The Statewide Injunction: State Judicial Power and Meaningful Remedies

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Introduction

It is no secret that it is becoming harder to protect constitutional rights through federal court actions.[1] Civil rights litigators have long relied on established procedural rules and norms that are becoming quickly unsettled. Although the concept may be largely aspirational,[2] federal courts historically have at least attempted to give effect to the concept of *ubi jus, ibi remedium*—in Justice Marshall's words, that "every right, when withheld, must have a remedy."[3] But the modern Court is seemingly unconcerned with

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[1] *See, e.g.*, Richard H. Fallon, *Constitutional Remedies: In One Era and Out the Other*, 136 Harv. L. Rev. 1300, 1306-07 (2023) (explaining that it is newly possible for unconstitutional state laws to be wholly unchallengeable in federal courts); Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. Univ. L. Rev. 737, 750-57 (2021) (outlining judicially created limitations in Section 1983 actions); Alicia Bannon, *The Supreme Court Is Retrenching. States Don't Have to.*, Politico (June 29, 2022), https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928 [https://perma.cc/ZJE6-5FT7] ("The Supreme Court's decision in *Dobbs* . . . cements that we are in an era of retrenchment for many civil rights.").

[2] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 88 (1999).

[3] Marbury v. Madison, 5 U.S. 137, 147 (1803). The idea was by no means novel. *See, e.g.*, 3 William Blackstone, Commentaries on the Laws of England 23 (1768) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); Ashby v. White (1703) 92 ER 126 ("[I]ndeed it is a vain thing to imagine a right without a remedy . . . .").

the possibility that an unconstitutional law will go undisturbed in federal court.[4]

For example, the Court turned a blind eye when Texas passed Senate Bill 8, incentivizing citizen suits against abortion providers even when abortion was, at the time, a clearly protected federal constitutional right.[5] That decision has had significant downstream effects. States rushed to duplicate the citizen-suit provision in diverse areas of substantive regulation, including anti-transgender bathroom legislation,[6] anti-gun rights legislation,[7] transgender persons' participation in sports,[8] and restrictions on speech.[9] And state courts have not rushed to fill in the gap left by federal nonenforcement.[10]

Even when the courthouse doors are open, remedies may become unavailable. A change in federal practice that has generated significant recent scholarship[11] and come close to becoming binding law[12] involves the availability of universal injunctions—injunctions that benefit all individuals subject to an unlawful statute or government policy, even if they are not named parties to the lawsuit.[13] The Court has all but sounded the death knell

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[4] *See generally* Fallon, *supra* note 1.

[5] *See generally* Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).

[6] H.B. 1233, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (suit may be brought by person who encounters a "member of the opposite sex" in a public school restroom or changing room).

[7] S.B. 1327, 2021-2022 Leg., Reg. Sess. (Cal. 2022) (citizen may sue any assault rifle manufacturer or distributor until Texas Senate Bill 8 is rendered inoperative).

[8] S.B. 1028, 2021 Leg., Reg. Sess. (Fla. 2021) (suit may be brought by any student "deprived of an athletic opportunity" due to sports participation by transgender persons).

[9] H.B. 359, 68th Leg., Reg. Sess. (Mont. 2023) (suit may be brought by any minor or guardian when minor views "drag story hour" or "sexually oriented performance").

[10] *See* Tex. Right to Life v. Van Stean, 702 S.W.3d 348, 357 (2024) (remanding challenge to Texas Senate Bill 8 to lower court to consider standing in the first instance).

[11] *See generally* Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1090 (2018); Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 Notre Dame L. Rev. 2013, 2014 (2020); Zaya Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095 (2017); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. Colo. L. Rev. 87, 889 (2020); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. Colo. L. Rev. 847, 855 (2020); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. 29, 30-31 (2019); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 Lewis & Clark L. Rev. 335, 353 (2018).

[12] *See* McHenry v. Tex. Top Cop Shop, Inc., 145 S. Ct. 1 (2025) (staying universal injunction); *id.* (Gorsuch, J., concurring in the grant of stay) ("I agree with the Court that the government is entitled to a stay of the district court's universal injunction. I would, however, go a step further and, as the government suggests, take this case now to resolve definitively the question whether a district court may issue universal injunctive relief."); Labrador v. Poe, 144 S. Ct. 921, 921 (2024) (staying universal injunction against Idaho ban on gender-affirming medical interventions for minors); *id.* at 923 (Gorsuch, J., concurring in the grant of stay); *id.* at 931-32 (Kavanaugh, J., concurring in the grant of stay).

[13] Sohoni, *supra* note 11, at 924 n.17.

for universal injunctions against laws and policies challenged in federal court.[14]

As it becomes increasingly clear that federal courts hold limited promise for civil rights expansion (with a few exceptions[15]), eyes have turned to state courts for rights enforcement[16]—and appropriately so.[17] State constitutional rights are more robust,[18] state constitutional remedies are more complete[19] and constitutionally sourced,[20] and state courts are designed to be more responsive to citizens' needs.[21] Moreover, state courts may hear federal claims and, somewhat surprisingly, may do so without regard to federal procedural doctrines arising from limits on the federal judicial power.[22]

But the promise of state constitutional law is not a guarantee that state courts will remain interested in rights enforcement into the future. Indeed, few could have forecast the turn that federal law has taken—that, for example, the Supreme Court would be indifferent to a state law creating powerful incentives for private citizens to sue other individuals for exercising constitutionally protected rights.[23] And state courts have a tendency to engage in not only substantive lockstepping but also "a subtler" and "more concerning practice of methodological lockstepping" with federal courts.[24]

In this article, I address the likelihood that state courts (and state legislatures) will be asked to limit relief to the parties to a proceeding, in line

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[14] *See supra* note 12.

[15] *See, e.g.*, Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 125 (2024) (regulated entities have a right to a jury trial prior to imposition of civil penalties for fraud); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543-44 (2022) (public school football coach has a right to engage in on-field prayer while at work); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70-71 (2022) (individuals have a right to carry firearms outside the home for self-defense).

[16] *See, e.g.*, Helen Hershkoff, *Introductory Remarks: The Promise and Limits of State Constitutions*, 99 N.Y.U. L. Rev. 1895, 1904-05 (2024); Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 Colum. L. Rev. 1855, 1857 (2023).

[17] *See, e.g.*, Barron v. City of Baltimore, 32 U.S. 243, 249-50 (1833) (contrasting the relative ease of creating new protections for rights in states against "[t]he unwieldy and cumbrous machinery" of federal constitutional amendment).

[18] Bulman-Pozen & Seifter, *supra* note 16, at 1905.

[19] *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 Penn. St. L. Rev. 923, 941-55 (2011) (giving examples of remedies in state court cases raising constitutional socioeconomic rights claims).

[20] "[T]oday, some formulation of a right to court access and a remedy appears in forty state constitutions." Marcus Alexander Gadson, *Theseus in the Labyrinth: How State Constitutions Can Slay the Procedural Minotaur*, 98 Wash. L. Rev. 1, 11 (2023).

[21] *See infra* sections III.B and III.C.

[22] Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 Minn. L. Rev. 1211, 1254-62 (2021); Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. Rev. 1257, 1260 (2011); Hans A. Linde, *The State and Federal Courts in Governance: Vive la Différence*, 46 Wm. & Mary L. Rev. 1273, 1281 (2005).

[23] Whole Woman's Health v. Jackson, 595 U.S. 30, 45 (2021); *see* Fallon, *supra* note 1, at 1306-07.

[24] Bulman-Pozen & Seifter, *supra* note 16, at 1858.

with the federal trend of limiting universal remedies. In Part I, I give a short, general background on universal injunctions in federal courts to provide additional context. The federal debate has begun to inform state courts that have been asked to examine their equitable powers, and understanding this debate demonstrates why state conversations must be different.

Part II documents the nascent state court conversation on universal (or "statewide") injunctions. The stakes are high. If state courts were to reflexively follow federal law and reject universal injunctions, state civil rights litigation would become less effective and more expensive. Unconstitutional state laws would stand for those without the resources to challenge them,[25] and practitioners would be required to seek class certification in order to protect all those encompassed within an unconstitutional law's ambit.[26]

Finally, in Part III, I offer reasons why state courts and civil rights practitioners should swim against the federal tide. First, the current debate has been framed largely in strict originalist terms, but state courts are generally not originalist—and even if they were, state constitutional originalism would require rejecting federal originalism's look-back to pre-founding English common-law conceptions of equitable judicial power. Second, pragmatic concerns that inform the federal debate are different—and at times absent—in state courts due to differences in court structure, geographic jurisdiction, and democratic accountability. Third and finally, state judicial power generally is broader than federal judicial power, as evidenced by relaxed state court standards for justiciability—and that broader power is essential to state separations of powers.

I. The Federal Debate over Universal Injunctions

The unavailability of federal review for citizen-suit enforcement legislation is a particularly significant example of a broader pattern—a death-by-a-thousand-cuts approach to federal rights enforcement. A primary theme of this pattern, evidenced in the Texas Senate Bill 8 litigation, is skepticism toward standing. Indeed, even as the Court has refused to allow challenges to state laws authorizing citizen enforcement, it has limited Congress' ability to give effect to federal consumer protection laws through citizen-suit provisions.[27] It has chipped away significantly at the availability of facial challenges, even for laws regulating lawful speech.[28] And at least

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[25] *See* Labrador v. Poe, 144 S. Ct. 921, 921 (2024) (allowing Idaho to enforce ban on gender-affirming care against minors not named as plaintiffs in the case).

[26] *Id.* at 927 (Gorsuch, J., concurring).

[27] TransUnion LLC v. Ramirez, 594 U.S. 413, 430-42 (2021). *See generally* Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 Harv. L. Rev. 1222.

[28] Moody v. NetChoice, LLC, 603 U.S. 707, 742-43 (2024) (Thomas, J., concurring in the judgment) ("Facial challenges are fundamentally at odds with Article III."). In *Moody*, although no other justice joined Thomas's concurrence, a majority of the Court agreed—across ideological

one justice has argued that the doctrine of associational standing—which allows organizations to sue on behalf of their members, alleviating the pressure on individual plaintiffs[29]—must be reconsidered.[30]

In addition to limiting citizens' ability to enter the courthouse, the Court has displayed a similarly skeptical view of the remedies available to successful litigants. Qualified immunity has expanded,[31] implied constitutional claims have diminished,[32] and vicarious liability has contracted.[33] And even though circuit courts had unanimously concluded that attorney's fees are available under Section 1988 to at least some litigants who win a preliminary injunction against a subsequently repealed law, the Supreme Court recently rejected the consensus view.[34]

The debate surrounding universal injunctions falls firmly within this pattern. Courts historically used the term "nationwide injunction" to refer to any injunction either (1) extending beyond the borders of the district from which it issued or (2) operating to the detriment or benefit of nonparties. Although "[n]o term is perfect,"[35] I use the term "universal injunction" because it better addresses the latter circumstance: "'universal' foregrounds 'the real point of distinction,' which is that 'the injunction protects nonparties,' rather than the geographic scope of the injunction."[36] This distinction is particularly important here, as the authority of *state* courts to issue relief beyond their borders raises jurisdictional questions absent from the prudential questions raised by federal "nationwide" injunctions—and these questions arise only in cases involving the actions of private parties, as an out-of-state government is not subject to suit within the state. Moreover, the term appears to have taken hold at the Court in recent years, at least for Justices Thomas and Gorsuch.[37]

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lines—that a facial challenge was unavailable to petitioners bringing a First Amendment challenge, *id.* at 723-26, an entirely unanticipated outcome, Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 137 (2024).

[29] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 459-60 (1958).

[30] Food & Drug Admin. v. Alliance for Hippocratic Medicine, 602 U.S. 367, 399 (Thomas, J., concurring) ("Associational standing raises constitutional concerns by relaxing both the injury and redressability requirements for Article III standing."). *See generally* Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. 1539 (2024) (arguing that associational standing cannot be squared with justiciability doctrines for reasons largely parallel to those justifying limited-scope injunctions).

[31] *See, e.g.*, Mullenix v. Luna, 577 U.S. 7, 15-19 (2015) (per curiam).

[32] Egbert v. Boule, 596 U.S. 482, 502 (2022).

[33] *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 60 (2011).

[34] *See generally* Lackey v. Stinnie, 145 S. Ct. 659 (2025).

[35] Bray, *supra* note 11, at 419 n.5.

[36] Sohoni, *supra* note 11, at 924 n.17 (quoting Bray, *supra* note 11).

[37] *See* Trump v. Hawaii, 585 U.S. 667, 713 n.1 (2018) (Thomas, J., concurring) ("universal injunction" is a "more precise" term); Labrador v. Poe, 144 S. Ct. 921, 926-27 (2024) (Gorsuch, J., concurring in grant of stay). *But see id.* at 937-38 (Jackson, J., dissenting from grant of stay) (using quotation marks to indicate skepticism about the term).

The history of the universal injunction in federal courts is debated.[38] Critics of the universal injunction, including current Supreme Court justices, generally describe it as an invention of the Warren Court.[39] Injunctions are equitable remedies, and the Court has said that federal courts may issue only those equitable remedies "traditionally accorded by courts of equity."[40] Under this theory, described as "equitable originalism,"[41] "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,"[42] the year when Congress conferred to federal courts jurisdiction over suits in equity.[43] As no exhaustive list of equitable remedies was written down in 1789, the search turns to English common law—more specifically, to deciphering "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789."[44] Through a strict originalist lens, universal injunctions are simply too modern to pass muster.

For their part, defenders of the universal injunction—along with those who propose caution—dispute both its recency[45] and the relevance of its origins.[46] At times, individual plaintiffs cannot receive complete relief through a narrowed injunction.[47] They can be less disruptive and more workable than narrower and potentially conflicting injunctions.[48] And, of particular import for constitutional and public interest litigators, they can be the most effective and least expensive way to safeguard the rights of individuals when a law or policy has wide-reaching impact: if an unconstitutional or otherwise

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[38] *Compare Trump v. Hawaii*, 585 U.S. at 716 (Thomas, J., concurring) ("Universal injunctions . . . are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently"), *with* Sohoni, *supra* note 11, at 924 ("Article III courts have issued injunctions that extend beyond the plaintiff for well over a century").

[39] *See Trump v. Hawaii*, 585 U.S. at 716 (Thomas, J., concurring); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Universal injunctions have little basis in traditional equitable practice. Their use has proliferated only in very recent years." (internal citation omitted)).

[40] Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999).

[41] James E. Pfander & Jacob Wentzel, *The Common Law Origins of* Ex parte Young, 72 Stan. L. Rev. 1269, 1269 (2020).

[42] Bray, *supra* note 11, at 425.

[43] *Grupo Mexicano*, 527 U.S. at 318.

[44] *Id.* (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)).

[45] Sohoni, *supra* note 11, at 924.

[46] Frost, *supra* note 11, at 1090.

[47] Labrador v. Poe, 144 S. Ct. 921, 936 (2024) (Jackson, J., dissenting from grant of stay) (noting that the district court entered a universal injunction against Idaho's ban on gender-affirming care for minors "for a party-centered fact-specific reason: because it found that doing so was necessary to protect the particular plaintiffs before the court, including two minors proceeding under pseudonyms, against action by the State it deemed likely unconstitutional").

[48] Frost, *supra* note 11, at 1098-101.

unlawful government action sweeps broadly, arguably so too should the remedy.[49]

Even within a historical framework, there is reason to question the terms of the federal debate. There is, in fact, evidence of universal injunctions reaching back well before the Warren Court, though not to the creation of federal courts of equity.[50] But founding-era sources themselves present a challenge to equitable originalism, as early American legislation and jurisprudence reflect the expectation that equity jurisdiction would be flexible and subject to change over time.[51]

While the federal debate focuses on history, it is motivated by truly modern concerns. In the past, universal injunctions were sustained without debate,[52] and the controversy has arisen as the Court faces frequent challenges to executive actions in today's hyperpolarized political landscape.[53]

Most commonly, the injunction—or, more accurately, the kind of universal injunction that becomes controversial—is issued against a federal law or policy.[54] As a typical example, immediately after former President Biden took office, the Department of Homeland Security announced a 100-day pause on certain immigration deportations.[55] Texas sued, and a district judge issued a temporary restraining order within days[56] and a universal preliminary injunction shortly thereafter.[57] Claiming "deep skepticism with nationwide injunctions in general," the judge found that a universal injunction was nonetheless warranted.[58] The policy, temporary by design, never went into effect, and the case became moot when the 100-day period elapsed.[59]

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[49] *Id.* at 1094-98.

[50] Sohoni, *supra* note 11, at 924.

[51] Anna Conley, *A Challenge to Equitable Originalism*, 17 N.Y.U. J. L. & Liberty 112, 156 (2024).

[52] Sohoni, *supra* note 11, at 959-73 (describing universal injunctions issued or affirmed by the Court in the early twentieth century). Indeed, the Court affirmed universal injunctions as early as the 1890s. *Id.* at 935-36 (citing Smyth v. Ames, 169 U.S. 466, 550 (1898); Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 413 (1894)).

[53] *See* Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 Ariz. St. L.J. 359, 365-82 (2022).

[54] At least one scholar has asserted that federal policies are likeliest to give rise to a universal injunction. Frost, *supra* note 11, at 1071. But it is unclear whether such injunctions are, in fact, more common than federal injunctions against state laws or private actors—particularly as the latter categories are relatively less studied. *See* Siddique, *supra* note 11, at 2100 (noting limited scholarship on and beginning to catalogue private law cases involving broad geographic relief); Sohoni, *supra* note 11, at 958-73 (outlining Court-issued or -affirmed universal injunctions against state laws in the early twentieth century).

[55] Memorandum from David Pekoske, Acting DHS Secretary, to DHS Officials, Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/H89P-L37Q].

[56] Texas v. United States, 515 F. Supp. 3d 627 (S.D. Tex. 2021).

[57] Texas v. United States, 524 F. Supp. 3d 598 (S.D. Tex. 2021).

[58] *Id.* at 666-67.

[59] Stipulated Dismissal, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. May 20, 2021).

With whiplash-inducing policy changes between recent presidential administrations,[60] overreaching executive power,[61] and the rise of partisan state-attorney-general-driven litigation,[62] everyone has reason to be outraged by one universal injunction or another. Thus, hot-button federal issues understandably have driven the conversation.

Regardless of the modern debate's provenance, though, the same justifications for limiting federal injunctive relief have appeared recently in federal challenges to *state* laws.[63] Interestingly, the current focus on federal policies (with trickle-down effects on state laws) inverts early concerns about injunctions, which were grounded in federalism and arose from interference with state, rather than federal, laws. In 1910, Congress created three-judge district courts in response to *Ex parte Young*.[64] Congress was particularly concerned about injunctions against state action, and it even considered stripping federal courts of jurisdiction to enjoin state laws.[65] Ultimately, it settled on innovative procedural safeguards—a multimember district court including a circuit judge, a right of direct appeal to the U.S. Supreme Court, and the requirement of a hearing before issuance of an injunction.[66]

Today, federalism concerns appear to be absent from the conversation, which is framed in terms of federal courts' judicial power within the federal separation of powers. In *Labrador v. Poe*, for example, the Supreme Court considered a challenge to a universal injunction against Idaho's ban on gender-affirming care for minors.[67] It granted the state's request that the injunction be narrowed to protect only those minors who were parties to the lawsuit.[68] Justice Gorsuch wrote separately that the district court's universal injunction "defied . . . foundational principles" of federal equitable

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[60] Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 Yale J. Reg. 1100, 1103-05 (2022); *see* Howard M. Wasserman, *Congress and Universal Injunctions*, 2021 Cardozo L. Rev. de novo 187, 189-90 (2021).

[61] *See* Elizabeth Goitein, *Emergency Powers: A System Vulnerable to Executive Abuse*, Democracy (Winter 2024), https://democracyjournal.org/magazine/71/emergency-powers-a-system-vulnerable-to-executive-abuse/ [https://perma.cc/6CLD-LQA4].

[62] Seth Davis, *The New Public Standing*, 71 Stan. L. Rev. 1229, 1301-02 (2019); Dishman, *supra* note 53, at 362-63.

[63] Labrador v. Poe, 144 S. Ct. 921, 921 (2024); Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023) (denying application for stay of universal injunction against state ban on allowing children to see "adult live performance[s]," challenged as a restriction on drag); *id.* at 2 (statement of Kavanaugh, J., respecting denial of application of stay) (although "[n]o federal statute expressly grants district courts the power to enter injunctions prohibiting government enforcement against non-parties in the circumstances presented in this case," the First Amendment overbreadth doctrine may be exception to general rule against universal injunctions).

[64] Michael E. Solimine, *Congress,* Ex parte Young, *and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 113 (2008).

[65] *Id.* at 113-14.

[66] *Id.*

[67] Labrador v. Poe, 144 S. Ct. 921 (2024).

[68] *Id.* at 921.

powers.[69] Lower federal courts quickly took note and shrank the scope of injunctions in cases challenging state laws.[70]

Federal courts' authority to issue universal injunctions is not yet definitively settled, despite the Biden administration's request for a definitive statement just before the presidential transition.[71] But with clear evidence that universal injunctions are becoming unavailable in federal courts, a final determination may be unnecessary. To fully invalidate an unconstitutional law in federal court, civil rights practitioners are now likely required to file a class action lawsuit or demonstrate that the law is unconstitutional in nearly all applications.[72] Because of the resource costs of classwide litigation and the difficulty of meeting the federal facial invalidity standard, state litigation may be the only viable route to fully invalidating many unconstitutional state laws.

II. Challenges to Universal Injunctions in State Courts

State courts are only just beginning to enter the conversation. Only two state supreme courts and one territorial supreme court have used the term "universal injunction" within the meaning of the modern debate.[73] Although others have discussed the propriety of a "nationwide injunction,"[74] these conversations appear to arise most frequently—if not exclusively—in the context of economic and business disputes and relate to injunctions extending to particular named parties.[75] More appropriately, states have considered

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[69] *Id.* at 923 (Gorsuch, J., concurring in the grant of stay); *see also id.* at 931-32 (Kavanaugh, J., concurring in the grant of stay) (noting debate over universal injunctions as relevant to controversies about the Court's emergency docket management).

[70] *See* Hecox v. Little, 104 F.4th 1061, 1068 (9th Cir. 2024) (remanding question of scope of preliminary injunction against Idaho ban on transgender individuals' participation in women's student athletics); Order, McGuire v. Att'y Gen., No. 24-11731 (11th Cir. Aug. 28, 2024) (granting stay of permanent injunction against Alabama's residency restrictions for registered sex offenders, except as applied to named plaintiffs); Robinson v. Labrador, No. 1:24-cv-00306, 2024 WL 4027946, at *11-12 (D. Idaho Sept. 3, 2024) (in putative class action challenge to state statute denying medical care to transgender prisoners, discussing *Poe* and issuing injunction that is not a "universal injunction" because it operates only on behalf of members of the proposed class); Sierra Club v. City of Boise, No. 1:24-cv-00169, 2024 WL 2932994, at *2 (D. Idaho Apr. 29, 2024) (in First Amendment challenge to regulation on noise amplification in public parks, limiting injunction "to the parties at the bar"); Walls v. Sanders, 733 F. Supp. 3d 721, 751-54 (E.D. Ark. 2024) (issuing narrow injunction in challenge to state law prohibiting teaching critical race theory in schools).

[71] Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Texas at 36-38, McHenry v. Texas Top Cop Shop, Inc., 145 S. Ct. 1 (2025) (No. 24A653).

[72] *See supra* notes 25-26 and accompanying text.

[73] Limetree Bay Terminals, LLC v. Liger, 2024 V.I. 26, ¶ 26 (2024); State *ex rel.* Yost v. Holbrook, 234 N.E.3d 481, 488-89 (Ohio 2024) (Brunner, J., concurring); Van Huis v. Marine Ventures, Ltd., 672 S.W.3d 22, 27 (Tex. 2023) (Young, J., dissenting).

[74] Historically, the more common name for universal injunctions. *See supra* notes 35-37 and accompanying text.

[75] *See, e.g.*, Edgewell Personal Care Co. v. O'Malley, No. CV-176025160S, 2018 WL 10217045, at *9 (Conn. Super. Ct. Aug. 6, 2018) (denying motion for preliminary injunction

their authority to issue "statewide injunctions." The phrase, like "nationwide injunction" is used indiscriminately to refer to injunctions providing protections to nonparties[76] and injunctions operating outside a particular court's jurisdiction.[77]

In Professor Samuel L. Bray's influential article advocating for limits to federal universal injunctions, he notes that the questions for state courts should be different: "the analysis here could be extended to injunctions issued by state courts. Whether it should be, however, depends on a state's preference either for speedy resolution of legal questions or for an accumulation of multiple judicial opinions (in hope of epistemic advantages)."[78] But in the absence of clear justifications for why state courts should approach the issue independently, there is a very real probability that the federal debate (and ultimately a rule against universal injunctions) will trickle down. Although only two state constitutions include a "case or controversy" limitation on judicial power,[79] many state courts in other jurisdictions nonetheless have adopted federal justiciability doctrine in large part.[80]

Indeed, to the limited degree that state courts are considering their equitable power to issue universal injunctions, arguments framed in the federal debate are already being repeated in state courts. Today, the Ohio Supreme Court is the only state supreme court to expressly grapple with its authority to issue universal injunctive relief. In *State ex rel. Yost v. Holbrook*, the Ohio Supreme Court denied an emergency motion to stay a temporary restraining order against the Ohio Saving Adolescents from Experiment Act—a law that, like the law at issue in *Labrador*, barred some forms of gender-affirming

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premised on global noncompete agreement); TMX Fin. Holdings, Inc. v. Drummond Fin. Servs., LLC, 797 S.E.2d 842, 845 (Ga. 2017); Williams v. Powell Elec. Mfg. Co., 508 S.W.2d 665, 668 (Tex. Civ. App. 1974).

[76] *See* Abbott v. Doe, 691 S.W.3d 55, 70 (Tex. App. 2024) (explaining that mandamus relief against an order was available as it applied to "'any and all' nonparties," but Texas appellate courts only have authority to secure the parties' rights until disposition of the appeal).

[77] *See* Pro. Emps. of the W. Va. Educ. Ass'n *ex rel.* Meadows v. Hey, 399 S.E.2d 657, 659 (W.V. 1990) (explaining the issue in the case is "whether the Circuit Court of Kanawha County had jurisdiction to issue a statewide injunction").

[78] Bray, *supra* note 11, at 424. I agree with this statement. *See infra* section III.B. Because Professor Bray argues that federal universal injunctions are unconstitutional (rather than simply improper), however, it is essential to explain why states cannot analogize to federal constitutional constraints. *See infra* Parts III & IV.

[79] Ala. Const. art. VI, § 140; Mo. Const. art. V, § 2.

[80] *See* Dover Hist. Soc'y v. City of Dover Plan. Comm'n, 838 A.2d 1103, 1111 (Del. 2003) ("This Court has recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware."); Moore v. City of Middletown, 975 N.E.2d 977, 982 (Ohio 2012); Pontbriand v. Sundlun, 699 A.2d 856, 861-62 (R.I. 1997); ATC South, Inc. v. Charleston Cnty., 669 S.E.2d 337, 339 (S.C. 2008); Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 825-26 (S.D. 2009); Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001); Hinesburg Sand & Gravel Co. v. Vermont, 693 A.2d 1045, 1047-48 (Vt. 1997); *see also* Bennett, *supra* note 22, at 1233.

care for minors.[81] The court did not issue a written opinion, but two concurrences address the issue of universal injunctions in Ohio courts.[82]

Three justices signed onto the first concurrence. Noting that the procedural posture of the case barred serious consideration of the issue under the circumstances, they nonetheless signaled interest in determining the scope of Ohio courts' equitable powers, agreeing that the "case raises an important issue: is it appropriate for one judge in a single county to issue a statewide injunction that goes beyond what is necessary to provide interim relief to the parties in the case?"[83] Without forecasting resolution of the issue in an appropriate case, the concurrence summarized the Supreme Court justices' writings in *Labrador*, suggesting no reason to view the question differently under the Ohio Constitution.[84]

In the second concurrence, a lone justice described as "ludicrous" the suggestion "that the effects of [an injunction] concerning the facial constitutionality of legislation might be limited to the parties seeking the order."[85] Looking to the Ohio Constitution's grant of original jurisdiction to lower courts, Justice Brunner suggested that courts are obligated to enjoin facially unconstitutional laws—and even indicated that the legislature would be unable "to diminish this unequivocal grant of power."[86] She went on: "to suggest that a trial-court judge does not have the power to declare a law facially unconstitutional undermines the central philosophy of why courts exist—to say what the law is," citing *Marbury v. Madison*, which, of course, does not define state judicial power unless and until the state court holds that it does.[87]

Setting aside whether it is correct as a matter of Ohio constitutional law, Justice Brunner's approach appears to be radically pro-state constitutionalism. But it is fairly unlikely that state court judges will be so emboldened to entirely disregard the federal debate, as evidenced by the breakdown of votes for the *Yost* concurrences and by even Justice Brunner's reliance on federal law to support her points. Although "the legal issues that the separation of powers doctrine raises [for many state courts] differ from those encountered in the federal courts,"[88] state courts nonetheless turn frequently to federal law when they encounter novel separation of powers issues.[89]

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[81] 234 N.E.3d 481 (Ohio 2024).

[82] Without explanation, the chief justice would have awarded the relief requested—presumably because she agreed that the scope of the injunction should be narrowed. *Id.*

[83] *Id.* at 483 (DeWine, J., concurring).

[84] *Id.* at 481-84.

[85] *Id.* at 485 (Brunner, J., concurring).

[86] *Id.*

[87] *Id.* at 486-87.

[88] Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1554 (1997).

[89] Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers*

Yost represents the clearest example of a state court in conversation with the federal debate over universal injunctions. But it won't be the last. Legislation has been introduced in at least one state, Montana, to bar courts from "restrain[ing] the enforcement of a statute against a nonparty to the proceedings before the court"[90]—if passed and subject to legal challenge, the reviewing court will be required to consider not whether it *may* issue a universal injunction, but whether the state constitution affirmatively bars legislative interference with its constitutional authority to do so.

Litigation in other states suggests that the state court debate is only beginning. A few courts have talked around the issue. Dissenting from the Texas Supreme Court's denial of a petition for review, three justices wrote about another issue relating to injunctive relief—requiring a bond on appeal—writing that the failure to require a bond may "create perverse incentives," such as seeking universal injunctions.[91] And the Supreme Court of the Virgin Islands, reviewing its power to decide an enactment's facial constitutionality, has suggested that concerns about universal injunctions, grounded in the federal separation of powers, are "wholly irrelevant to the Virgin Islands context" because "the Courts of the Virgin Islands are not courts of limited jurisdiction organized under Article III and possess the authority to adjudicate more than just cases and controversies."[92]

Indeed, even where the question presented does not directly implicate the state separation of powers, the federal debate appears to seep in. *Abbott v. Doe*, involving a challenge to a Texas policy defining certain gender-affirming treatments as child abuse, provides a case study. In *Abbott*, the trial court granted a temporary injunction barring state officials from enforcing the policy by investigating parents and medical providers, including those who were not party to the proceedings.[93] Under the Texas Rules of Appellate Procedure, the notice of appeal supersedes the restraining order, but the court of appeals had the authority to "make any temporary orders necessary to preserve the parties' rights until disposition of appeal,"[94] and it did so by reinstating the injunction in its entirety.[95]

The Texas Supreme Court conditionally granted the State's petition for mandamus and vacated the order to the degree that it provided protections to nonparties, reasoning that the broader injunction exceeded the court of appeals' authority to preserve the "*parties'* rights" on appeal—tracking the

Discourse, 4 Roger Williams U. L. Rev. 79, 87-92 (1998).

[90] S.B. 43, 69th Leg., Reg. Sess. (Mont. 2025).

[91] Van Huis v. Marine Ventures, Ltd., 672 S.W.3d 22, 26 n.3 (Tex. 2023) (Young, J., dissenting).

[92] Limetree Bay Terminals, LLC v. Liger, 2024 VI 26, ¶¶ 26-27 (2024).

[93] *In re* Abbott, 645 S.W.3d 276, 282-83 (Tex. 2022).

[94] *Id.* at 282.

[95] *Id.* at 280.

federal debate without reaching a constitutional issue.[96] On remand, though, the operative rule was no longer relevant, and the court of appeals affirmed the full scope of the injunction, reasoning that it was necessary to grant relief to an anonymous plaintiff, served judicial economy by preventing serial lawsuits, and remained consistent with its own precedent affirming statewide injunctive relief.[97] Litigation remains ongoing.[98]

Other cases involve challenges to statewide injunctive relief, but the challenges are not framed in terms of the state courts' power to grant relief to nonparties.[99] But even these cases indicate that state courts may be hesitant to grant broad relief from unconstitutional laws—and for reasons that incorporate federal justiciability and equitable standards.

For example, in 2023, the Indiana Supreme Court reviewed a post-*Dobbs* state law prohibiting nearly all abortions.[100] It determined that the Indiana Constitution protects the right to terminate a pregnancy that poses a serious threat to a pregnant woman's health or life,[101] but it nonetheless vacated a preliminary injunction against the challenged state law on the grounds that it had some constitutionally permissible applications, concluding that the plaintiffs had not met their burden to mount a facial challenge against the law.[102] The standard that the court applied requires a law's challenger to show that "there are no circumstances in which [the law] could ever be enforced consistent with [the Indiana Constitution]."[103] And that impossibly high standard derives directly from federal law.[104] When the court later denied the plaintiffs' petition for rehearing, the chief justice wrote separately of her "deep concern[]" that the challenged law may impede constitutionally protected abortion rights, but she washed her hands of it, concluding that the plaintiffs, by seeking a too-broad injunction, had "not properly put these concerns before [the court]."[105]

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[96] *Id.* at 282-83.

[97] *Id.* at 90-91.

[98] *Doe v. Abbott*, Am. C.L. Union, https://www.aclu.org/cases/doe-v-abbott [https://perma.cc/3X4M-6N9K] (last updated Jan. 23, 2025).

[99] *See, e.g.*, Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Hawai'i, Alaska, Indiana, Kentucky, Inc., 214 N.E.3d 348, 349 (Ind. 2023) (mem.) (Rush, C.J., concurring); Commonwealth *ex rel.* Conway v. Thompson, 300 S.W.3d 152, 162-63 (Ky. 2009); O'Connell v. Superior Ct., 47 Cal. Rptr. 3d 147, 167-70 (2006); Smallwood v. Cent. Peninsula Gen. Hosp., 151 P.3d 319, 327-28 (Alaska 2006).

[100] Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Hawai'i, Alaska, Indiana, Kentucky, Inc., 211 N.E.3d 957 (Ind. 2023).

[101] *Id.* at 976-77.

[102] *Id.* at 975.

[103] *Id.* The Indiana Supreme Court adopted this standard, citing only to federal law.

[104] The court cited to its own precedent and to federal law for this proposition. *Id.* (citing Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999), and United States v. Salerno, 481 U.S. 739, 745 (1987)). In *Baldwin*, the Indiana Supreme Court expressly adopted this standard for facial challenges, looking to federal law. 715 N.E.2d at 337 (citing Reno v. Flores, 507 U.S. 292, 301 (1993), and *Salerno*, 481 U.S. at 745).

[105] Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Hawai'i,

These cases demonstrate that parties asking state courts to disregard federal law often face significant headwinds. And states appear inclined to follow federal law even, as with separation of powers issues, when federal law *cannot* speak to the issue facing the state court.[106] While the reasons for what has been termed the "gravitational force of federal law"[107] are complex, they likely include the substantially greater resources enjoyed by federal courts,[108] the lure of uniformity,[109] systemic biases toward federal law,[110] and political pressures and benefits.[111] Thus, it is likely that, as the universal injunction disappears in federal courts, state courts will find themselves newly confronted with arguments against statewide injunctions, transplanted from federal courts considering the federal judicial power.

III. The Applicability of Federal Concerns to State Injunctions

Discourse about the propriety of universal injunctions in federal courts is "already cacophonous,"[112] and I do not attempt an exhaustive review of the extensive scholarship[113] in this area. Instead, I briefly characterize significant aspects of the federal debate in order to explain why the conversation in state courts is necessarily different.

The first is methodological: originalism drives analysis of the federal universal injunction, but state courts are less originalist than the U.S. Supreme Court—and even if that were not true, the results of originalist methodologies would vary considerably, depending on the dates of and contexts surrounding state constitutional ratification. The second aspect of the federal debate is pragmatic, focused on concerns for judicial overreach and the benefits and hardships associated with courts of limited geographic jurisdiction deciding one-size-fits-all rules for federal policies. Here, too, results do and should vary for state courts, which are differently structured and often, unlike their federal counterparts, democratically accountable. The third and final aspect relates to constitutional structure. Federal courts are limited in jurisdiction to deciding cases and controversies, and they operate within a separation of powers that is bounded on all sides by limits to federal power. State courts, on the other hand, are not so constrained by constitutional limits on jurisdiction and justiciability. And while state separations of

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Alaska, Indiana, Kentucky, Inc., 214 N.E.3d 348, 349 (Ind. 2023) (Rush, C.J., concurring).

[106] *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L. J. 545, 573 (2023).

[107] *See generally* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703 (2016).

[108] *Id.* at 730.

[109] *Id.* at 736.

[110] *Id.* at 736-39, 744-45.

[111] *Id.* at 740-41.

[112] Smith, *supra* note 11, at 2014.

[113] *See supra* note 11.

powers share similarities with the federal tripartite system, more expansive state legislative and executive power demands that state courts exercise more robust judicial review to keep the other branches of government in check.

A. Originalism

Much of the debate surrounding the federal injunction addresses the propriety of an originalist approach and the results of an originalist analysis.[114] While this approach makes sense to the degree that scholarship critiques Supreme Court jurisprudence and speaks to originalist federal court judges, it has diminishing value in state courts for two primary reasons.

The first is methodological. Federal actors enjoy only limited power, even to act for the common good, and originalism purports to constrain that power, requiring formal constitutional amendment to change the meaning of constitutional text.[115] There is no similar structural argument for originalism in most state constitutions,[116] which rarely include jurisdictional language tracking the federal Constitution.[117] Indeed, certain provisions—such as open courts provisions, common to state constitutions[118]—suggest the need for a flexible, equitable approach.[119] Although arguments can be made that state courts do, in fact, practice originalism,[120] the propriety of originalism as an exclusive or primary methodology for state courts is hotly debated, even among the decisionmakers themselves.[121] And some state courts—at least at times—have rejected outright an originalist approach.[122] Still others purport to apply an originalist approach, but it is a purposivist originalism, not original public meaning originalism.[123]

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[114] *See supra* notes 38-44 and accompanying text.

[115] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989).

[116] Brian A. Stern, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. Rev. 77, 94-97 (1994).

[117] *See supra* note 79.

[118] *See* Gadson, *supra* note 20, at 11.

[119] *See generally* Helen Hershkoff & Adam Littlestone-Luria, *The Louisiana Constitution and the Courts of Westminster: Standing and the Civil Law Heritage*, 85 La. L. Rev. 523 (2025).

[120] Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 Geo. J. L. & Pub. Pol'y 341, 344 (2017).

[121] Chihiro Isozaki, *State Justices Speak Out Against Originalism*, State Ct. Rep. (Oct. 7, 2024), https://statecourtreport.org/our-work/analysis-opinion/state-justices-speak-out-against-originalism [https://perma.cc/Y7LX-BHUY].

[122] Held v. State, 560 P.3d 1235, 1248 (Mont. 2024) ("New advancements, consistent with the object and true principles of the Constitution, are provided for within Montana's living Constitution."); State v. Jenkins, 3 A.3d 806, 854 (Conn. 2010) (the Connecticut "constitution is an instrument of progress . . . and should not be interpreted too narrowly or too literally"); State v. Cannon, 190 A.2d 514, 516 (Del. 1963); *see also* William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2399-440 (2015).

[123] *See* Christiansen, *supra* note 120, at 347-57 (identifying examples of state courts of last resort describing their methodology, generally by referring to the framers' intent).

The second relates to the results of an originalist analysis. Even assuming that a consistent federal originalism is possible, it is not transferable to state courts. State constitutions were ratified at different political moments, ranging from 1780[124] to 2022.[125] An originalist approach means something very different for state constitutions, only four of which were ratified within fifty years of the U.S. Constitution.[126] Thus, only a small handful of the most long-established state constitutions even arguably could support an approach that mirrors one employed by today's originalist Court, though these states would, of course, be free to disagree with any conclusion about the mixed historical record. With the exception of Alabama, which ratified its operative, seventh constitution in 2022 and includes "case or controversy" language tracking Article III, Section 2,[127] no state constitution was ratified in the midst of the current debate about the judicial power, and a number were ratified during the Warren Court era or shortly thereafter[128]—a time when the Court unquestionably issued universal injunctions.[129] Thus, for the majority of state courts interpreting their own constitutions, to march lockstep with the current federal approach to universal injunctions would be to adopt a fundamentally *anti*-originalist approach.

B. Pragmatic Concerns

Many of the most compelling arguments against universal injunctions are not constitutional but consequentialist. Universal injunctions against federal policies "are overwhelmingly issued by judges appointed by a President from the opposite political party as the President who promulgated the policy at issue,"[130] threatening the legitimacy of federal courts.[131] They prevent percolation: "[r]ather than having the benefit of varying court of appeals decisions based upon multiple records, the Court may instead review a single grant of preliminary relief and effectively decide a legal issue of nationwide importance without a well-developed sense of the consequences of its decision."[132] And they promote gamesmanship through

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[124] MASS. CONST.

[125] ALA. CONST.

[126] MASS. CONST. (ratified 1780); N.H. CONST. (ratified 1793); VT. CONST. (ratified 1793); ME. CONST. (ratified 1820).

[127] ALA. CONST. art. VI, § 140.

[128] ALASKA CONST. (ratified 1959); HAW. CONST. (ratified 1959); MICH. CONST. (ratified 1963); CONN. CONST. (ratified 1965); FLA. CONST. (ratified 1968); ILL. CONST. (ratified 1970); N.C. CONST. (ratified 1970); VA. CONST. (ratified 1971); MONT. CONST. (ratified 1972); LA. CONST. (ratified 1975).

[129] Trump v. Hawaii, 585 U.S. 667, 716 (2018) (Thomas, J., concurring).

[130] *Developments in the Law—District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1707 (2024).

[131] Cass, *supra* note 11, at 30-31.

[132] Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 382 (2021).

forum- and judge-shopping,[133] allowing litigants to not only target favorable venues but even to bring serial actions until a favorable ruling issues.[134]

Pragmatic concerns about universal injunctions are, of course, valid considerations for state courts determining what the rules should be.[135] Encouraging percolation and discouraging forum-shopping may well be compelling, depending on a state's judicial structure.[136] But erroneous lower-court judgments are, as a general rule, less likely to go unchecked by a court with statewide jurisdiction. Eight states, along with the District of Columbia, lack an intermediate court of appeals, meaning that litigants have a right to appeal to the court of last resort.[137] In most states with intermediate appellate courts, the courts have statewide jurisdiction.[138] Thus, in those states, there is no benefit of percolation and no danger of a court ruling extending beyond the borders of the court's jurisdiction—at least by the time a case reaches the court of appeals. And even in the most populous states, the court of last resort is far more likely to hear a case than is the U.S. Supreme Court.[139]

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[133] Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 243 (2017).

[134] Bray, *supra* note 11, at 460.

[135] *See id.* at 424.

[136] They likely are also remediable, especially because state courts of last resort generally have broad powers to determine rules of procedure within the state judiciary. James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 521-22 (2002). In this way, they stand in contrast to the U.S. Supreme Court, which must rely on statutory authority, reinforcing the relative breadth of state judicial powers. *See* 28 U.S.C. §§ 2071-77.

[137] These states are Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming. *State Intermediate Appellate Courts and General Trial Courts*, COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, https://bookofthestates.org/tables/2022-5-2/ [https://perma.cc/H885-NRUT] (last visited Apr. 2, 2025). Even though it is the only appellate court in the state, not every litigant has a right of appeal to the New Hampshire Supreme Court, which generally must accept jurisdiction over appeals but may decline to hear certain appeals, particularly in criminal contexts. N.H. Sup. Ct. R. 3, 7(1). North Dakota is often classified with these eight, and for good reason: it has an intermediate appellate court, but the court is subject to legislative reauthorization, hears only cases referred to it by the North Dakota Supreme Court, and decides cases extremely infrequently, hearing only ninety cases since 1987. *Court of Appeals*, N.D. CT. SYS., https://www.ndcourts.gov/supreme-court/court-of-appeals [https://perma.cc/Z5GD-Y4T4] (last visited Mar. 2, 2025). Nevada and West Virginia added intermediate appellate courts relatively recently. *About the Court of Appeals*, NEV. APP. CTS., https://nvcourts.gov/supreme/court_information/court_of_appeals [https://perma.cc/U9ZZ-CRSK] (last visited Mar. 2, 2025) (court established by voters in 2014); *Intermediate Court of Appeals: About the Court*, W.V. JUDICIARY, https://www.courtswv.gov/appellate-courts/intermediate-court-of-appeals/about-the-court [https://perma.cc/R4XV-NJJQ] (last visited Apr. 2, 2025) (court established by legislature in 2022).

[138] JOHN P. DOERNER & CHRISTINE A. MARKMAN, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE 4-5 (Nov. 2012), https://www.sji.gov/wp/wp-content/uploads/Report_5_CCJSCA_Report.pdf [https://perma.cc/DL3L-L3YD]. As of November 2012, nine state intermediate appellate court systems had "multiple courts with regional jurisdiction and independence or a single court with multiple locations and geographically assigned cases." *Id.* at 5.

[139] Both the California and Texas supreme courts grant roughly 10% of cases in which a petition for review is filed. STATE OF TEX. JUD. BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FY 2023, at 98, https://www.txcourts.gov/media/1459429/ar-statistical-fy23.

State courts also may have less reason to worry about legitimacy. It is debatable whether, at least today, judicial appointments and lifetime tenure increase public confidence in the judiciary.[140] For better or for worse, in contrast to the current seesaw of federal politics, control over state politics is less likely to shift dramatically from election to election,[141] leading to less political instability and decreased likelihood of disparities between judges' and other state actors' political views. And where judicial behavior threatens judicial integrity (or frustrates popular policymaking), citizens often have recourse at the ballot box, where they may be able to elect their judges[142] or change the text of their constitutions.[143] While there are valid criticisms of state judicial elections,[144] they weigh against a frequent concern of universal injunctions—that an unelected judge may override policy decisions made by an official acting on behalf of the populace.[145]

C. Limits on the Judicial Power

The theory for limiting universal injunctions that appears to have found the most purchase at the Supreme Court is that federal courts lack the

pdf [https://perma.cc/MAA7-2EB5]; JUD. COUNCIL OF CAL., 2025 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2014-15 THROUGH 2023-24, at 17 tbl.1 (2025), https://courts.ca.gov/system/files/file/2025-court-statistics-report.pdf [https://perma.cc/U7WA-MK3E]. While these numbers may seem low, they substantially exceed the U.S. Supreme Court's grant rate, which is around 3%. U.S. CTS., PETITIONS FOR REVIEW ON WRIT OF CERTIORARI TO THE SUPREME COURT COMMENCED, TERMINATED, AND PENDING 1, tbl.B-2 (Sept. 30, 2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_b2_0930.2022.pdf [https://perma.cc/4W5Y-AJV5].

[140] *See* Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx [https://perma.cc/UHL3-8HCU] (charting record-low confidence in U.S. judiciary).

[141] For example, few states currently have politically divided governments. *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 31, 2025), https://www.ncsl.org/about-state-legislatures/state-partisan-composition [https://perma.cc/7M3N-CRGG].

[142] Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1357 ("The vast majority [of state court judges] are elected."). Even where this is not the case, state court judges serve limited terms of office, allowing the elected branches an opportunity to weigh in more regularly. *Id.* at 1358. And while the appearance of partisanship may be a problem for judicial legitimacy at the federal level, it may not be in state courts *because* of judicial elections—citizens generally prefer to know what judges think about controversial topics if the judges will be ruling on them. James L. Gibson, *The Effects of Electoral Campaigns on the Legitimacy of Courts*, 59 SYRACUSE L. REV. 397, 411 (2009).

[143] Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 191, 196 (2023).

[144] *See, e.g.*, Marshfield, *supra* note 106, at 570 ("If courts are meant to operate as neutral arbiters maintaining constitutional balance and tension between branches as a protection against majority faction, then the election of judges may present obvious problems."); Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J. (Sept. 27, 2006, 12:01 AM), https://www.wsj.com/articles/SB115931733674775033.

[145] *See* Jack Thorlin, *Constitutional Hardball and Nationwide Preliminary Injunctions*, 18 DUKE J. CONST. L. & PUB. POL'Y 1, 46-47 (2023).

power to issue relief benefitting nonparties.[146] Regardless of its merits, this is a powerful argument because it is constitutional;[147] unlike consequentialist fretting about judicial legitimacy, it may be possible that the judiciary cannot reform itself and thus demands, at minimum, a legislative grant of additional authority.[148]

This theory has limited relevance for state courts, however. Although states follow the basic tripartite structure of government found in the federal Constitution[149] (and Massachusetts, in fact, served as its model[150]), "those surface-level similarities misrepresent state government and state constitutional design."[151] State courts are designed to operate differently—and they do, in ways that explain why state courts generally have the power to broadly invalidate constitutional enactments, even to the benefit of nonparties.

The separation-of-powers argument against universal injunctions arises from the federal judicial power, which is limited by the federal Constitution. But few state constitutions impose similar "case or controversy" constraints on the judicial power.[152] Rather, state constitutions often provide for broader state court jurisdiction by, for example, authorizing advisory opinions either expressly or impliedly.[153] And taxpayer standing is generally enough to get in the state courthouse door,[154] even as the U.S. Supreme Court has held that taxpayers generally suffer an insufficiently particularized injury to challenge the government's use of taxpayer dollars.[155] State courts have a long and varied history of hearing disputes that would be thrown out of federal courts.[156] Although state courts may demonstrate a troubling pattern of reflexively citing to and applying federal standing doctrine,[157] the

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[146] *See* Labrador v. Poe, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring in the grant of stay).

[147] The precise constitutional source of the federal equitable power is debated. *Compare* Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1221 (2023) (placing the court's equitable authority within Article III, Section 2), *with* Carlos M. Vázquez, *The Constitution as a Source of Remedial Law*, 132 YALE L.J.F. 1062, 1085 (2023) (arguing for its placement in the Supremacy Clause).

[148] *See* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 (1998).

[149] Marshfield, *supra* note 106, at 560.

[150] *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[151] Marshfield, *supra* note 106, at 561.

[152] *See supra* notes 79-80 and accompanying text.

[153] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844-52 (2001); Marshfield, *supra* note 106, at 570-71 (counting at least eleven states with advisory opinion authority).

[154] Hershkoff, *supra* note 153, at 1854-55.

[155] Frothingham v. Mellon, 262 U.S. 447, 488-89 (1923).

[156] *See generally* Hershkoff, *supra* note 153.

[157] *See* Dover Hist. Soc'y v. City of Dover Plan. Comm'n, 838 A.2d 1103, 1111 (Del. 2003); Moore v. City of Middletown, 975 N.E.2d 977, 982 (Ohio 2012); Pontbriand v. Sundlun, 699 A.2d 856, 861-62 (R.I. 1997); ATC South, Inc. v. Charleston Cnty., 669 S.E.2d 337, 339 (S.C. 2008); Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 769 N.W.2d 817, 825-26 (S.D. 2009); Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001); Hinesburg Sand & Gravel Co. v. Vermont, 693

on-the-ground reality demonstrates that state courts do not fully incorporate the federal justiciability standards.[158]

Relatedly, the legislative referendum power further safeguards against judicial overreach into policymaking. In nearly every state, the legislature has the authority to refer constitutional issues to the voters to overturn state court decisions.[159] When a state court facially invalidates a state law, a direct and proportional remedy exists for the offended legislature. And, taking a big-picture view, expanded judicial review makes sense for states, which as a whole enjoy broad powers; the balance of state powers is less likely to be upset by overreaching state judges when the legislative branch is not constrained to enumerated powers (which only increases the need for judicial review). Counterintuitively, while constitutional referenda and initiative powers—like judicial elections[160]—trigger majoritarian concerns,[161] here they counsel in favor of universal injunctions against unconstitutional laws, a tool that protects minority interests.

Conclusion

Increasingly, civil rights practitioners find roadblocks on the way to federal review of state constitutional violations and meaningful federal remedies for those violations. As litigation shifts to state courts, practitioners are looking for and finding opportunities within state constitutions, which are more broadly protective of individual liberties. We may finally be reaching an inflection point, as state courts become the courts of first resort for those looking to safeguard constitutional rights.

But a right without a remedy is no right at all, and limits on federal constitutional remedies are already threatening to seep into state courts. Litigants must think deeply about how to counter the inertia of federally developed limits on federal judicial power, and judges must demonstrate courage and creativity to resist the temptation of lock-stepping. While the task of independent state constitutional construction is difficult, it is both feasible and required to ensure consistency with state constitutions and to promote justice.

Universal injunctions are becoming unavailable in federal courts, and the arguments made in federal courts are already beginning to appear in state courts considering the constitutionality of state laws. As is often the case in

A.2d 1045, 1047-48 (Vt. 1997).

[158] Hershkoff, *supra* note 153, at 1842-67.

[159] Bulman-Pozen & Seifter, *supra* note 143, at 196.

[160] Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719, 728 (2010).

[161] Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 Stan. L. Rev. 1695, 1702 (2010).

state constitutional law, the responses of state courts to calls for limiting injunctive relief likely will—and should—vary. But when state courts must respond, they should start at zero. Despite the volume of the federal debate over universal injunctions, it offers little to state courts considering their own constitutional authority.