Equity, the Judicial Power, and the Problem of the National Injunction

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Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction* (2016), available at SSRN.

Samuel Bray's newest article tackles a topic of serious concern. The national injunction is an injunction against the enforcement of a federal statute or regulation against all people nationwide, not simply to protect the plaintiffs in one case. It is a powerful tool for political actors and interest groups who use litigation to accomplish regulatory and de-regulatory goals.

Unknown to traditional equity, the national injunction somehow wormed its way into judicial practice in the second half of the twentieth century and has been deployed with powerful effect through the present. Bray identifies some of the principal problems caused by the national injunction, investigates the changes that led to its emergence and spread, and offers a simple principle for limiting injunctive relief to the protection of plaintiffs. If adopted, Bray's prescription would end the national injunction.

Bray justifies his reform proposal as a translation of traditional equity principles, growing out of the institutional transformation of equity practice. England had only one Chancellor, one person empowered to issue injunctions. In the United States, by contrast, every federal trial judge is a chancellor when deciding on equitable relief.

That injunctions can extend beyond protecting individual plaintiffs to reach all people nationwide creates two big problems: an incentive to forum shop and a risk of conflicting injunctions.

The forum shopping point is easy to grasp. As Bray explains, "[i]t is no accident that the major national injunctions in the George W. Bush administration were issued by California courts, and the major national injunctions in the Barack Obama administration have been issued by Texas courts." The shopping is not just for trial judges, but also for appellate courts like the Ninth Circuit and the Fifth Circuit. "The pattern is as obvious as it is disconcerting."

The risk of conflicting injunctions is "less common," but still "potentially serious." Bray points to historical examples of conflicting injunctions, but the problem is not limited to the past. As Bray writes his article, for instance, cases were pending in the Eastern District of New York and the Northern District of Illinois seeking injunctions that would require the federal government to ignore a national injunction granted by a federal district court in Texas prohibiting enforcement of President Obama's deferred action immigration program.

By tracing these two problems to the institutional shift to multiple chancellors, Bray roots his reform proposal in traditional principles of equity practice. Because English equity practice had one chancellor, it did not need to develop solutions to the problems of forum shopping and conflicting injunctions.

At the same time, equity had principles limiting the scope of equitable relief, which must be translated to the setting of multiple chancellors. The rule Bray prescribes can be stated in terms of what an injunction against enforcement of a federal regulation or statute should and should not cover: "A federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant's conduct vis-à-vis non-parties." A "rule of thumb" for thinking this through is to look ahead to possible contempt proceedings: "an injunction should be no broader than what the plaintiffs—not in any kind of representative capacity, but solely for themselves—should logically be able to bring contempt proceedings to enforce."

Bray does not just make this rule up; he roots it in traditional equity, in which "injunctions did not control the defendant's behavior against non-parties." But Bray also acknowledges that "traditional equity never condensed its practice into a sharply defined principle" such as the one he advances. Again, the reason for this is historical and institutional. "With only one chancellor, and with a modest conception of what equitable relief was supposed to do, traditional equity did not need to develop rules [like this one] to constrain the scope of injunctive relief."

I am not normally one to quibble about article titles, but Bray's title may obscure the most interesting and important contributions of his article by highlighting just one. *Multiple Chancellors: Reforming the National Injunction* is a fine title for an article that does only what this review has thus far described.

But Bray's article does something more. And that something more provides an opening for additional promising scholarship seeking insight into conceptual transformations in the self-understanding of those exercising the judicial power of the United States.

As Bray recognizes, the "multiple chancellors" aspect of equity in the federal courts is a "structural precondition" of the forum shopping and conflicting injunction problems that stem from national injunctions. But it does not explain why such injunctions emerged with any frequency only in the second half of the twentieth century. We had multiple chancellors long before that.

Bray offers a tentative explanation that is compelling as far as it goes. He points to two "ideological shifts," along with judicial experience with desegregation decrees leading to creation of the Rule 23(b)(2) class action (that is, the class action for injunctive relief).

One "ideological shift" is in how judges think about suits for injunctive relief. The older conception was to view injunctions against enforcement as anti-suit injunctions, a defensive, plaintiff-protective conception. The newer conception understands a suit for injunctive relief as a challenge to the validity of a statute. In this way of thinking, the injunction-seeking plaintiff is on the offense.

This shift is closely related to another, which is a change in judges' conceptions of what they are doing vis-à-vis an unconstitutional statute. Under the older conception, a judge would decline to recognize an unconstitutional law or invalid regulation as applicable in resolving the case at hand. As applied in the anti-suit injunction context, this older conception would result in an injunction enjoining enforcement against the plaintiff. Under the newer conception, the judge "strikes down" the law or "sets aside" the regulation. Bray captures the import of this shift: "If a court considers a statute inconsistent with the Constitution, and thus does not apply it, nothing follows about the remedy…. But on the contemporary conception of what a court does—striking down or setting aside an unconstitutional statute or regulation—a national injunction begins to have a relentless logic."

In elaborating these conceptual shifts, Bray identifies other variables. Scholars, lawyers, and judges seeking to better understand how the federal judicial power has drifted into its present, confused state when it comes to the intersection of constitutional adjudication with injunctive relief would do well to follow up on these other variables.

One is passage of the federal Declaratory Judgment Act in 1933. By untethering cases from coercive relief, the Act may have transformed the idea of what makes a case fit for judicial resolution, as critics of the Act feared. Another is the rise of facial challenges, a term that reflects the offensive nature of constitutional adjudication. With the statute itself on the chopping block, constitutional adjudication is conceived less in terms of the rights and duties of the parties vis-à-vis each other under the law and more in terms of the court doing something to the statute itself. Finally, Bray points to the Administrative Procedure Act, which says that federal courts are to "set aside" unlawful agency action. When that action is a regulation promulgated after notice and comment, one sees the parallel with the idea of "striking down" a statute. The APA's language, Bray notes, is "less violent but still suggestive of physical dislocation."

Following Bray's lead, it is possible to probe the parallel between the shifting conceptions of judicial treatment of

invalid regulations and unconstitutional statutes and the origins of the phrase “judicial review.” While it is commonplace to treat “judicial review” of federal laws as extending back to Marbury v. Madison in 1803 (at least!), the phrase itself was not used to describe the practice until the early twentieth century. As used to describe the practice of refusing to recognize unconstitutional statutes, the phrase “judicial review” appears to have been imported from the practice of reviewing the legality of administrative regulations and orders.

When one burrows deeper into the origins of the national injunction, one recognizes that the metastasis of injunctive relief is just one symptom of a broader pathology afflicting the federal judiciary. Most federal judges’ conception of what they are doing when entering injunctive relief against the enforcement of an invalid regulation or an unconstitutional statute is removed not only from traditional equity but also from traditional understandings of the judicial power itself. Bray’s prescription treats this symptom, and his description helps us understand related problems such as injunctions against the enforcement of statutory provisions that do not even apply to plaintiffs obtaining the injunction. Bray’s article can help the judiciary put one problem—the problem of national injunctions—to rest. And it provides a needed alert to the existence of others.

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