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CONSTITUTIONALIZING EQUITY: CONSEQUENCES OF BROADLY INTERPRETING THE "MODERN RULE" OF INJUNCTIONS AGAINST DEFAMATION

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In 1931, the Supreme Court decided *Near v. Minnesota*,[1] a landmark freedom of the press case involving a claim against *The Saturday Press*, an anti-Semitic scandal-sheet and extortion racket.[2] As one longtime Minneapolis reporter said, *The Saturday Press* "was

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1. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

2. Fred W. Friendly, Minnesota Rag 33 (Random House 1981).

a shakedown completely."[3] In fact, the editor of the newspaper admitted that he had engaged in at least one instance of blackmail.[4] The editors also commonly took money from local politicians in exchange for running scandalous stories about their rivals.[5] A lower court issued a permanent injunction against the newspaper, and the paper was shut down and forbidden from resuming operations until it could show the court that it had changed its ways.[6]

The Supreme Court struck down the injunction, announcing that "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication."[7] The majority seemed to think that the injunction was self-evidently such a "previous restraint" and thus could not stand.[8] Thus the decision in *Near* marked the first time the Court introduced the idea that injunctions against defamation may be invalid prior restraints.[9] However, the seemingly categorical rule that the Court announced actually masked a deep inconsistency regarding what exactly constitutes a "previous restraint" that is still unresolved today.

Justice Butler, writing for the four dissenters in *Near*, took issue with the majority's assumption that the injunction constituted a "previous restraint." He wrote that "[t]he Minnesota statute does not operate as a previous restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors[,] but prescribes a remedy to be enforced by a suit in equity."[10] In Justice Butler's view, the judicial process had worked exactly as it should: "The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance."[11] In other words, how could the injunction be considered a "prior" restraint if it came only after a full trial and all the due process of law one could ask for? The majority did not respond to Justice Butler's argument, perhaps hoping that some future court would offer a more consistent theory of injunctions against defamation. However, the Supreme Court has yet to settle the matter.

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3. *Id.*
4. *Id.* at 34–35.
5. *Id.* at 35.
6. *Near,* 283 U.S. at 706.
7. *Id.* at 713.
8. *Id.*
9. *Id.*
10. *Id.* at 735 (Butler, J., dissenting).
11. *Id.*

In the absence of clear guidance from the Supreme Court, several views have emerged. Some courts and scholars have argued that no injunctions against defamation are permissible, while others have argued that the prior restraint doctrine is simply wrong—the First Amendment puts no limits on a court's power to issue injunctions against defamation. The most popular view among the lower courts—what one court has called the "modern rule"[12]—allows such injunctions as long as they are limited to restraining speech that has been *specifically adjudicated to be unlawful*. In other words, this prevailing standard says that injunctions against defamation must be narrowly tailored, but it is unclear how narrow this tailoring must be. At one extreme, this requirement could essentially amount to strict scrutiny, which almost no injunction could survive. At the other extreme, a broad view would subject injunctions against defamation merely to the same tailoring requirement that general equity principles impose on all injunctions.

The broad interpretation, which subjects injunctions against defamation only to traditional equitable limitations, is generally assumed to be a non-starter because it seems tantamount to abandoning any First Amendment restrictions on injunctions in defamation cases. This Article will argue against that assumption. There is an important difference between stating that there are no First Amendment limitations on injunctions and stating that there *are* First Amendment limitations, but they are exactly coterminous with the limitations imposed by ordinary equitable principles. Although in some sense they are the same standard, the latter, but not the former, has a constitutional dimension. Even if the limitations on a judge's discretion are the same, constitutionalizing those limitations has important consequences.

This argument will proceed in four parts. Part I provides a history of the use of injunctions against defamation and outlines the range of current views on the issue. Part II discusses the most compelling current view—the so-called "modern rule" that injunctions are permissible as long as they are limited to speech specifically adjudicated to be unlawful—and offers several possible interpretations of this principle. Part III discusses a broad interpretation of the modern rule, an interpretation that subjects injunctions against defamation only to the ordinary tailoring requirement for all injunctions derived from general equity principles. Part IV then discusses the consequences of such an

12. Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 308 (Ky. 2010).

interpretation. Although constitutionalizing equity in this way would subject injunctions against defamation to the same limitations as all injunctions, it would also change federal court jurisdiction, limit remedies that legislatures can adopt by statute, and reinvigorate attempts to define and limit equity power.

I.
THE HISTORY OF INJUNCTIONS AGAINST DEFAMATION

Although *Near v. Minnesota* brought the issue to the fore, the principle that "equity will not enjoin a libel" has existed since well before the founding of the United States.[13] This Part will discuss the history of this rule, as well as the history of prior restraints more generally. This overview will show that the doctrine of prior restraints is well-born but ill-bred: It emerged from a common-sense reaction to specific historical practices, but the Supreme Court has never offered a compelling rationale for the rule or a clear definition of its scope. This Part will first evaluate the history of the doctrine from early England to recent Supreme Court cases. It will then show that despite the dearth of guidance from the Supreme Court, lower courts have begun to coalesce around a standard to govern injunctions against defamation—the so-called modern rule.

The rule against enjoining defamation and the more general presumption against prior restraints originated as reactions to the excesses of the Star Chamber. Before the Star Chamber was created in the fifteenth century, English courts had all been divided into common-law courts and the Courts of Chancery. Common-law courts applied the common law and statutory law. Courts of Chancery were meant to be more flexible supplements to the sometimes rigid law, and they were authorized to depart from the letter of the law in the name of the "king's conscience."[14] In the 1600s, the Chamber declared libel to be a crime and began to prosecute it aggressively.[15] Punishments ranged from fines to "pillory and loss of

13. *See* Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740, 746 (Neb. 1997) ("One of the unwavering precepts of the American law of remedies has long been the axiom that equity will not enjoin a libel.") (quoting RODNEY A. SMOLLA, LAW OF DEFAMATION § 9.13(1)(a) (1996)).

14. *Equity*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* GEORGE T. BISPHAM, THE PRINCIPLES OF EQUITY 1–2 (Joseph D. McCoy ed., 11th ed. 1931).

15. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 563 (1903). Before the 1600s, courts generally did not make the now common distinction between written libel and spoken slander. Rather, they distinguished defamations based on how publicly they were expressed, reserving the harshest punishments for widespread songs and epigrams. *Id.* at 565.

[one's] ears."[16] At the same time, common-law courts retained jurisdiction over defamation claims for damages.[17] In addition to criminalizing libel, the Star Chamber also introduced a licensing scheme for printing. It limited the number of printing presses to twenty and strictly monitored who used them.[18]

After the Star Chamber was abolished in 1641, the crime of libel was slowly abandoned.[19] Although common-law courts maintained jurisdiction over defamation actions for damages, the Court of Chancery was reluctant to take up the power that the Star Chamber had wielded.[20] By the mid-eighteenth century, this reluctance had become an established principle. In the *St. James Evening Post Case* of 1742, Lord Hardwicke ruled that courts of equity simply had no jurisdiction over libel or slander cases.[21] This rule eventually became a canonical feature of British and, later, American law.

The licensing system persisted somewhat longer, but after impassioned pleas from John Milton and others, it was allowed to lapse in 1694.[22] Soon after Lord Hardwicke canonized the ban on injunctions against defamation, Sir William Blackstone gave a passionate argument justifying the end of the licensing statute.[23] In his Commentaries, Blackstone defined freedom of the press as freedom from such administrative licensing schemes, arguing that the old law "subject[ed] all freedom of sentiment to the prejudices of one man."[24]

In short, by the late eighteenth century, British judges and thinkers had resolved not to repeat either of the two great mistakes of the Star Chamber: enjoining defamation or licensing printing presses. At the same time, scholars began to see these practices not as two distinct problems, but as two aspects of a greater principle that, whether imposed by judges or bureaucrats, speech should not be subject to "prior restraint." In 1775, Jean DeLolme, a Swiss politi-

16. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 309 (2001) (quoting Veeder, *supra* note 15, at 546, 565).

17. *Id.* at 309.

18. Veeder, *supra* note 15, at 568.

19. Meyerson, *supra* note 16, at 310.

20. *Id.*

21. Roach v. Garvan, 26 Eng. Rep. 683, 683 (1742) (popularly known as the *St. James Evening Post Case*). *See* Meyerson, *supra* note 16, at 310 (discussing this case and its influence on the law of prior restraints).

22. *See* JOHN MILTON, AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENS'D PRINTING, TO THE PARLIAMENT OF ENGLAND (1644).

23. 4 WILLIAM BLACKSTONE, COMMENTARIES *150–*53 (1769).

24. *Id.* at *152.

cal theorist who deeply influenced the American revolutionaries, wrote: "The liberty of the press . . . consists . . . in this,—that neither the courts of justice, nor any judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed."[25] This principle has survived in some form or another ever since.

In the United States, the adoption of the First Amendment and similar provisions in state constitutions raised the important question of whether and to what extent these new constitutions incorporated the rule banning injunctions against defamation. Before 1931, the question was rarely addressed by the federal courts, and, in general, the Supreme Court seemed unsympathetic to First Amendment claims at that time.[26] However, several state court decisions during the nineteenth century made clear that the rule against prior restraints was alive and well. In 1827, for example, New York adopted a law forbidding restrictions on the press prior to publication,[27] and a court enforcing the law held that equity courts could not take jurisdiction of such libel claims "without infringing upon the liberty of the press."[28] To do otherwise, the court reasoned, would be inconsistent with "the principles of a free government."[29] Similarly, in 1876, a Missouri court found that its state constitution forbade injunctions against libel.[30] A Louisiana court followed in 1882, holding that without such protection against prior restraint, "the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed."[31] In the early twentieth century, the Supreme Courts of Oregon, Nebraska, and Alabama all interpreted their respective state constitutions to offer the same protections.[32] Until 1931, however, it was uncertain what the federal Constitution had to say about the matter.

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25. JEAN DELOLME, THE CONSTITUTION OF ENGLAND 203 (John MacGregor ed. 1853) (1775).

26. *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 129, 131 (1997) ("[N]o major casebook on constitutional law includes a single decision before 1917 in its section on freedom of expression . . . . [And] [n]o court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case.").

27. Meyerson, *supra* note 16, at 324.

28. Brandreth v. Lance, 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

29. *Id.*

30. Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, 176, 179–80 (Ct. App. 1876).

31. State *ex rel.* Liversey v. Judge of Civil Dist. Court, 34 La. Ann. 741, 745 (La. 1882).

32. Balliet v. Cassidy, 104 F. 704, 706 (D. Or. 1900); Howell v. Bee Publ'g Co., 158 N.W. 358, 359 (Neb. 1916); Citizens' Light, Heat & Power Co. v. Montgomery

Near v. Minnesota was a watershed moment. H.L. Mencken described it as "the most noble opportunity that the Supreme Court in all its history faced" and believed it was "of more value to human liberty in this world than a dozen bogus wars to save democracy."[33] It certainly was important. Adopting the rule against prior restraints as federal constitutional law surely meant something, but even today, no one seems to know exactly what.

Although the Supreme Court has decided many cases involving injunctions against defamation and other prior restraints since *Near*, it has done little to grapple with the conceptual foundations of the doctrine. In *Organization for a Better Austin v. O'Keefe*,[34] the first Supreme Court case to address injunctions against defamation since *Near* was decided forty years earlier, the Court struck down an injunction as a prior restraint because it "operate[d], not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000."[35] In *New York Times Co. v. United States*, decided the same year, the Court's uncertainty was on full display: nine separate opinions were issued in the case, none agreeing on the proper standard to be utilized.[36] Additionally in *Nebraska Press Ass'n v. Stuart*, the Court offered only the observation that "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."[37] Even today, courts rarely offer reasoned rationales for why certain restrictions constitute prior restraints. Too often, a prior restraint is identified in the same way that Justice Stewart identified obscenity: "I know it when I see it."[38]

II.
THE MODERN RULE OF INJUNCTIONS AGAINST DEFAMATION

In the absence of clear guidance from the Supreme Court, several views have emerged among lower courts and scholars about the scope and vitality of the bar on permanent injunctions against defa-

Light & Water Power Co., 171 F. 553, 556 (M.D. Ala. 1909). See *infra* note 47 for some of the later state courts adopting the rule and the rationales that they offered.

33. FRIENDLY, *supra* note 2, at iii.
34. 402 U.S. 415 (1971).
35. *Id.* at 418–19.
36. 403 U.S. 713 (1971).
37. 427 U.S. 539, 559 (1976).
38. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

mation. Some courts have found that no injunctions, preliminary or permanent, can ever be issued against defamation. The most popular view, however, allows for injunctions as long as they target only speech that has been specifically adjudicated to be unlawful.

A. A Spectrum of Views

Several circuit courts of appeals still categorically forbid injunctions against defamation. For example, the D.C. Circuit has said that it follows "[t]he usual rule . . . that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages."[39] The First, Second, and Fourth Circuits have all similarly held that injunctions are unavailable in defamation cases.[40] These courts rely on various rationales. Some argue that injunctions are particularly harmful forms of prior restraint that are virtually never justified.[41] Others argue that common-law damages will always be a sufficient remedy and, as a result, an injunction will never be necessary.[42] Scholars have made similar arguments, based on many rationales, including "the historical condemnation of injunctions in such actions, the inherent adequacy of money damages, and the inevitable futility of crafting an injunction that is both effective and narrowly tailored."[43]

On the other side of the spectrum, some scholars have argued that the prohibition on prior restraints is incoherent and unjustified, and, therefore, injunctions against defamation should be subject to no special disfavor. For example, Professor John Jeffries has argued that even if the prior restraint doctrine made sense at some point, "[i]ts historic role in protecting freedom of expression has been superseded by the expanded substantive coverage of the First Amendment and by the development of other, and more apt, tech-

39. Metro. Opera Ass'n v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001) (quoting Cmty for Creative Non-Violence v. Pierce, 814 F.2d 663, 667 (D.C. Cir. 1987).

40. *Id.* at 177; *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986); Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967).

41. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 792 (1994) (Scalia, J., dissenting) ("[A] restriction upon speech imposed by injunction . . . is at least as deserving of strict scrutiny as a statutory, content-based restriction.").

42. *See Metro. Opera Ass'n*, 239 F.3d at 177.

43. Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 167 (2007); *see also* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 18–41 (2013) (collecting arguments justifying the no-injunction rule).

niques for implementing that guarantee."[44] Professor Jeffries advocates abandoning prior restraints as an independent category. Only slightly less dramatically, Professor Marin Scordato has argued that the only coherent nub of the prior restraint doctrine is a prohibition on actual physical restraint—all other forms of restraint, including injunctions, should be subject to no special disfavor under the First Amendment.[45] Essentially, these scholars believe that the First Amendment has little to say about injunctions against defamation *per se*, and that other categories such as equitable limitations or substantive protections for speech are sufficient to provide any necessary protections. Such a rule is squarely contrary to Supreme Court precedent, and no court has adopted it. Nevertheless, it remains influential in academic discussions of the doctrine.[46] Under this view, in enjoining defamation, judges may be subject to the same equitable limitations that they face in ordinary injunction cases, but these restrictions have no constitutional importance.

B. The Origin and Prevalence of the Modern Rule

Despite this diversity of views, many federal and state courts seem to be coalescing around a standard that recognizes the vitality of the prior restraint doctrine without treating it as a categorical bar on injunctions against defamation. This "modern rule" allows injunctions as long as they restrict only speech that has been specifically adjudicated to be unlawful.[47]

The first whisperings of this principle came in the area of obscenity. In the 1957 case of *Kingsley Books, Inc. v. Brown*,[48] the Supreme Court upheld a "limited injunctive remedy, under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be ob-

44. John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 434 (1983).

45. *See* Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 34 (1989) (arguing that prior restraint doctrine should be limited to actual physical restraint because "(1) actual physical restraint is a far more practically effective form of speech suppression than any scheme of threatened legal sanction that is not imposed until after the public expression of the prohibited speech; (2) every instance of a prior restraint actually will result in the suppression of speech; and (3) every mistake made in the implementation of a prior restraint will involve the actual suppression of constitutionally protected speech").

46. *See* Ardia, *supra* note 43, at 42–52 (discussing contemporary criticisms of Supreme Court precedent).

47. *See* Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 308 (Ky. 2010) (describing this as the "modern rule").

48. 354 U.S. 436 (1957).

scene . . . ."[49] However, the Court distinguished *Near v. Minnesota* at least partly on the grounds that it involved defamation rather than obscenity.[50] In 1975, both the Ohio and Georgia Supreme Courts followed this rule to its logical conclusion and applied it to defamation.[51] The Georgia court found that a permanent injunction did not constitute a prior restraint because it allowed "publication of further reports on [the defendant], provided there is no repetition of the exact allegations found to have been libelous."[52]

A decade later, Minnesota adopted the rule, and since that time similar decisions have slowly trickled in from other state and federal courts.[53] Among the federal courts, the Third, Fifth, Sixth, and Ninth Circuit courts of appeals have either adopted some version of the rule or expressed sympathy with it.[54] Among the states, the supreme courts of California, Kentucky, and, most recently, Texas have done the same, joining Ohio, Georgia, and Minnesota in adopting what the Kentucky Supreme Court has described as "the modern rule."[55]

The Supreme Court had an opportunity to evaluate this theory in 2005 in *Tory v. Cochran*,[56] but it ended up deciding the case on narrower grounds. Ulysses Tory had been dissatisfied with Johnnie Cochran's representation of Tory in his claim against law enforcement officials, and he intended to let the world know it.[57] Tory marched around Cochran's office carrying signs accusing Cochran of being a "bad boy" and "a crook, a liar, and a [t]hief."[58] The trial court issued an injunction forbidding Tory or anyone "acting in

49. *Id.* at 437 (internal quotation marks omitted).

50. *Id.* at 445 ("Unlike *Near*, [the statute at issue] is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive.").

51. *See* O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753 (Ohio 1975); Retail Credit Co. v. Russell, 218 S.E.2d 54 (Ga. 1975).

52. *Retail Credit Co.*, 218 S.E.2d at 62–63.

53. Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984).

54. *See* Kramer v. Thompson, 947 F.2d 666, 676 (3d Cir. 1991); Brown v. Petrolite Corp., 965 F.2d 38 (5th Cir. 1992); Lothschuetz v. Carpenter, 898 F.2d 1200, 1206 (6th Cir. 1990); San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1234 (9th Cir. 1997).

55. *See Hill*, 325 S.W.3d 302, 308 (Ky. 2010); *see also* Kinney v. Barnes, 443 S.W.3d 87, 97 (2014). Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846, 856 (Cal. 1999); *Advanced Training Sys., Inc.*, 352 N.W.2d at 11; *O'Brien*, 327 N.E.2d at 753; *Retail Credit Co.*, 218 S.E.2d at 62.

56. 544 U.S. 734, 736 (2005).

57. Chemerinsky, *supra* note 43, at 158–59.

58. *Id.* at 160.

concert" with him from picketing or "orally uttering statements about Cochran and/or Cochran's law firm."[59] The lower court upheld the injunction by adhering to the modern rule that "[o]nce there has been a final adjudication on the merits that the speech is unprotected, an injunction restraining that speech does not constitute an impermissible prior restraint."[60]

The Supreme Court granted certiorari to resolve "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."[61] However, soon after oral argument in the case, Johnnie Cochran died.[62] The Court held that the changed circumstances made it unnecessary to fully answer the question on which certiorari had been granted.[63] Instead, it simply noted that with Cochran's death, "the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification."[64] Although this short disposition gives little guidance, the concerns it identified are fully consonant with the general principle that certain narrowly-tailored injunctions should not be considered disfavored prior restraints. The Court recognized that the breadth of the remedy was key to determining whether it is constitutionally suspect.[65] Presumably, a more narrowly tailored injunction may not constitute such an "overly broad prior restraint."

Thus, the modern view is not only the most popular standard among the lower courts, but the Supreme Court is arguably sympathetic to it as well. Although it is stated slightly differently in each court, the general rule is that "once a judge or jury has made a final determination that the speech at issue is defamatory, the speech determined to be false may be enjoined."[66] This "modern" standard is often offered without detailed theoretical justification, but it is in fact a logical consequence of a theory of prior restraints based on

59. *Id.* at 161 (quoting Joint Appendix, Tory v. Cochran, 544 U.S. 734 (2005), No. 03-1488, 2004 WL 2891867, at *34).

60. Cochran v. Tory, No. B159437, 2003 WL 22451378, at *3 (Cal. Ct. App. Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005). Like most such cases, this decision did not actually use the phrase "modern rule."

61. *Tory*, 544 U.S. at 736.

62. *Id.* at 738.

63. *Id.* at 737–38 .

64. *Id.* at 738.

65. *Id.*

66. *Id.* The Ohio Supreme Court gave a similar formulation in 1975: "Once speech has judicially been found libelous, . . . an injunction for restraint of continued publication of that same speech may be proper." O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753, 755 (Ohio 1975).

due process concerns.[67] This theory was introduced by Professor Martin Redish, who has argued that the crucial moment in distinguishing prior restraints is not the moment of publication but the moment in which final judgment is entered.[68] Under this view, a restraint is worrisome not when it is issued prior to publication of the material, but when it is made without a full and fair judicial proceeding determining that the restraint is proper. In essence, the principle is that, in the First Amendment context, courts should be extremely careful to avoid false positives—restrictions on speech that turn out to have been unlawfully imposed.[69] Courts, therefore, cannot restrict or punish speech until they are sure that it is not constitutionally protected, a determination that is possible only after a full trial.[70]

Under this standard, Redish asserts, "Most disfavored would be nonjudicial administrative licensing schemes, while the least problematic would be permanent judicial injunctions issued after trial. Somewhere in between are judicially issued preliminary injunctions and temporary restraining orders."[71] Redish argues that preliminary injunctions should be issued only in exceptional circumstances and should not be subject to the collateral bar rule, which states that a person can be held in contempt for violating a court order even if the order later turns out to have been issued unconstitution-

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67. *See, e.g.*, *supra* notes 47–64.

68. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55–56 (1984).

69. This desire to avoid false positives has been described as a feature of *New York Times v. Sullivan*'s actual malice standard for defamation actions against public officers. *See* Josh M. Parker, *The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions*, 78 U. CHI. L. REV. 1503, 1532 (2011).

70. One other exception to the general rule against prior restraints involves injunctions against speech that violates property rights. *See, e.g.*, Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Employees of Am., C.I.O., 400 Ill. 38, 42 (Ill. 1948) ("The rule long in force was that in the absence of the showing of a violation of some property right, or some breach of trust or of a contract, an injunction was not available to prevent actual or threatened publications of a defamatory character."). The provenance and justifications for this rule implicate important questions of constitutional law and equity jurisdiction, but they are outside the scope of this Article. For a recent discussion of the issue, and an argument that the distinction is mostly incoherent, see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing that at the very least, publications that are alleged to infringe copyrights should not fall into the "property rights" exception to the general rule against prior restraints).

71. Redish, *supra* note 68, at 57.

ally.[72] In contrast, he claims, "Most of the problems plaguing the use of preliminary injunctive relief against expressive activity are irrelevant to the issuance of permanent injunctive relief following a full trial because all of the procedural protections necessary for a full and fair adjudication are present."[73]

The modern rule that limits permanent injunctions to speech specifically found to be defamatory is essentially an application or extension of Redish's principle. Redish properly recognized that premature decision-making is a serious problem, but what he did not realize is that this problem is not limited to preliminary injunctions; permanent injunctions can also restrict speech that has not been fully adjudicated and found to be defamatory. All preliminary injunctions will be disfavored under this rule because they necessarily occur before a full adjudication. A permanent injunction can also cross this line if it sweeps so broadly that it restricts speech that the court did not specifically consider and find to be defamatory. In other words, for some permanent injunctions, the problem is not that the adjudication is abbreviated, but that the full adjudication results in an order against speech not before the court.

The purpose of this Article is not to argue that this is the best theory of prior restraints. Indeed, in many ways it is seriously lacking. For example, there is good reason to think that a preliminary injunction is less harmful to speech than a permanent injunction. After all, a preliminary injunction is only temporary.[74] A preliminary injunction automatically expires after a certain time without any more judicial process, whereas a defendant cannot get out from under a permanent injunction without a dissolution order.[75] Addi-

72. *See id.* at 98 ("If in [emergencies] the traditional justifications for the collateral bar rule prove unacceptable, the government will never be able to establish a sufficiently compelling interest to prevent a defendant's collateral challenge at a contempt proceeding of the constitutionality of that restraining order.").

73. *Id.* at 89. This principle also has some support in Supreme Court precedent. For example, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, the Court noted that while it had "boldly stepped beyond [its previous] narrow doctrine in *Near v. Minnesota* . . . in striking down an injunction against further publication of a newspaper found to be a public nuisance, it has never held that all injunctions are impermissible." 413 U.S. 376, 390 (1973).

74. Further, courts often make an attempt to hasten the proceedings of a trial to minimize even this temporary deprivation. 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2950 (3d ed. 2014).

75. Even more conservatively, courts can issue conditional preliminary injunctions, so that the restriction does not attach at all in certain circumstances. *See, e.g.*, Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528 (1960) (upholding an injunction against a strike conditioned on management maintaining the status quo).

tionally, this theory still allows speech to be subject to "the prejudices of one man."[76] However, even if it is not normatively attractive, the modern rule at least makes sense. If the world were born anew, it may be better simply to abandon the prior restraint doctrine or to splinter it into several rules without a unifying principle. Nonetheless the Supreme Court seems committed to maintaining prior restraints as a distinct category. The modern view may be the best coherent standard that can be crafted from the crooked timber of First Amendment jurisprudence.

Despite its drawbacks, the modern view seems to be well-accepted, and recent cases suggest that it may be the framework under which future cases will be decided. It is, therefore, a force to be reckoned with, even if not to be recommended. The aim of this Article is to investigate possible implications of this rule.

C. The Indeterminacy of the Modern Rule

The modern view of injunctions against defamation resolves many of the conceptual difficulties surrounding injunctions against defamation, but it raises many questions of its own. In particular, it is unclear what speech should be considered to have been "specifically subject to adjudication." In other words, injunctions against defamation must be somewhat narrowly tailored, but it is unclear how narrowly. This is essentially the same question that divided the Court in *Near*. Chief Justice Hughes believed that the blanket ban on any future publication went beyond the specific defamation at issue and therefore constituted a prior restraint.[77] Justice Butler, on the other hand, noted that the trial was about whether the newspaper was a nuisance, and, as a result, the remedy covered only what had been specifically adjudicated.[78]

This is essentially a matter of defining the "unit of speech" subject to adjudication. For example, if the unit of speech—that is, what was adjudicated—consisted of certain words, the defendant can be enjoined from using those precise words. Alternatively, if what was adjudicated was something narrower, such as certain

76. *See supra* note 23 and accompanying text.

77. *See Near*, 283 U.S. at 628–29 (describing the unconstitutional breadth of the remedies authorized by the statute). *See also infra* note 166 and accompanying text.

78. *Near*, 283 U.S. at 735 (Butler, J., dissenting) ("[The Minnesota statute] does not authorize administrative control in advance such as was formerly exercised by the licensers and censors, but prescribes a remedy to be enforced by a suit in equity."). For further discussion of the importance of this disagreement between the majority and dissenting opinions, see *infra* note 169 and accompanying text.

words in a certain context, an injunction may extend only to uses of those words in that context. The courts that have adopted the modern rule have rarely explicitly discussed this tailoring concern. Nevertheless the issue is evident in the varying degrees of leniency with which the rule has been applied. For example, in *Balboa Island Village Inn v. Lemen*,[79] the California Supreme Court adopted a fairly broad view of what had been specifically adjudicated to be unlawful. The case involved a dispute between a bar and its vindictive neighbor.[80] The neighbor, Lemen, had complained constantly about noise and disruption from the bar, videotaped the premises for hours on end, and scared potential customers away with sordid tales of sex and scandal within. After a full trial, the lower court issued an injunction prohibiting Lemen from making the following defamatory statements about Plaintiff to third persons: Plaintiff sells alcohol to minors; Plaintiff stays open until 6:00 a.m.; Plaintiff makes sex videos; Plaintiff is involved in child pornography; Plaintiff distributes illegal drugs; Plaintiff has Mafia connections; Plaintiff encourages lesbian activities; Plaintiff participates in prostitution and acts as a whorehouse; Plaintiff serves tainted food.[81]

The California Supreme Court struck down the injunction as applied to others "in active concert" with Lemen but upheld it as applied to Lemen herself.[82] The court held that because it had been determined at trial that Lemen had defamed the plaintiff, "the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory."[83] The court recognized that this could prevent Lemen from making even truthful statements, if, for example, the bar began selling alcohol to minors. The court therefore stated that "[i]f such a change in circumstances occurs, [the] defendant may move the court to modify or dissolve the injunction."[84] However, even this argument recog-

79. 165 P.3d 339 (Cal. 2007).

80. California had originally adopted a similar rule in the context of discriminatory statements in the case of *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846, 858 (Cal. 1999), in which it upheld an injunction prohibiting a defendant found guilty of employment discrimination from using certain words or phrases in the future.

81. 156 P.3d at 342.

82. *Id.* at 352. The court justified this limitation on the grounds that "[t]here is no evidence in the record . . . to support a finding that anyone other than Lemen herself defamed defendant, or that it is likely that Lemen will induce others to do so in the future." *Id.*

83. *Id.* at 349.

84. *Id.* at 353.

nized that the injunction covered speech that may not be defamatory.

A dissent argued that the majority opinion was flawed because of its "failure to appreciate that whether a statement is defamatory cannot be determined by viewing the statement in isolation from the context in which it is made."[85] In other words, the majority had not properly identified the defamatory speech and, as a result, ended up approving an insufficiently tailored injunction. Words themselves are not inherently defamatory, the dissent claimed, they are only defamatory in certain contexts, and thus an injunction cannot restrict their use in all circumstances. The dissent argued that such a restriction on possibly truthful speech was a classic prior restraint.[86]

Even more broadly, as discussed above, the California court that was overturned by the Supreme Court in *Tory v. Cochran* had allowed an injunction that covered not only Tory himself, but anyone "in concert" with him. The injunction also covered an extremely wide range of statements—indeed, it forbade Tory from making *any* "statements about Cochran and/or Cochran's law firm."[87] The court justified its holding by appealing to the modern view that "[o]nce there has been a final adjudication on the merits that the speech is unprotected, an injunction restraining that speech does not constitute an impermissible prior restraint."[88] Nevertheless, to forbid *any* statements about Johnnie Cochran seems to be an extremely expansive interpretation of that standard.

On the other hand, some courts have interpreted the limitation more narrowly. For example, in the Minnesota case of *Griffis v. Luban*,[89] an online chatroom scuffle broke into real-world litigation. Luban had allegedly damaged Griffis's reputation on the message board of an Egyptology newsgroup. After trial, the court issued

85. *Id.* at 356.

86. *Id.* (Kennard, J., concurring and dissenting) ("Because the injunction here makes no allowance for context, it muzzles nondefamatory speech entitled to full constitutional protection."). A concurrence made the interesting argument, reminiscent of Martin Redish, that the injunction should stand, but that the defendant should be able to assert a defense of truth to any contempt proceedings. *Id.* at 353 (Baxter, J., concurring); *see* Cochran v. Tory, 544 U.S. 734 (2005) (describing Redish's argument that under prior restraint doctrine, some injunctions should not be subject to the collateral bar rule).

87. Cochran v. Tory, No. B159437, 2003 WL 22451378, at *5–*6 (Cal. Ct. App. Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005).

88. *Id.* at *8.

89. Griffis v. Luban, No. CX-01-1350, 2002 WL 338139 (Minn. Ct. App. Mar. 5, 2002).

an injunction forbidding Luban from making certain statements about Griffis, including that she is a "liar," a "phony," a "con-artist," or—that most unkind of schoolyard insults—that she is not an Egyptologist.[90] The court struck down the injunction, finding that "because this provision is not restricted to any particular context, i.e., postings to the Egyptology newsgroup, the injunction has the effect of prohibiting Luban from calling Griffis 'a liar' even if to do so in another context would not be defamatory."[91] For example, the court said that this injunction would prohibit Luban from calling Griffis a liar even if she said, "John F. Kennedy was never President of the United States."[92] Limiting the injunction even to specific words was not enough. Since defamation only occurs within a context, the injunction must be limited to that context.[93]

In *Brown v. Petrolite Corp.*,[94] the Fifth Circuit also adopted an even narrower interpretation when it evaluated a permanent injunction against an oil services company for allegedly defamatory statements that it had made based on certain tests and samples of a competitor's products.[95] The defendant argued that the injunction was overbroad.[96] The court offered little analysis and did not address whether the injunction constituted a prior restraint, but it did agree that "injunctions must be narrowly drawn and precise."[97] Because the injunction before it was not properly tailored, the court remanded to allow the trial court "to narrow its previous language so as to enjoin the dissemination of information relating to the tests and samples that were the subject of the underlying suit and not of independent, reliable information that Petrolite may acquire in the

90. *Id.* at *1.

91. *Id.* at *6.

92. *Id.*

93. In deciding this case, the Minnesota Supreme Court applied the rule that it had adopted decades earlier in *Advanced Training Systems v. Caswell Equipment, Co.*, 352 N.W.2d 1 (1984). In that case, Caswell had published numerous "bulletins" and a book libeling Advanced Training Systems, a rival police training firm. *Id.* at 1. The publications had claimed that Advanced Training Systems used "gimmicks" that, while appearing harmless, in fact trained police improperly and thereby put them in danger. After a full trial, the lower court issued an injunction against Caswell forbidding it from republishing certain versions of its previous bulletin and the book. The court upheld the injunction allowing permanent injunctions against defamation "so long as the suppression is limited to the precise statements found libelous after a full and fair adversary proceeding." *Id.* at 11.

94. 965 F.2d 38 (5th Cir. 1992).

95. *Id.*

96. *Id.* at 50.

97. *Id.* at 51.

future."[98] This forbade the defendant from making statements based on the information it had at the time of trial. Nevertheless, the court recognized that new information could make what was once defamatory paranoia into a truthful warning if it turned out that the plaintiffs' products were indeed harmful.

Thus, while the *Balboa* and *Tory* cases represent a broad interpretation of the rule that courts can enjoin speech that has been determined to be defamatory, the *Griffis* and *Petrolite* cases offer a narrower interpretation. But these may not be stable positions. As the following section will show, a principled application of the rule may in fact be so narrow as to allow almost no injunctions at all against defamation.

D. Is the Modern Rule Self-Defeating?

Although the *Griffis* and *Petrolite* cases adopt a somewhat narrow position, there are even narrower interpretations of the modern rule. In fact, Erwin Chemerinsky, who represented Ulysses Tory before the Supreme Court, has argued that the modern rule is in fact so narrow that it is self-defeating: Any principled application of it would necessarily be so cramped that no injunction against defamation could ever pass muster. Under this view, "[a]ny *effective* injunction will be overbroad, and any *limited* injunction will be ineffective."[99]

In one sense, it is clear that any injunction will forbid future speech. After all, an injunction cannot order someone not to have said something yesterday.[100] But the modern view is simply that once a court has evaluated certain speech, it can enjoin repetitions of that speech. Chemerinsky's position, therefore, seems to be that no future speech can properly be considered a "repetition" of past speech. In other words, even if a court could enjoin what has been specifically adjudicated to be defamatory, it can only adjudicate speech that took place in the past, and any forward-looking injunction will necessarily go beyond the scope of the adjudication.

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98. *Id.*

99. Chemerinsky, *supra* note 43, at 171.

100. The confusion in this area echoes the confusion about whether certain injunctive remedies constitute retrospective or prospective relief for the purposes of a suit against a government officer under *Ex Parte Young*, 209 U.S. 123, 163 (1908). In describing the incoherence of the distinction, Professor David Currie has noted that "nobody is ever ordered to have paid yesterday." David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 162 (1984).

This interpretation takes a very metaphysically precise view of the "unit of speech" subject to adjudication. This "unit of speech" is more than a certain proposition or even a certain combination of words. It is a particular use of certain words at a particular time. The court in *Griffis* seemed to recognize the importance of context, but it did not go nearly far enough for Chemerinsky.[101] In his view, it would not be enough to limit the injunction against Luban calling Griffis a liar to the context of the Egyptology Newsgroup. After all, such a limited injunction would still forbid Luban from calling Griffis a liar even if she says "Tutankhamen was never Pharaoh of Egypt" on the newsgroup. In other words, the relevant context includes not only the broad subject-matter of Egyptology, but also what specifically Griffis had done and said and whether those actions justify calling her a liar. Calling Griffis a liar on two different occasions may in some sense be a "repetition," but only in a superficial way. In a more important sense, circumstances may change such that Luban's accusations are now entirely fair and even compelling. But in order to make such a statement, Luban would have to seek judicial dissolution of the permanent injunction. Chemerinsky's view is that such an injunction goes beyond what was specifically adjudicated and is, therefore, an invalid prior restraint.[102]

However, Chemerinsky seems to overstate this position; even this extremely narrow view may allow for some effective injunctions. In particular, it would allow for injunctions against speech *about the past*. Chemerinsky's concern is that someone might be enjoined from making a statement that could become true if circumstances change, but this concern evaporates if the speech concerns only past events. For example, the statement "LeBron James has never won an NBA championship" is not only false, it will always be false. An injunction against making such a statement would, therefore, pose no risk of forbidding protected speech.[103]

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101. *See* Chemerinsky, *supra* note 43, at 171 ("[T]he injunction must either be limited to the exact communication already found to be defamatory, or reach more broadly and restrain speech that no jury has ever determined to be libelous.").

102. *Id.* at 172 ("[A]n injunction that reaches more broadly than the exact communication already held to be defamatory has the effect of forcing a defendant to go to court any time he or she wants to say anything about the plaintiff and prove to the court that the intended statement is not defamatory.").

103. It may be argued that such injunctions are equally problematic because new information may show that the statement was in fact true. It may turn out that an alleged libeler was right all along, but he would still be forbidden from making truthful statements until he sought dissolution of the injunction. But this is no more troublesome than the ever-present concern that a court might simply come

Additionally, Chemerinsky's principle does not forbid injunctions that are entirely remedial. For example, an injunction ordering a newspaper to publish a correction or retraction would necessarily be directed at past statements, and, therefore, would not go beyond what has been specifically adjudicated. Indeed, such injunctions prohibit no future speech at all.[104]

In short, even the most extreme interpretation of the "modern view" may allow some injunctions against defamation. Despite what Chemerinsky has argued, this view is not the equivalent of a categorical bar on injunctions in such cases. The next Part will investigate whether other, broader interpretations of the modern view are theoretically sound.

III.
CONSTITUTIONALIZING EQUITY: A BROAD INTERPRETATION OF THE MODERN RULE

Chemerinsky's arguments against the modern rule are powerful. Although he may have somewhat overstated his case, it certainly seems that "speech specifically subject to adjudication" is most plausibly defined in a very narrow way. If this is true, few injunctions against defamation could be allowed. But this is not the only possible interpretation of the modern rule. Several courts, including the courts in *Balboa* and *Tory*, have authorized broad injunctions under the rule, but they have not offered persuasive justifications for doing so. Instead, their liberal attitude seems to come from a failure to seriously analyze all that the phrase "speech specifically subject to adjudication" entails.

The issue has to do with determining the scope of an adjudication. When judges decide cases, what exactly are they deciding?

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to the wrong conclusion. Under the theory behind the modern rule, the problem is not that courts sometimes get things wrong. Instead, it is that courts sometimes restrict speech before their decisions can be fully informed. The point of the principle is to ensure that courts go through all the proper procedures before deciding to restrict speech. The possibility that they may still get it wrong after all this process is a separate concern.

104. The Supreme Court has said very little about retraction statutes. In *Miami Herald v. Tornillo*, the Court held that a Florida right-of-reply statute was unconstitutional because, under its influence, "political and electoral coverage would be blunted or reduced." Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974). Nevertheless, two concurring justices joined the majority opinion on the understanding that it "addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes . . . ." *Id.* at 258 (Brennan, J., concurring).

Chemerinsky's answer seems to be that, at least in the First Amendment context, the scope of an adjudication is very narrow. An adjudication covers only the individual instance of alleged wrongdoing, and therefore a judge's power is limited to remedying that precise wrongdoing. This makes some sense, but it is certainly not the way lawsuits are usually conceptualized. It is true that any lawsuit comes before the judge on specific historical facts, but ordinarily a court of equity has power to take cognizance of matters well beyond that and issue remedies that have wider effects. Of course, there are limits to this power, and those limits are dictated by traditional principles of equity. In short, in ordinary lawsuits, the scope of an adjudication is simply the scope of the judge's common-law and equity powers. But can this definition be used to interpret the modern view on injunctions against defamation? In other words, could the requirement limiting injunctions to "speech specifically adjudicated to be unprotected" be nothing more than a requirement that judges stay within the traditional bounds of equitable discretion? If the First Amendment limits are the same as the limits derived from general principles of equity, then the tailoring requirement for injunctions against defamation is nothing more than a restatement of the tailoring requirement for *any* injunction.

The instinctive answer is that this cannot be right. After all, that would amount to saying that injunctions against defamation are subject to no special disfavor. Judges are always constrained by equitable limitations when they issue injunctions, but they can grant an injunction against defamation just as freely as an injunction against patent infringement or dog fighting or debt collection. It may seem that this essentially removes all First Amendment protection against injunctions in defamation cases. The goal of this Article is to convincingly show that this is not the case. On the contrary, even if the protections of the First Amendment are coextensive with the protections of traditional equitable principles, the fact that those protections are *constitutional* makes an enormous difference.

It is true that a very broad interpretation of the modern rule would result in applying nothing but normal equity rules to injunctions against defamation——but the devil is in the details. There is a world of difference between saying that the First Amendment does not restrict injunctions against defamation and saying that the First Amendment does restrict injunctions against defamation, but that its restrictions are precisely coterminous with traditional limitations on equitable discretion. The latter approach gives these restrictions constitutional significance, and constitutionalizing

principles of equity has important effects. Most importantly, this approach changes the jurisdiction of federal courts, limits the types of remedies that can be adopted by statute, and incentivizes courts to develop robust and clear principles to govern equitable discretion.

Of course, this does not mean that a broad interpretation of the modern rule is necessarily the best interpretation. It may be that the best rule about injunctions against defamation is somewhere between Chemerinsky's view, which allows essentially none, and a broad view, which allows them under normal equity principles. Unfortunately, any intermediate view seems very difficult to define. Thus, the purpose of this Article is to argue that there is a plausible and coherent—if not completely compelling—interpretation of the modern rule that allows for certain injunctions against defamation, and that this interpretation does not have the absurd consequences that it seems to have at first blush.

In preparation for a deeper discussion of the consequences of this interpretation, this Part will first discuss general limits on equity power. Section A will discuss the sources of equity power, and section B will evaluate the limits of that power.

A. Whose Equity Should Govern?

Even if injunctions against defamation should simply be subject to ordinary principles of equity, determining what exactly that means is difficult. It is not obvious where these "ordinary" principles of equity come from. This section will attempt to answer the question of "whose" equity should control, and the next section will discuss the current state of the law on the limits of equitable discretion.

If the First Amendment incorporates equitable principles by reference—and that is essentially what a broad reading of the modern view on injunctions against defamation does—which equitable principles does it incorporate? The last time equity powers were subject to a single interpretation was when they were concentrated in the King's Court of Chancery. There are now systems of equity in forty-nine states[105] and the federal judiciary, along with the equity system in England.

At the time of the founding, the systems of equity throughout the states and the federal government were even more convoluted than they are today. Several colonies had declined to create sepa-

105. Louisiana, of course, has a civil law system derived from French law and does not incorporate the traditional distinction between law and equity, which was a British innovation.

rate equity courts, and, as late as 1821, Justice Story wrote that equity jurisdiction "exists in complete operation in some states, in partial operation in others, and in others again is obsolete."[106] Equity power was also given to the federal government in Article III of the Constitution and defined in later statutes.[107] However, with so many equity systems existing at the time of the founding, it is not immediately clear which system the First Amendment adopted.

Some guidance may be found in judicial interpretations of the Judiciary Act of 1789, which was nearly contemporaneous with the passage of the First Amendment and which granted federal courts jurisdiction over "all suits . . . in equity."[108] It seems likely that if Congress incorporated some notion of equity into the First Amendment, it would be the same notion that it enacted in this statute. In interpreting the Judiciary Act, the Court held in *Atlas Life Insurance*

106. Kristin A. Collins, "*A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 267–68 (2010) (citing Joseph Story, An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, at Boston (Sept. 4, 1821) in 1 Am. Jurist 1.22 (1829)).

107. U.S. CONST. art. III, § 2. The federal courts were given equity power by statute in the Judiciary Act of 1789. This power was clarified by Supreme Court caselaw and the Federal Equity Rules adopted in 1822 and 1842. *See* Collins, *supra* note 106, at 274. This is only a very brief overview of the fascinating history of equity in the early federal courts. For a full discussion of the subject, see generally Collins, *supra* note 106.

108. Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82. This statute tracks the language of Article III, which states that "the judicial power shall extend to all cases, in law and equity" meeting certain criteria. U.S. CONST. art. III, § 2. However, Article III has never been interpreted to limit the permissible remedies that Congress can enact by statute. For example, in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the Supreme Court held that federal courts did not have jurisdiction under the Judiciary Act of 1789 to issue a *Mareva* injunction freezing all of a defendant's assets. In doing so, the Court distinguished several equally broad remedies on the grounds that they had been properly enacted by statute. *Id.* at 326–27. At first blush, it seems strange that the Judiciary Act of 1789 should impose a limitation when Article III, which uses almost the same language, does not. There are two explanations for this seeming inconsistency. First, it is not at all unusual for constitutional and statutory language to be interpreted differently. *Compare* Osborn v. Bank of the United States, 22 U.S. 738, 823 (1824) (giving the constitutional standard for "arising under" jurisdiction), *with* Grable & Sons Metal Prods, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (giving the statutory standard for "arising under" jurisdiction). Second, and more importantly, a statute authorizing a certain remedy need not be seen as "expanding" the scope of equity jurisdiction. Instead, it can be seen simply as a law that a federal court has the jurisdiction to enforce. As discussed below, this is not true for injunctions against defamation. Because traditional equitable principles apply to such injunctions by virtue of the First Amendment, no legislature may go beyond them in constructing remedies, whether those remedies are designated as equitable, legal, or anything else. *See infra* Part IV.B.

v. W.I. Southern that "[t]he '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."[109] Similarly, in *Guaranty Trust v. York*, Justice Frankfurter wrote that to fall within a federal court's equity powers a suit "must be within the traditional scope of equity as historically evolved in the English Court of Chancery."[110]

In other words, under the current statutory framework governing the federal courts, equity is not an organic, ever-changing power subject to the judge's broad discretion. Instead, it is bound to the historical practices of a particular English court at the time of the Founding.[111] Because constitutional symmetry suggests that the equity standard defining the jurisdiction of federal courts is the same standard that was incorporated into the First Amendment, injunctions against defamation can be no broader than the types of injunctions historically issued by the Court of Chancery at the time of the Founding.[112]

B. Federal Equitable Limitations on Injunctions

Under the modern view on injunctions against defamation, courts can issue injunctions as long as they do so only against

109. Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939) (quoting Payne v. Hook, 74 U.S. 425, 430 (1868)).

110. Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 105 (1945).

111. *See, e.g.*, *Grupo Mexicano de Desarrollo*, 527 U.S. at 318–19 ("Substantially, then, the equity jurisdiction of the federal courts is 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." (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

112. Of course, at the time of the Founding, the Court of Chancery simply had *no* jurisdiction to issue injunctions against defamation. *See supra* note 21 and accompanying text. However it is important to note that under the theory outlined above, the First Amendment does not incorporate all historical limitations on equity jurisdiction. Instead, it merely defines the scope of adjudication—and therefore the "unit of speech" that could be subject to an injunction—by reference to the scope of a judge's equitable discretion. Under the modern view, the overall standard remains the same: courts can issue any injunction that covers only speech specifically adjudicated to be unlawful. Equity principles are borrowed merely to determine what speech falls in that category. Nevertheless, it should be noted that as a statutory matter, federal courts applying federal law may still be bound by this categorical ban on injunctions against defamation. After all, the Judiciary Act of 1789 granted only the powers of the English Court of Chancery, and the English Court of Chancery had explicitly foresworn the power to issue such injunctions at the time of the Founding.

speech that has been fully adjudicated to be unlawful. Under one plausible interpretation of that standard, once an adjudication is complete, a court can enjoin speech to the full limits of its ordinary federal equitable powers. In other words, the tailoring requirement imposed by the First Amendment is the same tailoring requirement imposed by ordinary equity principles. This raises the question of what the ordinary limits of federal equitable powers are. This section will discuss several competing perspectives on the limits of equitable power in the federal system and show that, recently, the Supreme Court has interpreted these powers to be fairly narrow.

At one extreme is the theory that courts of equity essentially have "roving commissions to do good:"[113] once a violation of the law brings a case within their jurisdiction, courts can continue to act as monitors to enforce whatever the judges see as just and fair between the parties. At the other extreme is the view that courts should be limited to narrowly preventing or remedying illegal conduct, and that, like compensatory damages, injunctions should aim only to place the plaintiff in the precise position she would have been in if the defendant had not broken the law. Between these two poles, of course, is a wide range of possibilities.[114]

The most extreme view is one of maximum deference to a judge's equitable discretion.[115] This view is well represented by the First Circuit's decision in the case of *Bailey v. Proctor*.[116] In that case, the trustees of the Aldred Investment Trust had seriously misman-

113. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 240 (4th ed. 2012).

114. This debate can be seen as an extension of a debate that began centuries ago between Edward Coke and Francis Bacon about the nature of equitable jurisdiction. Coke argued that the common-law courts, rather than the "King's conscience," were the true source of legal principles, and that the Courts of Chancery should therefore be obligated to "follow the law." GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 26 (1982). As one of Coke's students argued, "had we angels for judges," no such restrictions on their discretion would be necessary. *Id.* at 11. But because no one can be safely given unlimited power, there must be "rules to preserve uniformity of judgments in matter of equity as well as common law." *Id.* Bacon, on the other hand, wanted to keep the courts of equity and common law strictly separate, and believed that Chancellors should be left with broad discretionary powers. Coke believed that if the courts were combined, courts of equity could be brought to heel. Bacon, on the other hand, worried that the opposite would happen, and that common-law judges would improperly gain the discretion that was the rightful prerogative of the courts of equity.

115. Indeed, some have argued that this view has made a resurgence in the modern world of public law, where the "right and remedy are pretty thoroughly disconnected." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1293 (1976).

116. 160 F.2d 78, 83 (1st Cir. 1947).

aged the trust. It was overleveraged, which was perfectly legal, but the trustees broke the law when they let the trust slip into insolvency. The district court appointed a receiver, who fired the old trustees and hired a new one, bringing the trust out of insolvency.[117] However, the court was still concerned about the enormous debt leverage and ordered the receiver to dissolve the trust.[118]

The new trustee objected, claiming that the illegality had already been remedied—the old directors were gone, the trust was out of insolvency, and everything was now strictly above board.[119] The appellate court was not impressed by this argument. Instead, it held that the court had full power over the trust due to the illegal acts and that the trustee's objections "pertain not to jurisdiction but to the propriety of the exercise of such jurisdiction."[120] In other words, talk to the judge who issued the injunction: within the bounds of his discretion, he is the arbiter of fairness, and fairness is the only standard.[121] The trustees' fraud brought the trust under the control of the court, and once it was there, the judge could do whatever was equitable, even if it was not legally required. This view takes the axiom that there should be no right without a remedy one step further and allows free-standing remedies without corresponding rights.[122]

At the other extreme, some courts have found that the only proper purpose of an injunction is to undo the precise illegal action that gave the court jurisdiction to issue a remedy. These courts believe that a judge should have no more discretion when acting under equity powers than when acting under common-law powers. All injunctions should follow the model of specific performance, in which the goal is to place the plaintiff in the position she would have been in absent the illegal action.[123]

The Ninth Circuit used this approach in *Winston Research v. Minnesota Mining & Manufacturing*.[124] Mincom, the plaintiff, had

117. *Id.* at 79.

118. *Id.* at 81.

119. *Id.*

120. *Id.* at 82.

121. Indeed, the court found that it was sufficient that the judge "*felt* that the debenture holders were entitled now to the cash salvaged from what had appeared to be a doomed enterprise." *Id.* at 83.

122. SNELL'S EQUITY 3-01, 27–28 (31st ed. 2000).

123. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 357–69 (AM. LAW INST. 1981) (discussing the requirements for and purposes of specific performance).

124. Winston Research Corp. v. Minn. Mining & Mfg. Co., 350 F.2d 134 (9th Cir. 1965).

developed an improved tape recorder with help from two employees, both of whom signed non-disclosure agreements.[125] Soon afterward, both men were hired by Winston Research, which quickly developed a nearly identical invention. To remedy the situation, the trial court had issued an injunction forbidding Winston from introducing the new product for two years. On appeal, Mincom argued that the injunction should be permanent. Nevertheless, the Court of Appeals upheld the two-year term, noting that "the appropriate injunctive period is that which competitors would require after public disclosure to develop a competitive machine."[126] In other words, the injunction should give Mincom the same competitive advantage it would have enjoyed if the trade secrets had never been disclosed. If the employees had not breached their contracts, Winston would still have seen Mincom's product when it went to market and would have been able to reverse engineer it. It could then develop its own competing product. The court was essentially guessing that this would have taken two years.[127]

In this case, the court was careful to devise an injunction that precisely undid the effects of the illegal activity and no more. This view is, therefore, far removed from that of *Bailey*, in which the illegal activity merely opened the door to a wholesale rearrangement of the trust. In general, the *Bailey* view, which allows courts to issue injunctions aimed at some goal other than compliance with the law, is now seen as somewhat antiquated.[128] Courts mostly agree that the only proper goal of injunctive relief is to prevent harm resulting from legal violations. However, this still leaves the question of how overinclusive injunctions can be relative to this goal. Several decades ago, the Supreme Court could not come to a consensus on this question, but its more recent cases make clear that the tailoring requirement for injunctions is fairly narrow.

In 1986, the differences of philosophy between Supreme Court justices were on full display in *Local 28, Sheet Metal Workers' International Association v. EEOC*.[129] The district court had found that the metal workers' union unlawfully discriminated against nonwhite workers in violation of Title VII and New York law.[130] The union

125. *Id.* at 141.

126. *Id.* at 142.

127. The court noted that dating the injunction from the time of final judgment was appropriate because "public disclosure occurred at about that time." *Id.* at 143.

128. Douglas Laycock, Modern American Remedies 304 (4th ed. 2010).

129. 478 U.S. 421 (1986).

130. *Id.* at 429.

repeatedly delayed, obstructed, and outright disobeyed numerous orders to cease its discriminatory practices.[131] The district court finally simply imposed a quota, ordering the union to bring its minority membership up to twenty-nine percent. In reviewing the order, the Supreme Court was badly fractured in its reasoning, but a majority upheld the injunction. All members of the Court seemed to agree that the injunction could go beyond remedying the discrimination against the precise parties before the court.[132] Justice Brennan, writing for a plurality, noted that a narrow injunction "reiterating Title VII's prohibition against discrimination will often prove useless."[133] Instead, in many cases, it may be necessary to issue an overinclusive injunction if that is "the only effective way to ensure the full enjoyment of the rights protected by Title VII."[134] Similarly, Justice Powell noted that although the proper goal of the injunction was compliance with Title VII, the Supreme Court should be somewhat deferential to the district court, which was in "the best position to judge whether an alternative remedy . . . would have been effective in ending petitioners' discriminatory practices."[135]

Justice O'Connor dissented in part, emphasizing that she agreed in principle that injunctions could go beyond forbidding illegal conduct if doing so were necessary to ensure compliance with Title VII.[136] Nevertheless, she believed that in the case at bar,

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131. *Id.* at 430.

132. *See, e.g.*, *id.* at 471 (plurality opinion of Brennan, J.) ("Petitioners refer to several cases for the proposition that court-ordered remedies under § 706(g) are limited to make-whole relief benefiting actual victims of past discrimination. . . . None of these decisions suggested that individual 'make-whole' relief was the only kind of remedy available under the statute; on the contrary, several cases emphasized that the district court's remedial powers should be exercised both to eradicate the effects of unlawful discrimination as well as to make the victims of past discrimination whole.").

133. *Id.* at 448.

134. *Id.* at 449.

135. *Local 28*, 478 U.S. at 486 (Powell, J., concurring).

136. *Compare id.* at 477–78 (Brennan, J., plurality) ("[T]he District Court's flexible application of the membership goal gives strong indication that it is not being used simply to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge petitioners' efforts to remedy past discrimination."), *with id.* at 493–94 (O'Connor, J., concurring) (concluding from this statement that "the plurality approves the use of the membership goal in this case only because, in its view, that goal can be characterized as 'a means by which [the court] can measure petitioners' compliance with its orders, rather than as a strict racial quota'").

the injunction was not tailored to this goal: it was "not truly remedial, but rather amount[ed] to a requirement of racial balance."[137]

Of course, *Local 28* is not simply about injunctive remedies in the abstract; as will always be the case, it is riddled with unique statutory and constitutional issues.[138] Nevertheless, the numerous opinions reflect distinct attitudes toward the discretion that judges have to remedy legal violations. Justice Brennan believed that remedies should be upheld as long as they have some rational relationship to the goal of inducing compliance with Title VII. Justice O'Connor, on the other hand, advocated a more searching inquiry and was concerned about judges using their equitable discretion to smuggle new substantive rights into remedial schemes.

More recently, the Supreme Court seems to have moved decisively toward Justice O'Connor's position. A decade after *Local 28*, the Court decided *Lewis v. Casey*.[139] This case involved a structural injunction issued against the Arizona prison system. A lawsuit had challenged the prisons' scanty library facilities, which the plaintiffs alleged offered little help to prisoners who wanted to file legal papers.[140] The district court found that this scheme violated the Sixth Amendment guarantee of assistance of counsel for two prisoners

137. In a separate dissent, Justice White argued that because many parts of the remedy were not justified under the statute, the injunction was "inequitable" and therefore invalid. *Id.* at 500 (White, J., dissenting).

138. Most obviously, the remedy implicated the Equal Protection Clause, which has been found to forbid the government from imposing straightforward racial quotas in most circumstances. *Id.* at 479–80. This does somewhat limit the case's relevance to the general issue of the extent of equitable jurisdiction. The fact that the court issued an injunction that would have been clearly invalid if enacted as a statute makes this case perhaps more closely analogous to injunctions against defamation, which also implicate constitutional rights. The scope of the remedy was also determined in part by the statutory language and legislative history of Title VII of the Civil Rights Act. The relevant provision of the statute states that "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." *Id.* at 446 (quoting 42 U.S.C. § 2000e–5(g) (2012)). The plurality and the dissents differed about whether the legislative history supported reading this statute as granting courts power to order racial quotas as a remedy. *See id.* at 493 (O'Connor, J., concurring and dissenting) (accusing the plurality of manipulating the legislative history and "cut[ting] the congressional rejection of racial quotas loose from any statutory moorings and mak[ing] this policy simply another factor that should inform the remedial discretion of district courts").

139. 518 U.S. 343 (1996).

140. *Id.* at 346–47.

who were either illiterate or had weak English skills.[141] In response to this finding, the district court issued a 25-page injunctive order specifying in detail how the new library system should be run, including the hours the library would be open, the qualifications the librarians must have, and other detailed instructions.[142]

The Supreme Court struck down the injunction, finding that it was seriously overbroad in relation to the constitutional violation. Justice Scalia, writing for the majority, offered a broadside against the common practice of overhauling prison systems through injunctions: "It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur."[143] The majority took it as a basic axiom of equitable discretion that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[144] The Court grounded this rule in principles of separation of powers and federalism, which impose "stringent requirements on the equitable powers of federal courts."[145]

Three Justices concurred, noting that although the injunction was overbroad, "[h]ad the findings shown libraries in shambles throughout the prison system, this degree of intrusion might have been reasonable."[146] Nevertheless, they agreed that "it was an abuse of discretion for the District Court to aggregate discrete, small-bore problems" in order to justify a structural injunction overhauling the entire prison system.[147]

Far from the nearly unfettered discretion authorized in *Local 28*, the Court in *Lewis* announced that there are "stringent" re-

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141. *Id.* at 356.

142. *Id.* at 347.

143. *Id.* at 349.

144. *Id.* at 357. *See also* Missouri v. Jenkins, 515 U.S. 70, 88–89 (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.") (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

145. *Lewis*, 518 U.S. at 385.

146. *Id.* at 397. The Court noted that, on the contrary, the district court "found only that certain of the prison libraries did not allow inmates to browse the shelves, only that some of the volumes in some of the libraries lacked pocket parts, only that certain librarians at some of the libraries lacked law or library science degrees, and only that some prison staff members have no training in legal research." *Id.*

147. *Id.*

quirements limiting the permissible scope of injunctions.[148] Thus, at least in the federal system, the tradition of *Bailey* seems to be essentially dead. The Supreme Court has certainly not gone as far as *Winston* by limiting courts to putting plaintiffs in precisely the position they would have been in absent the illegal conduct. Nevertheless, its decisions in *Local 28* and other cases suggest two principles. First, the goal of any injunction must be to remedy legal violations: Judges cannot go beyond the substantive requirements of the law and do what they think is fair, and any hint that they have done so will weigh heavily against the remedy. Second, the measures taken must be somewhat narrowly tailored to this goal, although the tailoring can vary depending on the statute or constitutional provision in question. In the language of tiers of scrutiny, this is somewhat akin to the tailoring requirement in the intermediate scrutiny standard.[149] It seems fair to describe the Court's rhetoric in *Lewis* as dictating that injunctive remedies be "substantially related" to the underlying violation.

Traditional equity principles are clearly far from a blank check for judges. Even in ordinary cases, the remedies must be somewhat narrowly tailored to specific legal violations. Thus, it is not completely implausible that the modern view of injunctions against defamation, which states that courts can issue injunctions against speech specifically adjudicated to be unlawful, is just a restatement of these general equity principles. However, if that is the case, are there any differences between injunctions against defamation and ordinary injunctions? The next Part will argue that although the tailoring requirement may be the same in both cases, treating the tailoring requirement for injunctions against defamation as *constitutional* rather than simply a matter of tradition makes an enormous difference.

148. *Id.* at 385.

149. Introducing this language from constitutional jurisprudence may risk creating more confusion than clarity. Injunctions are limited not only by the Constitution, but by statutes, rules, principles of equity, and other applicable legal norms. The term "intermediate scrutiny" is used only to invoke the familiar tailoring requirement that it contains. It should not be interpreted as a claim that the Constitution imposes this limitation on the equitable power of courts in ordinary cases.

IV.
CONSEQUENCES OF CONSTITUTIONALIZING EQUITY PRINCIPLES

The previous Part makes clear that a rule limiting judges to traditional equity principles in issuing injunctions against defamation is not equivalent to renouncing any limits on such injunctions. Even in ordinary cases, equity imposes fairly strict limits on a judge's discretion. However, some may object to treating injunctions against defamation like any other equitable remedies–after all, they might say, the whole point of the First Amendment is that speech deserves more protection than other forms of activity.

This Part will demonstrate that even if the tailoring requirement of the modern view about injunctions against defamation is the same as the tailoring requirement in traditional equity, speech is still treated very differently from other behavior. The fact that the limits of equity are adopted as the constitutional standard is very significant. In particular, constitutionalizing equity principles has three important consequences. First, it makes federal, rather than state, courts the ultimate arbiters of what kinds of injunctions against defamation are permissible. It gives federal courts jurisdiction over all such claims and forces state courts to defer to the federal interpretation. Second, it limits the kinds of remedies that legislatures can create in state or federal statutes. After all, a constitutional standard is supreme law, binding not only judges, but Congress and state legislatures as well. Third, it would reinvigorate attempts to understand and define the limits of equity power, which will have important effects in the First Amendment context and beyond.

A. Changing the Decision Maker

The first important consequence of constitutionalizing equity principles is the effect it has on jurisdiction—it quite literally makes a federal case out of an injunction against defamation. Federal courts, and particularly the United States Supreme Court, are the authoritative interpreters of the Federal Constitution. Thus, if equity principles are incorporated into the Constitution, the federal courts have primary authority to determine what those principles mean.[150] Additionally, the existence of a constitutional question gives federal courts jurisdiction over cases under 28 U.S.C. § 1331

150. *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing federal judicial review of federal legislation); Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (establishing federal judicial review of state court interpretations of federal law).

that they would otherwise lack.[151] This would not mean that state defamation actions could be filed in federal court or that defendants could remove those cases to federal court,[152] but it would allow challenges to the breadth of injunctions against defamation to be filed in federal court. In contrast, if one adopts the conclusion that the First Amendment simply has no bearing on injunctions against defamation, then defendants can challenge such injunctions only in state court. In both cases, the allegation is that the injunction was an abuse of equitable discretion, but only in the former case does the constitutional component of the question allow a federal court to become involved.

This method of constitutionalizing certain principles in order to provide a decision maker who is sensitive to federal interests is not new. Indeed, this was one of the chief motivations behind many of the federal common-law developments during the middle of the twentieth century. For example, the decision in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,[153] which found a cause of action under the Constitution for violations of the Fourth Amendment, was justified in part by the undesirability of "leaving the problem of federal official liability to the vagaries of common-law actions."[154] Additionally, although the point was never made explicitly in Supreme Court decisions, it was clear during the Warren and even early Burger Courts that many Justices, as well as numerous judges and scholars, simply did not trust state judges to faithfully apply the Federal Constitution as interpreted by the Supreme Court.[155]

However, the Court has since made an effort to disclaim this notion. For example, in *Stone v. Powell*, Justice Powell wrote for a majority that "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several

151. 28 U.S.C. § 1331 (2012).

152. *See* 28 U.S.C. § 1441 (2012) (allowing removal only of actions that could be originally filed in federal court); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (holding that anticipated defenses based on federal law do not confer federal jurisdiction).

153. 403 U.S. 388 (1971).

154. *Id.* at 409 (Harlan, J., concurring).

155. *See, e.g.*, Dombrowksi v. Pfister, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting) ("Underlying the Court's major premise . . . seems to be the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively.").

States."[156] Today, at least in the area of the First Amendment, there seems to be little reason to question state judges' commitment to the Federal Constitution.[157] Additionally, as the Court has recently stated, absent compelling evidence, it would be inappropriate simply "to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[158] If we accept the Supreme Court's view, improving the quality of decision-making does not seem to be a compelling reason to favor federal courts. Nevertheless even if state judges and federal judges are equally competent, there are reasons to favor a federal decision maker that have nothing to do with the quality of decision-making. In the words of Justice Story, it is "perfectly compatible with the most sincere respect for state tribunals" to favor federal decision makers for constitutional questions in order to assure "uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[159] This concern for assuring uniformity is widespread. It is another important impetus behind much of federal common law, which often governs certain areas of "uniquely federal interests."[160] These are areas that are "so committed by the Constitution and laws of the United States to federal control" that

156. Stone v. Powell, 428 U.S. 465, 494 (1976). *But see* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing against Justice Powell's opinion in *Stone*, and asserting that state courts simply are not as institutionally equipped as federal courts to decide constitutional question because of, among other things, a lack of a national spirit or sympathy for individual rights among state court judges).

157. *See* Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 561 (1989) (discussing the competence of state courts to protect constitutional rights in reference to *Younger* abstention doctrine). *But see* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 818 (1998) (arguing that, at least as of 1998, Southern state courts still could not be trusted to protect constitutional rights because of entrenched racism and a lack of judicial independence).

158. Alden v. Maine, 527 U.S. 706, 755 (1999). This respect for state courts is by no means uniquely modern. Nearly two hundred years ago, Justice Story emphasized that "[t]here is not a word in the constitution that goes to set up the federal judiciary above the state judiciary." Cohens v. Virginia, 19 U.S. 264, 318 (1821).

159. Martin v. Hunter's Lessee, 14 U.S. 304, 347–48 (1816). Justice Story went on to say that "Judges of equal learning and integrity in different States might differently interpret [the Constitution]; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, . . . the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States." *Id.* at 348.

160. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (quoting Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

federal law must apply even when there is no statute or constitutional provision that governs. Ultimately, this requires federal judges simply to choose the best policy.[161] Like federal common law, constitutionalizing equity will allow federal courts to introduce a uniform standard to govern an important national issue.

In short, one important difference between disclaiming First Amendment protection for injunctions against defamation and interpreting the First Amendment to incorporate ordinary equity principles is that using the latter approach changes the decision maker. Constitutionalizing equity principles gives jurisdiction to federal courts and makes them the authoritative arbiters of the limits of equitable discretion.[162] Although there is little reason to believe that this is an improvement in the sense that the state judges are unreliable or derelict in their duty, it does allow the First Amendment to be uniformly interpreted throughout the country.

B. Restraining Statutory Remedies

Another important consequence of constitutionalizing equity principles in the First Amendment context is the effect that it will have on federal and state legislatures. If equitable limits on remedies are part of the Constitution, this does more than limit judges. The Constitution is the highest law in the land, and nothing can trump it, including state or federal statutes. This means that when legislatures create statutory remedies for defamation, they are also limited by the same principles. A legislature cannot create an injunctive remedy broader than a remedy that the judge could create acting pursuant to her own inherent equity powers.

This is an important substantive limitation on injunctions against defamation. Ordinarily, legislatures have the power to enact statutes that either restrict or expand the availability of injunctive relief. For example, the Securities Enforcement Remedies and Penny Stock and Reform Act authorizes the Securities and Exchange Commission to permanently enjoin defendants who have

161. *Id.* Justice Scalia, who wrote the majority opinion in Boyle, nevertheless cautioned that "[i]n most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law . . . ." *Id.*

162. Of course, these constitutional claims could still be heard in state courts as well. Under the Supremacy Clause, the state courts have not only the concurrent jurisdiction, but also the solemn duty to enforce the Federal Constitution. *See* Testa v. Katt, 330 U.S. 386, 390–91 (1947) (noting that although "[v]iolent public controversies existed throughout the first part of the Nineteenth Century until the 1860's [sic] concerning the extent of the constitutional supremacy of the Federal Government," after the Civil War it became clear that it is "the obligation of states to enforce . . . federal laws").

been convicted of fraud from acting as directors of any publicly listed company—a remedy that would arguably be overbroad without statutory authorization.[163] Such a rule in the defamation context would be impermissible under the view outlined here. Of course, statutes could still restrict the availability of such injunctions, even to the point of completely forbidding them. Traditional equity powers set the outer bounds of the First Amendment, but legislatures are free to impose stricter limits.[164]

Although this limitation would have the greatest effect on states, because most defamation cases arise under state law, it would also bind the federal government. This would most obviously arise when the national government enacts defamation laws covering the District of Columbia, the territories, and other areas under exclusive federal control. It would also be relevant when Congress passes national laws that include provisions forbidding defamation. In fact, such laws already exist. For example, the Communications Decency Act of 1996, which was passed pursuant to Congress's interstate commerce powers, contains rules governing defamation on the Internet.[165]

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163. 15 U.S.C. § 78u(d)(2) (2012). This example shows how the line between remedies and substantive law can often blur. Forbidding such people from acting as directors could be seen as a remedy for their past frauds, or it could be considered simply a substantive restriction on what a certain class of people can do. Nevertheless, this conceptual difficulty is not an important problem in defamation law. If a law authorizing overbroad injunctions against defamation were recharacterized as substantive rather than remedial, it would likely be struck down as a violation of the First Amendment under the overbreadth doctrine.

164. In fact, Congress may also be able to impose more restrictive limits on injunctions available under state defamation law. If it did so under its power to enforce the Fourteenth Amendment, which incorporates the First Amendment against the states, and the restrictions it adopted were "congruen[t] and proportional[ ]" to identified constitutional violations, such restrictions would be valid. City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997). Nevertheless, there does not seem to be a rash of unconstitutionally overbroad injunctions against defamation throughout the states, and therefore it seems unlikely that Congress would have power under the Fourteenth Amendment to impose such restrictions. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640, 647–48 (1999) (overturning an attempt to abrogate state sovereign immunity for patent infringement suits on the grounds that Congress had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"); United States v. Morrison, 529 U.S. 598, 600 (2000) (denying an attempt to abrogate immunity because Congress's findings demonstrated that the problem "does not exist in all, or even most, States").

165. Under Section 230 of the Act, Internet service providers are not responsible for libels published using their services, even if they take on some editorial role with respect to the content. 47 U.S.C. § 230(c)(1) (2012).

As a practical matter, this limitation would likely have little effect on current laws. There seem to be few laws currently on the books that authorize injunctions against defamation that go beyond traditional equity powers.[166] However, the First Amendment can be an important restraint even if it does not lead to any laws being struck down. Indeed, this is a sign that state and federal legislatures take their responsibility to legislate within constitutional boundaries seriously.

This restriction on legislative powers also provides a plausible explanation for the result in *Near*, one that enjoys considerable support in the opinion.[167] Justice Butler was correct that the trial judge had done no more than fully adjudicate a lawsuit and issue relief as provided by the statute. However, the statute itself authorized injunctions far beyond the scope of traditional equity powers. As the Supreme Court noted, Chapter 285 of the 1925 Minnesota Session Laws authorized the court to "perpetually enjoin the person or persons committing . . . the nuisance from further committing, conducting, or maintaining any such nuisance."[168] Considering the breadth of the term "nuisance," this was already enormously overbroad.[169] The statute went even further, authorizing the injunction

166. As of 2005, seventeen states did have criminal libel laws, which allow possible prison time for certain forms of defamation. Org. for Security and Co-operation in Europe, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve* 171 (2005), http://www.osce.org/fom/41958?download=true. Although these laws do not authorize "injunctions" that go beyond traditional equity remedies, they certainly seem to authorize a broader form of restraint than even the broadest interpretation of the modern view would allow. As a practical matter, however, this is not a major concern. Between 1992 and 2005, only six people in the country were convicted of criminal libel, and in three of those cases the laws were found unconstitutional on appeal. *Id.* at 172.

167. As discussed further below, the majority opinion focused almost entirely on the statute, rather than on the judge's decision to issue an injunction. Chief Justice Hughes emphasized that the primary focus of the constitutional inquiry was squarely on the statute, saying that "[w]e are not concerned with mere errors of the trial court, if these be such, in going beyond the direction of the statute as construed by the Supreme Court of the state." *Near*, 283 U.S. at 709. *See also id.* at 707 ("This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action.").

168. 1925 Minn. Laws 358. *See also Near*, 283 U.S. at 702–03 (describing this provision of the statute).

169. This also implicates the concern addressed above, *see supra* note 163, about distinguishing between remedies and substantive law. But the same solution discussed above applies to this statute. If being declared a nuisance under the Minnesota statute is considered part of the remedy for distinct acts of defamation, then it is beyond equity power and hence unconstitutional. If, on the other hand, the term "nuisance" is considered part of the substantive law, then this remedial sec-

to run against "all other persons unknown claiming any ownership, right, title or interest in the periodical."[170] The majority opinion stated that the statute was improper because it was "not aimed at the redress of individual or private wrongs" and was concerned not with "punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."[171] In other words, as the *Near* Court recognized, the main flaw with the statute was that it authorized remedies that would not be available for defamation under the traditional equity principles that would govern an ordinary lawsuit. Even if the judge had done nothing but straightforwardly apply the statute, the statute itself violated the First Amendment by attempting to expand a court's equity powers to enjoin defamatory speech. *Near* thus provides a good illustration of how the standard discussed in this Article would not only limit judges' discretion, but would also limit the kinds of remedies that legislatures can authorize by statute.

This limitation on legislative power also illustrates an important difference between direct constitutional interpretation and federal common law. Even when federal common law is in some sense based on the Constitution, it is often subject to Congressional revision.[172] For example, the Court has interpreted *Bivens* actions, which it originally purported to find in the Constitution itself, to be unavailable if Congress has demonstrated an intent to foreclose such remedies.[173] Thus, if the rule that injunctions against defama-

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tion of the statute authorizes only a straightforward injunction against whatever violates that substantive law. That kind of remedy would be well within traditional equity powers. But in that case, the substantive law itself would be invalid under the First Amendment because it prohibits a substantial amount of protected speech, which is forbidden under the overbreadth doctrine.

170. 1925 Minn. Laws 358.

171. *Near*, 283 U.S. at 709–11. The majority opinion also identified other shortcomings of the statute, including the fact that it "is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodical of charges against public officers" and that it "put[s] the publisher under an effective censorship." *Id.* at 710–12.

172. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 71 (1985) ("[S]ome federal common law that derives its authority from the Constitution—in particular *Bivens* actions and constitutional common law—is subject to reversal by Congress, whereas other federal common law based on the Constitution—such as nonoriginalist judicial review—is not.").

173. For example, in *Schweiker v. Chilicky*, the majority held that *Bivens* remedies are not available when "Congress has provided what it considers adequate remedial mechanisms for constitutional violations." 487 U.S. 412, 423 (1988). Even Justice Brennan, who argued in dissent that a *Bivens* remedy should be available, drew this conclusion because he was "convinced that Congress did not intend to

tion are subject to traditional equity limitations were merely a matter of federal common law, Congress could displace it with its own, possibly more lenient, rules. On the other hand, if the rule is inherent in the First Amendment, Congress is constrained just as any state legislature or state or federal judge would be.

This restriction on state and federal legislatures is the most significant substantive limitation that constitutionalizing equity imposes. Injunctions against defamation would be subject to the same equity principles as ordinary injunctions. However, in the defamation context, neither Congress nor state legislatures would have the power to expand the remedies that judges can issue, and this restriction would be good policy. There is no reason to believe that among all decision makers, the legislative branch is the most trustworthy to decide the proper limits of injunctions against defamation. Legislatures are subject to majoritarian pressures and influence from the types of public figures who are most likely to be plaintiffs in defamation cases. Therefore, it is entirely plausible that Congress and state legislatures would be willing to enact broad injunctive remedies that do not adequately protect the "lonely pamphleteer" disseminating his views.[174] Federal courts, and particularly the Supreme Court, have the primary constitutional duty to interpret the meaning of the First Amendment, and there is no reason in this case to concoct an exception to that general rule by designating the standard as federal common law rather than straightforward constitutional interpretation.

C. Reinvigorating Equity

The previous sections have shown that adopting a tailoring requirement for injunctions against defamation that is equivalent to the ordinary equitable tailoring requirement would change the prior restraint doctrine significantly. This approach can also have consequences beyond the First Amendment context. It also has the potential to focus the attention of courts and scholars on the limitations of judges' equitable discretion more generally. As discussed in Part III, there has been some renewed focus on the propriety of certain remedies, and the Supreme Court has tried to rein in what it has seen as improperly broad uses of federal equity power. However, the subject has rarely been analyzed comprehensively and is

preclude judicial recognition of a cause of action for such injuries." *Id.* at 449 (Brennan, J., dissenting).

174. This phrase comes from *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972) ("[L]iberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher.").

sometimes not even seen as a topic worthy of study in its own right.[175] Explicitly adopting equity principles as the constitutional requirement for injunctions against defamation would likely reverse this trend. If general equitable limitations are part of the First Amendment, courts are likely to be much more careful to precisely define those limitations, because overstepping those limits would no longer be a simple abuse of discretion, it would be a constitutional violation.

1. Developing a Trans-Substantive Theory of Equity

Broadly interpreting the modern rule of injunctions against defamation would require treating equity as a unified whole, rather than a diverse assortment of remedies with no unifying principles. In a way, this is nothing new. As early as 1905, Professor Roscoe Pound was lamenting the "decadence of equity"[176] because traditional equity principles were being lost in a new trend of compartmentalization. Rather than giving a unified standard for what courts sitting in equity could do, academics were offering compartmentalized views that instead asked what courts can and should do in certain areas, such as contracts or trespass.[177] In other words, there was little discussion of equity as a "trans-substantive doctrine."[178] By the middle of the twentieth century, there seemed to be a standard for every subject. Much broader injunctions were accepted to desegregate schools, for example, than would be permitted to prevent a trespass.[179]

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175. As discussed below, this began to change somewhat with the holistic theories of equitable remedies offered by Owen Fiss and Douglas Laycock. However, this renaissance is still very much in its infancy, and courts have mostly continued a segmented approach to equity. *See infra* note 189 and accompanying text.

176. Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 26–27 (1905).

177. *See* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 631 n.11 (1988) ("Chapters in remedies casebooks and treatises often have titles such as 'Relief Against Contracts Induced by Fraud or Misrepresentation' or 'Relief against Contracts Induced by Mistake.'").

178. This term was coined by Robert Cover to describe rules of procedure, but it was Douglas Schoenbrod who introduced it as a term for the kind of holistic analysis that is missing in discussions of equitable remedies. *See id.* at 632.

179. Interestingly, in *Brown v. Board of Education*, the Court stated that "courts will be guided by equitable principles" in issuing injunctions to desegregate schools. 347 U.S. 483, 300 (1954); *see also* Schoenbrod, *supra* note 177, at 633. But the level of detail involved in such injunctions often went beyond "traditional" limits of equity power. *See* Milliken v. Bradley, 418 U.S. 717, 738 (1977) (striking down an inter-district busing remedy because "federal remedial power may be ex-

Even today, although the Supreme Court is much more attentive to the permissible limits of its own power, there is little focus on equity as a trans-substantive principle. For example, the case of *Lewis v. Casey*, discussed in Part III, has been cited many times in relation to prison reform litigation and the Sixth Amendment right to counsel, but it has almost never been cited for its implications for general equity principles.[180]

Constitutionalizing equity principles to govern injunctions against defamation has the potential to reinvigorate the search for trans-substantive principles of equity. At first glance, it may seem that this theory would have the opposite effect because it simply adds a new First Amendment compartment to the already splintered versions of equity. But this is not the case. This broad interpretation of the modern view does not adopt a First Amendment-specific version of equity to govern injunctions against defamation. Instead, it adopts "traditional" equity principles, without reference to subject matter, to govern injunctions against defamation. Thus, in order to decide what this means, courts must identify a "traditional," and therefore trans-substantive, description of equity.

2. Resolving Unanswered Questions About General Equity Principles

As discussed above in Part III, the Supreme Court has recently made an effort to define the tailoring requirement imposed by traditional equitable principles. The line of cases including *Lewis v. Casey* makes clear that injunctions must be somewhat tailored to the goal of preventing *legal* violations rather than simply reflecting the judge's sense of justice. However, this still does not fully answer the question of what exactly the injunction must be tailored to, let alone the question of how tailored it must be. For example, Professor David Schoenbrod has written that "under the tailoring doctrine, it is unclear whether the injunction must fit the rule that was violated, the rule's goals, or some looser measure."[181]

This is essentially a subset of a broader debate about what "the law" is. Answers to this question are as varied as the many theories about the proper methods of statutory interpretation.[182] Adopting the proposed rule certainly would not resolve this debate, but it would have the salutary effect of bringing all the fruits of the debate, from all ideological positions, to bear on the question of the

ercised only on the basis of a constitutional violation and, as with any equity case, the nature of the violation determines the scope of the remedy").

180. LAYCOCK, *supra* note 113, at 263.

181. Schoenbrod, *supra* note 175, at 635.

182. LAYCOCK, *supra* note 113, at 486.

permissible scope of injunctions under traditional equity principles. In other words, it would provide a framework to prevent scholars and courts from talking past each other.

Another unanswered question about traditional equity principles is how closely tailored injunctions must be to legal violations. Part III.B concluded that the Supreme Court has settled on a tailoring requirement similar to that of "intermediate scrutiny," which requires that the means be "substantially related" to the ends.[183] However, the Court had not adopted this standard explicitly, and there is the ever-present concern that its application will be limited to the subject areas in which it was introduced.[184]

Adopting a broad interpretation of the modern rule would naturally focus attention on defining these limits. Courts and scholars will always be anxious to ensure that constitutional bounds are respected. The fact that First Amendment interests are at stake will prompt the development of clearer rules to replace the compartmentalized standards that currently define—or more accurately, fail to define—the permissible limits of injunctions.

3. Showing that Equity is Not Obsolete

Adopting the rule described in this Article would also blunt the force of the common criticism that equity is obsolete.[185] This criticism comes from those such as Professor Daniel Farber, who has argued that the "equity mystique" should be replaced by a focus on congressional intent.[186]

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183. *See supra* note 149 and accompanying text.

184. In *Lewis v. Casey*, the subject matter was prison reform. *See supra* note 139–46 and accompanying text.

185. *See, e.g.*, Grace M. Long, Commentary, *The Sunset of Equity: Constructive Trusts and the Law-Equity Dichotomy*, 57 ALA. L. REV. 875, 876 (2006) ("[T]he [Supreme] Court is reining in the scope and breadth of equity such that traditional equitable remedies are increasingly mirroring their legal counterparts."); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 240–43 (1991) (arguing that courts should rely on modern, specific rules than "code phrase[s]" derived from traditional equitable principles).

186. Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 515 (1984) ("The general thesis of this article is that too much attention has been paid to general doctrines of equity jurisprudence and too little has been spent on ascertaining the specific duties created by Congress . . . . The focus . . . should always be on congressional intent, unclouded by the equity mystique."). It should be noted that this criticism applies primarily to federal courts. Whereas federal courts mostly apply statutory or constitutional law, state courts often decide purely common-law suits, including defamation suits, in which there is no legislative intent to discern.

This objection to the continued vitality of equity would be considerably weakened by a broad reading of the modern rule of injunctions against defamation. If this were the constitutional standard, the question of Congressional intent would be irrelevant.[187] It would be impossible to abandon these principles in favor of a focus on legislative intent because these standards are unalterable by any statute congress could enact.

This approach would also give lie to the more general notion that equity is unimportant in the modern administrative state. Even though equity may be partially supplanted by the congressional and administrative determinations about which remedies are appropriate,[188] equity may still play an important role in imposing constitutional limits on those policy decisions.

Of course, this is a welcome development only if equity *should* be saved from obsolescence. Some may object that constitutionalizing equity will only prop up a dying doctrine and perhaps introduce an incoherent principle into the Constitution. A full discussion of this objection is beyond the scope of this Article. However, the scattered views about when and how injunctions should be granted is proof enough of the need for at least some clarity about the basic doctrines of equity. Focusing on Congressional intent answers only part of the question, especially considering that Congress often legislates with reference to equitable principles.

There is already a well-developed niche of literature about general equity principles and the tailoring requirements they impose. Beginning in the 1970s, Professors Owen Fiss and Douglas Laycock began a mini-renaissance evaluating injunctions and remedies generally from a trans-substantive perspective.[189] Despite these important developments, courts rarely treat these questions in a trans-

187. To the extent that the question is about Congress's intent when it adopted the First Amendment, this view resolves that question by determining that Congress meant only to incorporate ordinary equity principles. The task then is to decide what those ordinary equity principles are.

188. Partly as a reaction to what it perceived as an improper enthusiasm for implying remedies under federal law, more recently the Supreme Court has emphasized that Congress is in charge of creating both substantive law and remedies for violations of that law, and it is the courts' responsibility to divine that intent. *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine where it displays an intent to create not just a private right but also a private remedy."). As discussed above, even federal courts' equity powers are a creature of statute. *See supra* notes 108–111 and accompanying text.

189. Owen Fiss's book *Injunctions*, written with Doug Rendleman, has been published in two editions and attempts to give a unified treatment of the field. *See generally* OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS (2d ed. 1984). Douglas

substantive way. Making these principles part of the First Amendment would allow scholars to apply these insights to important constitutional questions. Once those constitutional questions are decided, the influence of these discussions will not stop there. If a certain rule is adopted as a feature of equity principles governing injunctions against defamation, it will thereafter be equally applicable to all injunctions unless some statute provides otherwise. Thus a broad interpretation of the modern view will not only prompt the development of equity to govern injunctions against defamation, but the results of this renewed activity will also have spillover effects for all areas in which equitable remedies are used.[190]

This is not to say that constitutionalizing equity in this way will necessarily have the effect of narrowing the limits of equity power. It may be that a serious analysis of the foundations and theories of equity leads to a broader conception of judicial power. Nonetheless, it will at least allow competing theories to speak the same language. In the past several decades, the powers of federal courts have been narrowed, primarily because of renewed focus on Congressional intent rather than some vague notion of furthering federal interests.[191] The equity powers of federal courts have always been a background principle in such discussions, but that analysis has rarely come to the forefront, likely because equity has been so undefined. A renewed focus on the exact contours of the equity powers of federal courts will clarify what, if anything, courts can do other than simply interpret Congressional intent. Certainly there will be many sides to that issue—some arguing that equity can only narrowly effectuate statutory purposes, others arguing that it is a much broader mechanism of achieving social goals—but having that debate out in the open and in a common language can only bring clarity.

D. Models for Constitutionalizing Equity

In order to have a debate about the proper limits of equitable discretion, it helps to have models. In many ways, adopting a broad interpretation of the modern view that subjects injunctions against

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Laycock's casebook on remedies, now in its fourth edition, also follows this tradition. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES (4th ed. 2012).

190. Of course, in these other non-constitutional areas, remedies are subject to override by Congress. But where Congress has not spoken, a serious evaluation of the traditional limits of equity can have important consequences for the remedies available in practice.

191. *See, e.g.*, *Alexander*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

defamation to ordinary equity principles is not unique. It is common practice to interpret certain constitutional rights in light of the historical practices that they enshrine (or disavow). The right to petition the government, the availability of *habeas corpus*, the privilege against self-incrimination, and many others are derived from traditional English practice and are interpreted by reference to that history.[192] Evaluating historical practice to discover what rights the Constitution protects is nothing new, but most of these examples, unlike the theory described here, refer to the traditional practice directly, meaning that those principles were incorporated into the Constitution by explicit textual reference. However, even though there are no exact analogues for the kind of constitutional interpretation that this Article describes, investigating how other historical concepts have been incorporated into the Constitution sheds light on just how the broad interpretation of the modern view may work in practice.

There are also many instances in which the Constitution is held to incorporate certain common-law principles even though the text does not clearly refer to them. The most prominent example is sovereign immunity. Although the Eleventh Amendment by its terms forbids only a limited subset of suits against states, the Court has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."[193] This presupposition is that the states and the federal government came into the union with their common-law sovereign immunity intact. Thus, despite the fact that there is no explicit textual provision adopting these common-law principles, the Constitution has been interpreted to incorporate the principles in its structure.[194] However, unlike the theory described here, sovereign

192. *See* Boumediene v. Bush, 553 U.S. 723, 739 (2008) ("[T]o the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ [of *habeas corpus*] or its application to enemy aliens, those authorities can be instructive for the present cases."); Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2498 (2011) (interpreting the meaning of the petition clause in light of the practices in England and the United States before the founding); United States v. Jones, 132 S. Ct. 945, 950 (2012) (finding that the Fourth Amendment forbids a legal trespass partly on the basis of the pre-founding history of the doctrine).

193. Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (quoting Blatchford v. City of Noatak, 501 U.S. 775, 779 (1991)).

194. *See* Alden v. Maine, 527 U.S. 706, 713 (1999) (stating that the concept of sovereign immunity derives not from the Eleventh Amendment, but from "the Constitution's structure [and] its history").

immunity was considered to inhere in the overall structure of the Constitution, not in any one provision.[195]

Probably the closest parallel to the theory of injunctions against defamation described here is the doctrine of standing. In large part due to the efforts of Justice Frankfurter, this has taken on a constitutional dimension despite the fact that it is nowhere mentioned in the Constitution.[196] In contrast to sovereign immunity, standing does not inhere in the general structure of the Constitution. Instead, standing is part of a specific constitutional provision: the "case and controversy" requirement of Article III.[197] Nevertheless the standing doctrine is still derived from the common-law principles requiring the "real party in interest," rather than concerned bystanders, to sue. Thus the standing doctrine is similar to the theory described here because it is a traditional common-law requirement that is not explicitly mentioned in the Constitution, but is incorporated by reference into a particular constitutional provision. Nevertheless, the two are still different in an important way. The theory proposed here does not simply follow all the equity rules as they existed at the time of the founding. After all, at the time of the founding, equity courts had no jurisdiction over defamation. Instead this theory adopts one aspect of equity principles: the tailoring requirement it imposes on injunctions.

The broad interpretation of the modern view of injunctions against defamation has slightly different contours than most other common-law and equity doctrines incorporated into the Constitution. Nevertheless, the models described in this section show that it is by no means impossible, or even rare, to mix common-law and

195. Some Justices have argued that in part for this reason, sovereign immunity concepts that go beyond the Eleventh Amendment are federal common law rather than conclusive constitutional interpretation. *See* Seminole Tribe, 517 U.S. at 183 (Souter, J., dissenting) ("I would . . . treat *Hans* [*v. Louisiana*] as it has always been treated in fact until today, as a doctrine of federal common law."). Even if accepted, however, this principle does not support treating the theory described here as federal common law. After all, that theory derives not from the overall structure of the Constitution, but from interpretation of the meaning of a particular textual provision, the free speech and free press clauses of the First Amendment.

196. For an extended discussion, *see, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 104 (2014) ("[T]he doctrine of standing is one of the most venerable staples of modern constitutional law. The term 'standing', however, makes no appearance in the text of Article III . . . . [Modern standing doctrine] makes no sense as a matter of either constitutional law or political theory . . . .").

197. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.") (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

constitutional principles. Constitutionalizing equity is, therefore, more than simply a theoretical possibility—it could easily be done without introducing unnecessary novelty into methods of constitutional interpretation.

V.
CONCLUSION

The modern view of injunctions against defamation is not only the most popular standard among lower courts that allow injunctions against defamation, but even the Supreme Court seems poised to accept it at least in part.[198] Despite its popularity, however, on a conceptual level the theory is not quite fully formed. As the standard becomes more prevalent and mature, it will become necessary to flesh out what it means.

The most important unanswered question about the modern view is just how narrow it requires injunctions to be. This Article has evaluated two interpretations of this tailoring requirement. The narrowest interpretation is extremely restrictive, but it may still allow for certain injunctions. A broad view, which imposes the same tailoring requirement contained in ordinary equity principles, is more complex. The purpose of this Article has been to show that although this interpretation may seem tantamount to abandoning First Amendment protection, in fact it is not. Constitutionalizing those limits has several important effects: it allows federal courts to be the final arbiters of the meaning of equity in this context; it limits legislatures' ability to create broad statutory remedies; and, perhaps most importantly, it has the potential to refocus attention on trans-substantive theories of equity power, which can clarify judicial power well beyond the limited First Amendment context.

In short, subjecting injunctions against defamation to ordinary equity principles does not throw speech to the wolves. Instead it introduces a wolf tamer to bring the rigorous analysis of constitutional jurisprudence to the often undertheorized discussion of the limitations of equitable remedies. Today many people do not take the idea of equitable limitations seriously, but it is broadly accepted that the First Amendment requires careful attention. If limitations on equitable remedies become fused with First Amendment jurisprudence, then it is likely that the rigor applied to the constitutional analysis will transfer to equity, thereby accelerating the ongoing renaissance of equity.

198. *See supra* notes 56–66 and accompanying text (discussing the *Tory* case).