is good evidence that the legal issue has not yet percolated, making it more likely than not that if an injunction is granted and later appealed that the reviewing court will have few if any other cases to draw upon to resolve the issue. Where there is an immediate need for a ruling on a novel issue of law, this may warrant exercising jurisdiction. However, less emergent disputes may partially support the decision to abstain.

It is also imperative that we encourage comity between federal courts of equal rank.²⁵⁹ District courts are in a great position to do just that. Among other things, district courts reviewing this factor should assess whether sister districts have issued or declined nationwide injunctions in similar suits. Subsequent courts need not totally defer to the decisions of their co-equal sisters. However, they should assess whether “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of the litigation”²⁶⁰ favors abstention.

This factor sometimes cuts the other way. For instance, if the same issues have been substantially litigated in other circuits then there is less worry that issuing a nationwide injunction will depress percolation. This is what happened in *Pennsylvania v. President United States*.²⁶¹ There, the Department of Justice argued that a nationwide injunction should not have issued because it would depress percolation of the issue in other courts.²⁶² The Third Circuit found that argument unavailing because

²⁵⁹ *Cf.* *Zide Sport Shop of Ohio v. Ed Tobergate Assocs., Inc.*, 16 Fed. App'x 433, 437 (6th Cir. 2007).

²⁶⁰ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 324 U.S. 180, 183 (1952)).

²⁶¹ *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019).

²⁶² *Id.* at 576 n.34.

it identified several other cases where courts had considered “substantially the same legal issues as we confront here,” which it deemed as clear evidence of percolation.²⁶³

2. Circuit Split over a Core Issue of Law

This factor is calibrated to help guard against forum-shopping and also encourages horizontal comity between circuit courts with concomitant jurisdiction over cases with at least one common core legal issue.

Critics of nationwide injunctions are legitimately worried that litigants will strategically file suit so as to secure a court or even a judge that will favor its legal position, as discussed *supra* Section II.C. The crux of the worry is that litigants will shop their case to the circuit that already has or is most likely to be convinced to rule on a core legal issue in the movant’s favor. This factor directs district courts gather information that may point to the fact that the case was forum- or even judge-shopped. This helps in two ways—it may lend considerable weight in favor of the district court abstaining or, in the event it does not abstain, the district court’s analysis can help the reviewing court assess the propriety of the district court’s decision to not abstain in light of the information the district court had at its disposal at the time of its decision.

This factor also helps encourage comity among co-equal circuit courts. It does this in two ways. It flushes out forum-shopping, incentivizing litigants to not strategically deprive the appropriate fora of the case. And if the case is heard, it creates a record that can help the reviewing circuit take into account its sisters’ views on the common core legal issue. This is important because it affords an opportunity for conversation among the circuits. While district courts are bound by the law of their circuit, circuit courts may accommodate the views of its sisters on important legal issues.²⁶⁴

3. Representativeness of Named Parties

This factor is calibrated to guard against courts exercising jurisdiction over nationwide injunction suits that would inequitably infringe on the rights of nonparties. In that vein, it directs district courts to take into account the representativeness of the parties to the suit and, in certain circumstances, this may weigh heavily in favor of abstention. On the back end, it may help protect non-party interests by encouraging district courts to play a more proactive role in resolving representativeness problems.

Given the breadth of nationwide injunctions, they all too often affect the rights of nonparties to the suit. This is not always problematic. For instance, sometimes nationwide injunctions are the best means to go about quickly protecting the rights of a diffusely constituted marginalized group, such as a subclass of immigrants scattered throughout the country.²⁶⁵ In cases like that, the universe of nonparties inevitably

²⁶³ *Id.*

²⁶⁴ For a superb discussion of this approach, see Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401 (2020).

²⁶⁵ I suggest accommodation, not total deference. See *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488–89 (1900) (observing that “[c]omity is not a rule of law, but one of practice, convenience and expediency . . . the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right.” Deference comes into play only where “there may be a doubt as to the soundness” of the judge’s views such that “a uniformity of a ruling to avoid confusion” is preferred “until a higher court has settled the law.”).

supports the relief sought because most could not bring suit themselves. In such a situation, representativeness—the fact that those nonparties’ interests are adequately represented by the parties themselves—is sufficient to sustain the breadth of the remedy and thus would not tilt in favor of abstention.

However, in other cases the lack of representativeness harms nonparties. Too often, defenders of nationwide injunctions fail to account for how the unrepresentativeness of parties seeking nationwide injunction skews how the remedy is shaped, obfuscating the unique injuries of those affected by the injunction. There’s a special value in people who actually suffer an injury being able to have their day in court.²⁶⁶ Some defenders of the nationwide injunction urge that this is a *de minimus* problem. For instance, while Amanda Frost recognizes that “in some cases nonparties will not be able to bring their competing claims to court as a practical matter,” she suggests that any harm to nonparties is minimal because “nonparties can participate as amici in ongoing litigation, and their position may also be represented by government attorneys defending the law being enjoined.”²⁶⁷ But Frost misses the point that attorney general suits often fail to capture the true interests of real parties and amicus participation is woefully insufficient.

It is true that states’ public law litigation, in particular where it challenges federal overstepping, plays an important role in the “ongoing debate over the proper scope and contours of federal and public law litigation.”²⁶⁸ However, the main reason why states bring so many suits is because they have an advantage proving their standing.²⁶⁹

²⁶⁶ See generally Nina A. Mendelson, *Tribes, Cities, and Children: Emerging Voices in Environmental Litigation*, 34 J. LAND USE & ENV’T L. 237 (2019) (discussing value of tribes, cities, and youth in taking environmental claims to court; people who directly suffer the injury should be able to have day in court, might not have other options to address threats, their views might not be represented by state and federal government actors, etc.); Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193 (2013) (arguing litigation can promote desirable ends such as citizen empowerment and deliberation; also arguing group litigation can provide a safety valve for the executive and legislature).

²⁶⁷ Frost, *supra* note 1, at 1110.

²⁶⁸ Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 435 (2018).

²⁶⁹ The standing doctrine revolution has seriously limited the ability of private citizens to bring public law litigation. Prior to the 1970s, the Supreme Court’s standing analysis was typified by “flexible and decidedly sub-constitutional standards.” Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 318 (2001). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (arguing that federal courts have long sought to maintain distinctions between proper litigants of public and private rights). From the 1970s onward, the Court has grounded standing rules in Article III of the Constitution, promulgating rules and multi-pronged tests designed to evaluate plaintiffs’ standing to sue in light of separation of powers interests supposedly embodied in Article III’s “case or controversy” requirement. Gilles, *supra*, at 317. But see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (arguing contemporary standing doctrine does poor job of redressing separation of powers problems Court claims justify doctrine).

But states have fared better. There are two reasons for this. First, the Supreme Court holds states to a different standard than private citizens in public law litigation. In *Massachusetts v.*

The states have no particular acumen in forefronting the interests of interested nonparties. In fact, the states' suits have a tendency of obscuring the landscape of interests at stake and elevating interests that should not be prioritized by the courts. As Raymond Brescia explains in the context of the Muslim Travel Ban litigations:

The stories that states tell are very different from those of individual plaintiffs. Compare the alleged injuries of the states of Hawai'i, Washington, Minnesota, i.e., that their universities' students will not be able to travel and their universities' educational mission will be harmed, to those of an individual stopped at a U.S. airport who risked his life serving as an interpreter in Iraq for U.S. ground troops. Which is more salient, which calls out for judicial intervention, and which places the alleged illegal activity in higher relief?²⁷⁰

Thus, though states are getting past standing hurdles in nationwide injunction suits, they are not bringing vehicles that speak to the broad range of interests at stake.

Relegating impacted nonparties to amicus status is a similarly dubious suggestion. There are three key reasons why amicus status is a woefully insufficient means to protect and preserve third party interests in nationwide injunction cases. First and foremost, where a third party finds herself at risk of being bound by a nationwide injunction but not a party to the suit, amicus curiae status alone is not enough to allow her to preserve her interests. The reason for this is somewhat obvious—amicus participation is by design quite limited. American federal courts have historically been hostile towards third party participation in litigation.²⁷¹ Amicus practice, as we received and refined it from the English tradition,²⁷² is no replacement for full party participation and was never intended to be one. Rather, amici may appear and participate in proceedings only by negotiation with the core parties and are often further limited by the court. While such limits are sensible where third parties are

EPA, the Court famously instructed that states be afforded “special solicitude” in standing inquiries. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). That special status has been invoked by lower federal courts repeatedly as justifying less-than searching standing inquiries where states sue the federal government. Second, states have shifted their strategy in public law litigation to get around barriers to standing, increasingly deploying a private law model of litigation to advance public law interests.

²⁷⁰ Brescia, *supra* note 268, at 435.

²⁷¹ Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *YALE L.J.* 694 (1963) (describing evolution under American law).

²⁷² See, e.g., Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 *AM. U. L. REV.* 1244 (1992) (tracing origins of amicus curiae practice to 14th century and Roman law; traditionally, amicus curiae was not a party to the litigation, but served as an impartial assistant to the judiciary, providing advice and information to a mistake or doubtful court); Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790–1890*, 20 *CONST. COMMENT.* 111, 122 (2003) (arguing study of early amici participants reveals that transitioned from historic mix of neutral and partisanship in roughly equal measure to mixture dominated by partisanship; change that was “most likely driven by changing nature of litigation rather than by any change in partisanship of lawyers themselves”); Dan Schweitzer, *The Modern History of State Attorneys Arguing as Amici Curiae in the U.S. Supreme Court*, 22 *GREEN BAG* 143 (2019) (describing evolution of state amici curiae practice).

disinterested expert observers or advocates of causes,²⁷³ they make no sense where a third party's own rights are at stake. Second, amicus status may not even be a practical avenue for a wide array of third parties with stakes in the outcome of a case. The average person can no longer serve as an amicus. The amici bar is almost entirely made up of monied organizations, advocates, and wealthy private actors who can afford to fund briefs, lawyers, and trade in influence and prestige. Third, even if a third party harnesses the resources to appear as an amicus, the extent of her participation will be limited. Whether, when, and to what extent amici participate in proceedings is negotiated between the core courts and amici and ultimately subject to curtailment by the court. Moreover, even if a third party can appear, she will likely be drowned out by non-profits and others who control the field.²⁷⁴

Given the foregoing, under this factor, district courts should assess whether the parties sufficiently represent the universe of important interests at stake. This can be done by searchingly assessing whether the named parties' interests are representative of the universe of interests that will be affected by the nationwide injunction sought. That search should keep in mind that, more often than not, nonparties' interests are not only unrepresented by the parties but also not effectively or (sometimes, at all) raised by amici.²⁷⁵ The analysis should be informed by traditional equitable regard for the rights of nonparties. In that vein, district courts should take care to ensure that, where possible, they not only take jurisdiction in cases where it is more likely than not that the disposition will negatively impinge the rights of nonparties.²⁷⁶ Where the movant claims she is seeking to vindicate the rights of a large but poorly defined group of persons, this may weigh in favor of abstention if the court cannot reasonably discern a common set of facts shared by the group that justifies the ultimate relief sought.²⁷⁷

²⁷³ See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FL. STATE U. L. REV. 315 (2008) (arguing amicus briefs are an important part of deliberative democracy, a theory that favors fully informed debate as a condition to a democratic society); Paul M. Collins, Jr. et al., *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 228–29 (2014) (observing that literature reflects that amicus briefs influence judicial behavior; at Supreme Court briefs affect certiorari decisions, litigation success, ideological direction of the Court's decisions and justices' votes, frequency of separate opinion writing, and content of the Court's opinions).

²⁷⁴ Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2000) (arguing private party amicus curiae are inappropriate because they are inconsistent with established legal doctrine—they neither further policy goals nor a philanthropic agenda).

²⁷⁵ See discussion *supra* Part II.

²⁷⁶ Cf. *Joy v. Wirtz*, 13 F. Cas. 1172, 1174 (C.C.D. Pa. 1806) (explaining that courts should “take care to make no decree” that would affect the rights of nonparties).

²⁷⁷ Cf. *Scott v. Donald*, 165 U.S. 107, 115 (1897) (“The theory of the decree is that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it. It is, indeed, possible that there may be others in like case with the plaintiff, and that such persons may be numerous, but such a state of facts is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction.”).

It is possible that district courts might also use this factor to play a more proactive role in guiding nationwide injunction suits. For instance, if a suit has a clear representativeness problem, but equities otherwise weigh in favor of it proceeding, the district court would be justified in taking affirmative steps to help cure the representativeness problem.²⁷⁸ Judges could, after making a finding of deficient representativeness, put out a notice to those whose rights are at stake and create a “contest to the fullness and adequacy of the representation” or simply invite litigating amicus to the suit.²⁷⁹ Expanding the “who” of the litigation in this way may very well help quell concerns about the legitimacy of a very broad injunction.²⁸⁰

4. Commonality of Parties to Earlier Filed, Live Suits

This factor directs the district court to assess whether the case before it is the same or similar to other cases currently being litigated before co-equal district courts. For the purposes of this factor, a case is the same or similar where there are at least two common parties, at least one common core legal issue, *and* it is more likely than not that if all the courts hearing similar cases were to grant the relief requested that the remedies would conflict.

This factor is related to the first factor insofar as both direct the district court to take into account similar cases being heard by co-equal district courts. However, factors one and four pick up on different kinds of comity problems. The first factor targets what might be termed as moderate comity problems—cases that raise the same legal issue and that, down the line, might lead to conflicts between the courts. The fourth factor targets a more pernicious problem—cases where a common set of parties attempts to litigate the same common core legal issue in two or more courts simultaneously.

In the event that there are other suits involving some subset of the same parties and a common core legal issue, the district court should move on and assess the fifth factor, and so on. If the district court determines that there are no similar suits, it technically need not assess factors five, six, or seven, all of which are calibrated to assess potential problems that erupt where there are similar cases.

5. Order in Which Jurisdiction Was Assumed over the Parties

This factor directs the district court to take account of the order in which the same or similar suits, as found in factor four, were filed in other co-equal district courts. A finding that there are one or more earlier filed same or similar suits may weigh heavily in favor of abstention. There are a few reasons for this. First, it is well-settled that district courts lack the authority to hear later filed suits that seek to preempt substantially developed merits litigations in other federal fora let alone grant the relief

²⁷⁸ Fiss, *supra* note 199, at 26 (suggesting the same in the context of structural injunctions).

²⁷⁹ *Id.*

²⁸⁰ Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 366 (2018) (arguing that the scope of injunction is permissibly broadened by expanding the scope of the litigation itself—one way to do this is to allow greater third-party participation—class actions, associational standing, third-party standing, etc.).

sought therein.²⁸¹ Second, where possible, district courts should take reasonable steps to avoid the multiplicity and circuity of actions.²⁸² Third, and relatedly, district courts should not countenance litigants' attempts to use nationwide injunction suits as an instrument of procedural fencing either to secure delay or choose a forum.²⁸³

6. Relative Progress of the Suits

This factor directs district courts to assess whether exercising jurisdiction would needlessly encroach on the jurisdiction of sister courts. It ostensibly directs district courts to employ a kind of preclusion-light to avoid comity problems. Under this factor, district courts should searchingly assess the status of the same or similar cases uncovered in factor four. Among other things, the court should take account of whether there are motions pending or rulings of law on common core legal issues.

Where there are motions pending on common core legal issues before a sister court, this may weigh in favor of abstention in light of the interest in encouraging sound judicial administration and comity among federal courts.²⁸⁴ If there is sufficiently mature motion practice before a sister court, even if still pending, abstention may be appropriate. Different interests are at play here, including preservation of judicial resources, respect for other courts' decisions about how best to structure their proceedings, and avoiding waste of party resources.

If there are rulings of law on common core legal issues, this should weigh in favor of abstention. There are a few reasons for this, very similar to those supporting application of *res judicata* and claim preclusion.²⁸⁵ Among others, society has an

²⁸¹ See, e.g., *Gregory-Portland Indep. Sch. Dist. v. Tex. Educ. Agency*, 576 F.2d 81, 82–83 (5th Cir. 1978) (directing second district court to transfer case back to first district court which still had jurisdiction over the parties); *W. Gulf Mar. Ass'n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 731 (5th Cir. 1985) (holding that the second district court's issuance of preliminary injunction in a purported effort to "preserve the status quo" intruded on the decisional authority of the first district court which still had jurisdiction over the parties); see also *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992) (reversing district court's denial of intervention motion and directing the court to dismiss for lack of jurisdiction).

²⁸² Cf. *Smith v. Transit Cas. Co.*, 281 F. Supp. 661, 670 (E.D. Tex. 1968), *aff'd*, 410 F.2d 210 (5th Cir. 1969) (noting import of avoiding "multiplicity and circuity of actions" in declaratory judgment context).

²⁸³ Cf. *Mission Ins. v. Puritan Fashions*, 706 F.2d 599, 602 n.3 (5th Cir. 1983) (noting that the "wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum").

²⁸⁴ *EEOC v. Univ. of Pa.*, 850 F.2d 969, 971 (3d Cir. 1988).

²⁸⁵ *Res judicata* is a doctrine that bars claims that have been litigated or that could have been litigated from being relitigated. A related doctrine, collateral estoppel, bars issues that have been litigated from being relitigated. Whereas "*res judicata* operates only when there has been a prior judgment on the merits," collateral estoppel has "more limited preclusive effect," barring only re-litigation of issues actually litigated and necessary to holdings in the prior litigation. *Keene Corp. v. United States*, 591 F. Supp. 1340, 1346 (D.D.C. 1984), *aff'd sub nom. GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987).

interest in a stable judicial system, one hallmark of which is that once determinations about legal relations are set, they remain fixed.²⁸⁶

As far as rulings of law are concerned, district courts should employ a kind of preclusion-light approach to avoid comity problems. By this, I mean that assessing the relative progress of the same or similar cases entails looking at not just the date the cases were filed or judgments entered, but, in some instances, will extend to looking at decisions of law at the motion to dismiss and summary judgment stage, even if those decisions would for the purposes of appeal be deemed interlocutory.

There are two good reasons for that approach in the nationwide injunction context. First, where a coequal court has already reached a decision on the merits, even in an interlocutory order, respect for the orderly administration of the federal judicial system requires that its decision not be disturbed by a nationwide injunction issued by another coequal court. That is because it is for the court of first instance to determine the threshold legal question “and until its decision is reversed for error by orderly review, either by itself or a high court, its order based on its decision is to be respected.”²⁸⁷ As Justice Kennedy explained decades ago, “[w]hen an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases.”²⁸⁸

Second, where there is some mutuality of parties, it is even more important that courts give prior adjudications settling issues of law, such as issues of statutory interpretation, even at preliminary stages like the motion to dismiss stage, preclusive effect. While interlocutory orders issued by the first court may not be final in the sense that they may be reconsidered by the first court or appealed later, they should not be open to collateral attack in other fora.²⁸⁹ If the rule were otherwise, we would perversely incentivize well-resourced parties to file successive overlapping suits to relitigate key threshold questions of law, undermining the important policy that litigation of issues at some point must come to an end.²⁹⁰

²⁸⁶ Cf. Kevin M. Clermont, *Limiting the Last-in-Time Rule for Judgments*, 36 REV. LIT. 1, 2 (2017) (making similar point to explain res judicata’s import).

²⁸⁷ *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (Rehnquist, J.) (quoting *Walker v. Birmingham*, 388 U.S. 307, 314 (1967)).

²⁸⁸ *Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir. 1976) (Kennedy, J.).

²⁸⁹ *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 171 (1984) (“In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded one of ‘law.’”).

²⁹⁰ *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir. 1971) (“[T]here will always [be] a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance Without more, however, this question is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel – that litigation of issues at some point must come to an end.”).

7. Was Filing of Subsequent Suit Reactive

This factor directs district courts to assess whether the instant suit was filed reactively in response to one or more earlier filed or more mature cases. It aims to inoculate against litigants using nationwide injunction suits to procedurally fence or relitigate an issue of law.

Under this factor, district courts should searchingly assess whether there is evidence of reactivity. Among other things, courts may consider whether the instant suit was filed *after* a same or similar case was filed, an adverse judgment on a common or core issue of law was briefed or actually decided, a preliminary or permanent injunction premised on a common core issue of law was entered, or final judgment was entered.

If there is evidence of reactivity, this factor weighs strongly in favor of abstention. A few interests and well-settled rules of adjudication support this. This kind of balancing aligns with the rule that district courts lack the discretion to hear cases within their jurisdiction where the claims seek relief from a judgment entered by a coordinate court, when the parties can seek redress in the issuing court.²⁹¹ Similarly, equities and principles of judicial economy weigh heavily in favor of disallowing re-litigation of threshold issues of law already decided in an earlier filed, still pending suit from being relitigated in a later filed suit.²⁹² Evidence of reactivity also supports abstention given the strong interest in ensuring litigants have a single determination of their controversy, rather than several decisions which, if they conflict, may require separate appeals to different circuit courts of appeals.²⁹³ Indeed, abstention may, in some reactive suits, be the only true means of protecting the parties and courts from the possibility of conflicting orders and injunctions.²⁹⁴

Some circuits have already adopted a version of this factor. For instance, in *United States v. AMC Entertainment*, the Ninth Circuit held that the district court abused its discretion in issuing a nationwide injunction against AMC because it was

²⁹¹ *Feller v. Brock*, 802 F.2d 722, 728 (4th Cir. 1986); *Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964) (declining relief to party to original action who sought relief from coordinate rather than original court); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 408 n.5 (5th Cir. 1971) (quoting *Lapin*); *Treadaway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1421 (9th Cir. 1986) (same); *Carter v. Att’y Gen. of the U.S.*, 782 F.2d 138, 142 n.4 (10th Cir. 1986) (same); *see also* *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (4th Cir. 1981) (applying *Lapin* principle in case where plaintiff in second action was neither party nor the successor-in-interest of party in first action); *Brittingham v. Commissioner*, 451 F.2d 315, 316–17 (5th Cir. 1971) (same); *Exxon Corp. v. U.S. Dep’t of Energy*, 594 F. Supp. 84, 89–90 (D. Del. 1984) (same); *Common Cause v. Jud. Ethics Comm.*, 473 F. Supp. 1251, 1253 (D.D.C. 1979) (same).

²⁹² *See, e.g.*, *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1521 (10th Cir. 1990) (citing *Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 334 (1971)) (“The requirement that the party against whom the prior judgment is asserted had a full and fair opportunity to be heard centers on the fundamental fairness of preventing the party from relitigating an issue [she] has lost in a prior proceeding.”).

²⁹³ *Chavez v. Dole Food Co.*, 796 F.3d 261, 267 (3d Cir. 2015) (quoting *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941)).

²⁹⁴ *See, e.g.*, *EEOC v. Univ. of Pa.*, 850 F.2d 969, 977 (3d Cir. 1988).

geographically inappropriate in light of it covering areas in the Fifth Circuit, which had already spoken on the issue of law at the heart of the injunction adversely.²⁹⁵ The Ninth Circuit went on to explain that courts in the Ninth Circuit should not “grant relief that would cause substantial interference with the established judicial pronouncements of such sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping.”²⁹⁶

D. *Balancing Considerations*

There are a handful of other hard rules that should govern the balancing process.

First and foremost, district courts must take care to consider the abstention factors and reach a carefully considered judgment in writing explaining their reasons for electing or declining to abstain.²⁹⁷ If the district court does not take into account the abstention factors and reduce its rationales to writing, it has abused its discretion.²⁹⁸ Similarly, it is an abuse of discretion for the district court to not gather the necessary information from the parties on which to assess the abstention factors.

Second, the balance should heavily weigh *against* exercise of jurisdiction. Several reasons support this calibration. Where there are serious concerns about the propriety of court intervention, district courts should decline their equitable jurisdiction.²⁹⁹ Additionally, because all injunctions are regarded as extraordinary remedies, the default assumption should be that relief is not warranted.³⁰⁰ Because nationwide injunctions, given their breadth, are even more extraordinary the balancing mechanism should be calibrated to avoid exercise of jurisdiction that could give fruit to a nationwide injunction.

²⁹⁵ *United States v. AMC Ent., Inc.*, 549 F.3d 760, 770–73 (9th Cir. 2008).

²⁹⁶ *Id.*

²⁹⁷ *Cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818–19 (1976) (“[A] carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required.”).

²⁹⁸ The Fifth Circuit has adopted a similar rule in the declaratory judgment context. *See Travelers Ins. Co. v. La. Farm Bureau Fed’n*, 996 F.2d 774, 778 (5th Cir. 1993) (citations omitted) (“[U]nless the district court addresses and balances the purposes of the Declaratory Judgment Act and the factors relevant to the abstention doctrine on the record, it abuses its discretion.”).

²⁹⁹ *See Younger v. Harris*, 401 U.S. 37, 43–44 (1971) (explaining that abstention is premised on the “basic doctrine of equity jurisprudence that courts of equity should not act” in particular situations); *see also Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788, 805, 807 (1869) (noting that equitable jurisdiction should be exercised in a manner that “protect[s] all rights and do[es] justice to all concerned”).

³⁰⁰ *See, e.g., Harrisonville v. W.S. Dickey Clay Mfg., Co.*, 289 U.S. 334, 337–38 (1933) (the injunction “is not a remedy which issues as of course”); *Yakus v. United States*, 321 U.S. 414, 440 (1944) (“The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.”).

Third, the balancing factors *should not* be applied mechanically. Nationwide injunctions create complicated problems for coordinate courts. As the Supreme Court has recognized in other contexts where comity issues are at the fore, “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.”³⁰¹ Courts should thus not treat any single factor as a “mandate directing wooden application of the rule without regard to rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping. District courts have always had discretion to retain jurisdiction given appropriate circumstances.”³⁰²

Beyond those hard rules, district courts should be afforded flexibility in balancing the factors in light of the particular interests that predominate in the case.³⁰³ In some cases, representativeness problems (factor three) may be so strong that, in combination with weaker showings under other factors, abstention is necessary, at least until the representativeness problem is resolved. In other cases, the reactivity of the suit (factor seven) may predominate.

Where the district court determines that abstention is necessary, it should be afforded considerable flexibility in deciding the parameters of its abstention. A few options are available. It can totally decline to consider the request for a nationwide injunction but retain jurisdiction over the case. Alternatively, it can delay considering the request for a nationwide injunction until another court with priority acts first. Or, in exceptional circumstances, the district court may dismiss the case outright.

E. Benefits of an Abstention Approach

There are several benefits to an abstention approach to nationwide injunctions.

One key strength of abstention is that it facilitates early intervention. Many of the most pressing problems nationwide injunctions sow arise when a district court exercises jurisdiction in the first instance, long before any remedy is awarded. Abstention is ordered around that exact problem—it offers rough rules to manage traffic as cases and claims pile up and allows district courts to pause or entirely duck out of the dispute as necessary.

Another strength of abstention is its flexibility. The proposal directs district courts to take a wholistic account of what is at stake, who is involved, and what relief is sought in light of the case before it and the universe of other similar or overlapping cases. There are few rules, and thus little incentive for district courts to try to hide

³⁰¹ *Kerotest Mfg., Co. v. C-O-Two Fire Equip., Co.*, 342 U.S. 180, 183–84 (1952).

³⁰² *EEOC v. Univ. of Pa.*, 850 F.2d 969, 972 (3d Cir. 1988).

³⁰³ *Cf. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) (holding in context of *Colorado River* abstention that “[t]he weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case”).

what they are actually doing,³⁰⁴ which should increase public confidence in the nationwide injunctions that do issue.

The proposal also has practical value—it directs district courts to create a detailed record that is designed to flush out nationwide injunction problems. This ensures a record of district court’s considerations that an appellate court can review, facilitating better assessment of whether the district court should have exercised jurisdiction and as well as the merits of granting (or withholding) the remedy.

An additional benefit is that an abstention approach is responsive to, but does not overcorrect for, the legitimacy problems imprudently granted nationwide injunctions lay bare. Nationwide injunctions are constitutional,³⁰⁵ but the debate about their propriety has placed considerable pressure on the judiciary to make a constitutional account of their Article III powers.³⁰⁶ Judicial independence is fragile, politically constructed, and historically contingent.³⁰⁷ The judiciary thus has an incentive to guard against the isolated problems and abuses nationwide injunctions can sow³⁰⁸ in-house given increased pressures on judicial independence. As Owen Fiss explains in context of structural injunctions, it is better for the courts to tame remedies and inoculate against abuses.³⁰⁹ This helps not only reassure the public of the remedy’s legitimacy, but also helps the judiciary shore up its institutional legitimacy in the process.

Some other proposed solutions misdiagnose when and why nationwide injunctions prove problematic. For instance, some commentators, citing isolated abuses, urge nationwide injunctions be categorically barred.³¹⁰ This is an overcorrection. Not all nationwide injunctions have proved problematic.

Similarly flawed, some commentators suggest that the true problem with nationwide injunctions is that they overly burden nonparties. Matthew Erickson’s proposal falls in this camp.³¹¹ He suggests that courts adopt a three-factor test that takes into account “who” benefits from injunctions sought and if there are a large

³⁰⁴ Cf. Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911 (2018) (arguing it would be better for the Supreme Court to stop claiming it is strictly abiding by legal formalism when it is plain that realist considerations influence their rulings).

³⁰⁵ See discussion *supra* Part III.

³⁰⁶ See discussion *supra* Part II.

³⁰⁷ See generally Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018).

³⁰⁸ See discussion *supra* Section II.C.

³⁰⁹ Fiss, *supra* note 199, at 37 (“Consent can also be *earned*. But that takes time and thus structural reform should be given a chance to operate—a so-called trial run (assuming the past decade has not been sufficient). If it survives, it will then be given the same claim to legitimacy as the so-called traditional model: the institution will have legitimated itself.”).

³¹⁰ See, e.g., Bray, *supra* note 9, at 469.

³¹¹ Matthew Erickson, *Who, What, Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 334–35 (2018).

number of nonparty beneficiaries, a nationwide injunction is improper.³¹² This is also an overcorrection. Injunctions that benefit a large number of nonparties are not necessarily problematic.

Also misguided are commentators whose proposed solutions presume that the scope of the remedy is the true problem and, based on that misdiagnosis, suggest that we recalibrate the injunction factors. As one example, Zayn Siddique proposes that we modify the injunction factors to codify the “complete relief” principle as a formal limit on the appropriate geographic scope of an injunction.³¹³ The proposal is premised on the assumption that complete relief is a descriptively useful principle to categorize the types of cases where nationwide injunctions tend to issue and that it could thus function as a limiting principle. However, complete relief seems to be both a misleading and incomplete standard. Complete relief does not seem to have a limiting effect on the scope of injunctions where focus is not limited to an action’s effect solely on parties before the court. As Ronald Cass argues, where political judgments are “integrally related to the assessment of interests involved on both sides (for and against the injunction), the standard of complete relief tilts remedies toward the political forces opposing the government.”³¹⁴ Cass also cautions that the inherent bias of the complete relief standard can also exaggerate the bias baked into nationwide injunction suits given the fact that the side seeking the injunction is likely to have forum-shopped into a court it knows is likely to favor broader relief in the first instance—it thus leads to a situation where there’s both an easier venue for the moving party and easier standard for relief if that party prevails.³¹⁵ Indeed, the Ninth Circuit pointed to this problem in *East Bay Sanctuary Covenant v. Barr*, there reversing a nationwide injunction on the logic that if “complete relief” were given too much weight, then “a nationwide injunction would result any time an enjoined action has potential nationwide effects. Such an approach would turn broad injunctions into the rule rather than the exception.”³¹⁶

Some other proposals miss the mark because they urge that courts rigidly classify nationwide injunction suits by type and apply different rules to each kind of suit. Michael Morely’s proposal is one such example.³¹⁷ He suggests that we break nationwide injunction suits into five discrete classes—plaintiff-oriented injunctions, plaintiff-class injunctions, associational injunctions, defendant-oriented injunctions, and defendant-class injunctions—and argues a different judicial approach is due to

³¹² *Id.* at 361 (arguing that courts should adopt a three-factor test that takes into account “who” benefits from injunction sought and if there are a large number of nonparty beneficiaries a nationwide injunction is improper).

³¹³ Siddique, *supra* note 15, at 2139–47 (suggesting an amendment to Fed. R. Civ. P. 65 that would codify the “complete relief principle”).

³¹⁴ Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 *GEO. MASON L. REV.* 29, 62 (2019).

³¹⁵ *Id.* at 63.

³¹⁶ *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019).

³¹⁷ Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 *ALA. L. REV.* 1 (2020).

each.³¹⁸ But proposals like Morley’s miss the mark because they conflict with the Court’s recent equity precedents that abhor applying dispositive presumptions crafted to deal with sub-classes of cases.³¹⁹

Other proposed solutions suffer from being unrealistic to implement under current conditions. One example is Judge Gregg Costa’s proposal, which suggests that Congress pass legislation creating three-judge panels to hear nationwide injunction suits and make those decisions immediately appealable to the Supreme Court.³²⁰ Similarly unrealistic is Zachary Clopton’s proposal.³²¹ He suggests that the problems nationwide injunctions pose for nonparties can be solved if traditional preclusion principles are applied with the hefty caveat that this would require the Supreme Court to modify or overrule *United States v. Mendoza*,³²² which held that the federal government is exempt from offensive nonmutual collateral estoppel, an exceedingly unlikely proposition.³²³

F. Objections

Against this proposal at least three objections can be raised: one about constitutionality, one about supposed limits on abstention violated by the proposal, and one about whether it is appropriate for the Court to act or wait on Congress. Here, I briefly explore each objection.

1. Abstention is Unconstitutional

The concern that abstention is categorically improper has been floated in the literature for some time. The primary charge is that abstention is unconstitutional.³²⁴ Proponents urge that federal courts must exercise the jurisdiction given to them by

³¹⁸ *Id.* at 9–10.

³¹⁹ See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

³²⁰ Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/> [<https://perma.cc/TP94-2XQL>].

³²¹ Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019).

³²² *United States v. Mendoza*, 464 U.S. 154 (1984).

³²³ Clopton, *supra* note 321, at 5.

³²⁴ The best critique of abstention is Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72, 76, 82, 88, 114–15 (1984). For more on the enduring legacy of Redish’s critique see generally William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 NW. U. L. REV. 881, 883, 892, 896–98 (2013) (suggesting that Redish’s critique has “changed the way that the meaning of judicial restraint was conceptualized”); see also Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 156 (1986) (“[A]bstention for reasons of wise judicial administration—is properly construed only as an unprincipled judicial self-help remedy. It is judicial activism of the most blatant kind: a cynical disregard for clearly expressed congressional intent that the federal courts exercise jurisdiction under circumstances that are statutorily defined.”).

Congress. That requirement, they reason, is baked into Article III, which gives Congress the exclusive power to create and set the jurisdiction of inferior federal courts.³²⁵ Because Congress alone sets jurisdiction, they urge that refusing to exercise it to its fullest extent is tantamount to a “usurpation” of Congress’s authority.³²⁶ Often, they point to Chief Justice Marshall’s opinion in *Cohen v. Virginia* for support. There, Marshall opined that federal courts “have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution.”³²⁷

I do not think that the constitutional objection to abstention is insurmountable. After *Cohen*, the Court has repeatedly recognized that “[t]he proposition that a court having jurisdiction must exercise it, is not universally true.”³²⁸ When sitting in equity, federal courts exercise jurisdiction subject to the ancient principles of equity which inhere the “historic discretion” to abstain.³²⁹ The “power to abstain” is thus understood to be baked into the grant of equitable jurisdiction.³³⁰ This is an “extraordinary and narrow exception” to the rule that courts must typically exercise their full jurisdiction.³³¹ It is, as David Shapiro argues, a proper exercise of the judicial power because “notions of reasoned judicial discretion are embodied in the very concept of jurisdiction.”³³²

2. No Federal-Federal Abstention Doctrines

Some might oppose the proposal on the pretense that abstention can only be justified in rare circumstances where federalism concerns outweigh the imperative that federal courts exercise the jurisdiction granted them by Congress. But there is no

³²⁵ See *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (reaffirming that Congress’s control of federal courts’ jurisdiction is an essential component of separation of powers).

³²⁶ Redish, *supra* note 324, at 71, 72, 76, 82, 88, 114–15.

³²⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

³²⁸ *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 422 (1932).

³²⁹ *Id.*; see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) (clarifying that there are some classes of cases where abstaining is the “normal thing to do,” but that while abstention is permissible, it remains “the exception, not the rule”).

³³⁰ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (recognizing that the “power to abstain” is located “in the historic discretion exercised by federal courts ‘sitting in equity’”) (citation omitted).

³³¹ *Allegheny Cnty. v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959) (“The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances.”).

³³² David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 543 (1985); see also Richard H. Fallon, Jr., *Why Abstention is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 N.W. U. L. REV. 847 (2013) (arguing that abstention can be justified under both textualist and purposivist theories of statutory interpretation).

Supreme Court precedent that sustains this argument. Rather, it is a rule wrongly inferred from the handful of twentieth century cases where the Court identified discrete instances in which abstention was appropriate. In each of those cases—*Pullman*,³³³ *Younger*,³³⁴ *Burford*,³³⁵ and *Thibodaux*³³⁶—the Court justified abstention on federalism grounds.³³⁷ Even though the Court has never explicitly articulated principles to guide abstention where there is concurrent federal jurisdiction, that’s no bar.

While state-federal conflicts are key features of most Supreme Court abstention cases to date, there is good reason to believe the abstention power can be exercised in other contexts. Principally, the kinds of abstention already recognized by the Court fall within the ancient power but are not exhaustive. Indeed, in *Pennzoil Co. v. Texaco, Inc.*, the Court clarifies that “[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.”³³⁸ In fact, the Court has long recognized that district courts are empowered to invoke abstention in equity matters even if there is “no precise rule”

³³³ *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500–01 (1941) (“Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, ‘exercising a wise discretion’, restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary.” (citations omitted)).

³³⁴ *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of ‘comity’, that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”).

³³⁵ *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943) (“Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, ‘refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest’; for it ‘is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.’” (citations omitted)).

³³⁶ *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (“The justification for this power, to be exercised within indicated limits, lies in regard for the respective competence of the state and the federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State.”).

³³⁷ See Gardner, *supra* note 238, at 74 (characterizing mid-twentieth century abstention doctrines as devised “primarily to protect state interests from federal encroachment”).

³³⁸ *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

that applies.³³⁹ The Court has also recognized in dicta that abstention may be appropriate where there is concurrent federal jurisdiction. For instance, in *Colorado River* the Court acknowledges that “there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts.”³⁴⁰ The Court goes on to recognize that federal district courts had for some time abstained in the context of federal-federal conflicts.³⁴¹

Beyond that, it is unproblematic for district courts to exercise their discretion to abstain in the nationwide injunction context because, sounding in equity, a party that invokes the court’s jurisdiction and asks it to exercise discretion to afford particular relief is bound by that court’s discretionary decisions.³⁴² Thus, parties that file nationwide injunction suits seeking district courts to exercise their discretion to afford broad nationwide relief are legitimately bound by that same court’s discretionary decision to not hear the case at all.

3. Deference to Congress

Another likely objection to my proposal is that it would be better for Congress to act on nationwide injunctions, either passing legislation barring the remedy outright or perhaps creating a three-judge panel system like that suggested by Judge Costa.³⁴³ The exact solution is not so important here as is the idea that the judiciary should yield to Congress and, in the interim, not try to fix the injunction problem in-house. While it might in some ways be sensible for Congress to act, the judiciary’s hands are not tied in the interim.

The beauty of the abstention proposal is that it allows the judiciary to act now but does not foreclose Congress from stepping in later. Indeed, it leaves room for Congress to ratify or nullify later. This could be justified, as part of a dialogic approach that permits the Supreme Court and Congress, working together, to adjust jurisdictional lines to take account of changing conceptions of the roles of lower federal courts and the Court in our constitutional system. As Barry Friedman explains in another context, even if Congress should take the lead, there is no clear bar forbidding Congress from “obtaining the assistance of the federal courts in performing this function, or from acquiescing in Supreme Court decisions if the Court takes the lead.”³⁴⁴ Of course, the Court’s power to speak first on the issue would not necessarily thwart later efforts to

³³⁹ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

³⁴⁰ *Id.*

³⁴¹ *Id.* (citing *Kerotest Mfg.*, 342 U.S. at 183; *Steelman v. All Continent Corp.*, 301 U.S. 278 (1937); *Landis*, 299 U.S. at 254).

³⁴² See *Hoffman v. Blaski*, 363 U.S. 335, 347–50 (1960) (Frankfurter, J., dissenting).

³⁴³ Costa, *supra* note 320.

³⁴⁴ Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 *Nw. U. L. REV.* 1, 59 (1990).

compel exercise of jurisdiction. If Congress nullified the abstention proposal, courts should not willfully refuse Congress's explicit jurisdictional command.³⁴⁵

V. CONCLUSION

Anxieties about nationwide injunctions reached a fever-pitch under the Trump administration. But the increased frequency with which the remedy is issued by federal courts is not evidence of judicial overreach. In the vast majority of cases, federal judges are exercising their conscience within the metes and bounds of Article III's equity, tailoring remedies to protect the parties where law falls short and, in cases against the government, checking overreach, just as the Framers intended. Simply put: The chancellors are alright.

As this Article has revealed, the constitutional argument against nationwide injunctions—that their illegitimacy is proved by the fact that they were unknown to the English Chancellor at the time the Constitution was ratified—totally lacks merit. While our equity is in some respects informed by tradition, the Framers did not intend for Article III to import the idiosyncratic limits of the English Chancellor. Our equity extends as far as necessary to ensure justice to the parties. It evolves to meet modern needs. When federal courts, past and present, invoke the English Chancellor, he is a symbolic figure that embodies equity's aspirational aims since time immemorial. The ahistoric chancellor embodies equity's overarching commitments to justice and fairness. He also represents a promise by our modern-day chancellors that their conscience is guided by a measure of stability and capacity for change that are characteristic of equity's long tradition. The novelty critique of nationwide injunctions fails for another reason: the remedy is not even particularly new. Nationwide injunctions have been part of federal equity practice for more than a century, bringing them well within our tradition, just as *Grupo Mexicano* commands.³⁴⁶ Moreover, although there are isolated problems and abuses sown by nationwide injunctions, these issues are not explained by the remedy's relative novelty and would not be solved by eliminating it.

When the time comes, the Supreme Court should deem the nationwide injunction within the metes and bounds of Article III. But it need not and should not stop there. The Trump administration was so successful in using the nationwide injunction debate to smear the judiciary that it behooves the Court to use its nationwide injunction decision to help shore up public confidence in the courts. As I suggest here, this could be achieved by adopting a nationwide injunction abstention doctrine. The abstention doctrine proposed in this Article serves several purposes. As a practical matter, it gives flexible guidance to the lower courts, helping them decide whether it is prudent to exercise jurisdiction over nationwide injunction-type suits early on in the process. If adopted widely, the abstention approach should inoculate against the most troublesome problems nationwide injunctions can sow. An additional benefit is that an abstention approach is directly responsive to, but does not overcorrect for, the legitimacy problems imprudently granted nationwide injunctions lay bare.

³⁴⁵ William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 327 n.258 (1996).

³⁴⁶ Sohoni, *supra* note 17, at 928.