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SYMPOSIUM ESSAY

Remedies in the First Hundred Days of Trump II: A Gently Adversarial Collaboration

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The beginning of President Trump's second term has seen increasing friction between the executive and judicial branches. Many of these conflicts have concerned the remedies given by federal courts, and in a series of emergency orders the Supreme Court has tried to carefully calibrate these remedies. This Essay, prepared for a timely symposium at Stanford Law School on executive power and the rule of law,[1] considers the remedial issues presented by litigation over executive orders issued by President Trump in the first three months of his second term.

We are scholars who write about the remedies available from federal courts, and in our previous writing have both agreed and disagreed with each other. We offer this Essay as an adversarial collaboration in which we seek to identify common ground and points of disagreement between us on a pressing question: How should federal courts deploy equitable relief in response to novel or aggressive executive actions?

These remedial issues have arisen in now familiar cases. They include the Abrego Garcia litigation seeking the return of a Maryland man wrongly sent to a prison in El Salvador;[2] the U.S. Foreign Aid litigation pursuing restoration of appropriated funds that the Trump Administration impounded;[3] the

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1. The Symposium event was held on May 2, 2025, and this Essay considers developments through May 21, 2025. We therefore do not discuss *Trump v. CASA, Inc.*, Nos. 24A884, 24A885, 24A866, 2025 WL 1773631 (U.S. June 27, 2025), which came down after this date.
2. Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025) (vacating in part and remanding after affirming the executive branch's duty to "facilitate" return of individual removed unlawfully to El Salvador).
3. Dep't of State v. AIDS Vaccine Advocacy Coal., 145 S. Ct. 753, 753 (2025) (refusing to stay the lower court decision invalidating funding curtailment and ordering restoration of payments).

Wilcox/Harris litigation disputing Trump's power to remove officials from the boards of independent agencies;[4] the J.A.V. litigation in Texas challenging the Trump Administration's use of the Alien Enemies Act as the justification for the removal of Venezuelan nationals;[5] and the cases brought by individual plaintiffs, immigration advocacy groups, and some twenty-seven states contesting the Trump Administration's purported cancellation of birthright citizenship for U.S.-born children of individuals who are present in the United States temporarily or unlawfully.[6] In each of these conflicts between the executive and the judiciary, the remedies available to the federal courts have taken center stage.

I. As a conceptual matter, how should federal courts assess the scope of their equitable power today? How much should we insist that they ground their decrees in a showing that courts of equity traditionally were willing to grant such relief, and when does that tradition stop evolving and developing?

SB: There are a lot of basic things a legal system needs to provide, and these relate to functions like coordination, deterrence, and guidance. Once you get past the basics, two advanced problems for a legal system are (1) how to constrain the opportunistic exercise of legal powers and rights;[7] and (2) how to offer remedies that are not a matter of right, but that instead require channeled discretion.[8] In the common law legal systems, it happens to be the case that these two problems are solved by the same body of law, namely, the law of equity.

These two functions have implications for whether the law of equity can change, as well as implications for its form. A body of law that offers discretionary remedies and constrains the opportunistic exercise of legal powers and rights must be capable of change: Opportunism does not stand still, nor do the circumstances that call for remedies that are discretionary. Nor can these problems be solved with rules. That is why the law of equity is not excessively

4. Harris v. Bessent, No. 25-5037, 2025 WL 1021435, at *1 (D.C. Cir. April 7, 2025) (per curiam) (reinstating the district court decisions ordering reinstatement of members of the NLRB and MSPB).

5. J.A.V. v. Trump, 349 F.R.D. 152, 154 (S.D. Tex. 2025) (provisionally certifying a habeas class consisting of detainees scheduled for removal under the Alien Enemies Act); *cf.* A.A.R.P v. Trump, 145 S. Ct. 1364, 1367 (2025) (per curiam) (granting injunctive relief to preserve the due process rights of members of a putative class of habeas petitioners).

6. Trump v. CASA, Inc., Nos. 24A884, 24A885 (U.S. Apr. 17, 2025) (inviting argument about propriety of universal injunctions granted by three courts to block the Trump Administration's order purporting to narrow birthright citizenship).

7. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L. J. 1050 (2021).

8. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530 (2016).

rulish: It does have some rules, especially in trusts;[9] but it also has many principles, maxims, focal concerns, habits, and presumptions.

That still leaves the question of how the past of equity relates to its present. In an ideal world, federal and state judges would consider themselves the inheritors and developers of an equitable tradition. It would be developed—after all, every doctrine of equity *was* developed—but it would be developed by people who knew what the equity tradition was about, who had an acute knowledge of the distinctive patterns and habits of "equity jurisdiction."

We do not live in that ideal world. Some lawyers and judges are unfamiliar with equity, and even when statutes and cases direct a court to decide a case according to equitable principles, it may feel to the judge as if she were applying foreign law. Federal (and state) courts must recover the sense of equity as a living body of doctrine—a field of law that is continuously applied, that through its application is continuously restated, and that through its restatement is inevitably subject to alteration. That recovery is a goal of my scholarship on equity, including my collaborations with Professor Paul Miller.[10]

At present, however, courts will need to start and often end with what courts of equity did in the past.[11] But as they draw from traditional equitable principles, they should not be content with asking whether some exact thing was or was not done in the past. That is never enough to decide whether something should be done in equity—new forms of opportunism and novel evasions of legal rights may require equity to do something it has not done before. And new circumstances may require the courts to articulate new equitable constraints. Equity is not just flexibility in the pursuit of justice. Equity's elaboration, and indeed its very survival in our legal system, requires a judge who is attentive not only to its strength but also to its weakness.[12]

JP: Sam's formulation will often make sense, and I agree that judges in the United States would gain much from thinking of themselves as engaged in a continuing and evolving tradition of equity. For one thing, such an approach could give them access to the many thoughtful expositions of the law of equity as it continues to develop in other nations that inherited a law-equity distinction

9. *See* Paul B. Miller, *Equity as Supplemental Law*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 92, 107-09 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020).

10. *See, e.g.*, Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763 (2022).

11. Note that 1789 is not a limit on that inquiry. *See id.* at 1795-96; *see also* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269, 1282 (2020).

12. *Cf.* C. C. LANGDELL, A SUMMARY OF EQUITY PLEADING 38 n.4 (2d ed. 1883) (noting that "any one who wishes to understand" the law of equity "must study its weakness as well as its strength"). On the strength and weakness of equity, see, for example, Samuel L. Bray, *Equity: Notes on the American Reception*, *in* EQUITY AND LAW: FUSION AND FISSION 31, 31-45 (John C. P. Goldberg, Henry E. Smith & P. G. Turner eds., 2019).

from England. I am struck that the Court in *Grupo Mexicano* chose static equity of the 1789 period rather than the developing equity of today in assessing the so-called *Mareva* injunction for use in a private law dispute over creditor rights.[13]

I worry that the equitable principles—to which Sam rightly points as best calculated to enable courts to play a thoughtful role in constraining opportunism—face two important challenges today. First, and most obviously, the Trump-II administration has yielded an unprecedented number of executive orders and other unilateral executive actions.[14] The President's supporters suggest that the district courts have responded with an unprecedented spate of universal injunctions.[15] But one might fairly ask if those decrees represent opportunistic judging or measured responses to lawless executive activities. At least three of the injunctions, those calling for the return of Abrego Garcia, for a pause on removals pursuant to the Alien Enemies Act, and for the preservation of birthright citizenship, address executive claims that strike many as legally dubious in the extreme.[16] Thoughtful judges might view the need to constrain opportunism as entirely consistent with early judicial intervention.

Second, and more subtly, our place in a post-merger world of combined law and equity means that courts will use equitable tools to address legal problems that common law courts may once have handled with dispatch. Sam's scholarship reminds us that there was one chancellor presiding in the High Court of Chancery, rather than the multiple chancellors that sit throughout the country today.[17] So too there was one court of King's Bench presiding over common law applications for forms of relief (habeas, mandamus, certiorari) that could quickly halt unlawful executive branch activity.[18] Scholars report that

13. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 331-33 (1999). For the suggestion that the Court in *Grupo Mexicano* could legitimately grant the requested relief in light of changes in the underlying framework of legal remedies, see James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Judge Frank Johnson*, 71 ALA. L. REV. 723, 730-743 (2020).

14. *See* Irineo Cabreros & Aatish Bhatia, *Trump's Astonishing 100 Days, in 8 Charts*, N.Y. TIMES (April 29, 2025), https://perma.cc/Q46K-ZV3H (reporting that Trump issued more executive orders in his first 100 days than any modern president).

15. *Cf.* JOANNA R. LAMPE, CONG. RSCH. SERV., R48476, NATIONWIDE INJUNCTIONS IN THE FIRST HUNDRED DAYS OF THE SECOND TRUMP ADMINISTRATION 10-11 (2025) (summarizing the congressional reaction to universal injunctions directed at Trump orders).

16. *See* Abrego Garcia v. Noem, No. 25-1404, 2025 WL 1135112, at *1 (4th Cir. 2025) (Wilkinson, J.) (describing the Trump Administration's legal position as "shocking not only to judges, but to the intuitive sense of liberty that Americans far removed from courthouses still hold dear"); Alexandra Villarreal, *What Is US Birthright Citizenship and Why Is It Being Disputed at the Supreme Court?*, GUARDIAN (May 15, 2025, 7:05 AM EDT), https://perma.cc/63FC-PQMM (reporting a judicial description of the birthright citizenship order as "blatantly unconstitutional").

17. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 446-48 (2017).

18. *See infra* note 37.

Chief Justice Mansfield acted expeditiously to protect individuals who were wrongly impressed into naval service, a dispatch aimed at providing relief before the ship left the harbor.[19] Today, the Supreme Court no longer distributes such relief on a retail basis; that responsibility has passed to the district courts. But as the removal cases make clear,[20] lower courts today sometimes confront the same pressing need for expedition that Mansfield faced in the eighteenth century. One might argue that, post-merger, federal equity has adapted (in ways that Sam may find objectionable) by making similarly decisive assessments of legality available to suitors today, using the all-purpose temporary restraining order to address legal emergencies. So while I agree that federal judges, acting in equity, would do well to consult equitable tradition in appropriate cases, I think Sam would agree that they should also remain mindful of the importance of providing effective relief.

II. What authorizes the federal courts to grant equitable relief in cases such as *Ex parte Young* and *Armstrong*? Should we distinguish private law and public law cases?

JP: Sam's previous scholarship has rightly emphasized the importance of identifying a grievance—a threatened invasion of some recognized right—as the basis for invoking the equitable authority of the federal courts.[21] Over time, the recognition of the viability of such claims ripens into a pattern of litigation—the suit to enjoin a trespassory invasion of property in *Osborn*[22] was a matter of routine by the time of the *Virginia Coupon Cases*.[23] Conventional practice gradually displaces fresh analysis of the equities in every case, and patterns start to emerge. We thus get equity as a more rule-based form of law, rather than equity as case-by-case weighing of the equities.[24]

Grupo Mexicano has appeared, at least to some observers and to the government, as a threat to the conventional reliance on patterns of federal equity. Its call for identifying a form of equitable authority in the practice of the High Court of Chancery circa 1789 threatens many forms of equity that

19. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 115-116, 324-25 (2010).

20. *See* Sergio Martinez-Beltran, *Supreme Court Extends Pause on Deportations under Alien Enemies Act in Texas*, NPR (updated May 16, 2025, 6:18 PM ET), https://perma.cc/G8WC-VBNW (describing an unsigned Supreme Court order reversing the lower court's failure to intervene quickly to stop pending removal of "detainees facing an imminent threat of severe, irreparable harm").

21. Bray & Miller, *supra* note 10, at 1764, 1776-1780.

22. Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738 (1824).

23. Poindexter v. Greenhow, 114 U.S. 270 (1885).

24. *See* Brief for Petitioner at 17, Trump v. CASA, Inc., No. 24A884 (U.S. Mar. 13, 2025) (invoking *Grupo Mexicano* in arguing that the history of equity afforded no justification for universal injunctive relief).

developed in the United States over the course of our history.[25] That call at least poses questions about the legitimacy of the *Ex parte Young* claim for relief (I won't call it an equitable cause of action in deference to Sam) and about the propriety of universal injunctions, as we learned from the oral argument in the birthright citizenship cases on May 15, 2025.[26]

But the *Grupo Mexicano* suit was brought to federal court without any discernible federal interest, aside from providing a neutral forum for the adjudication of claims between diverse citizens. In other cases, such as *Armstrong v. Exceptional Child Center*[27] and *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[28] where the suit for injunctive relief seeks to enforce the rights of individuals against the government (state and federal), the Court has declined to view *Grupo Mexicano* as controlling. Instead, the *Armstrong* Court pointed to a history of judicial review of executive action rooted in the practice of the common law court of King's Bench.[29] Like the *Armstrong* Court, I would recognize that suits for injunctive relief now perform many of the functions once handled by common law writs of mandamus, prohibition, certiorari, and scire facias. Equity thus has an adaptable quality and can take on the complexion of other remedial forms. While its origin story at the High Court of Chancery obviously planted the seeds of U.S. legal development, we should focus today on the patterns of injunctive relief that have grown up in American soil, after the transplant occurred, as *Armstrong* and *Free Enterprise* appear to recognize.

SB: I agree with Jim that federal courts have the authority to hear grievances in equity. The statutory authorization is provided by the Judiciary Act of 1789.[30] Accordingly, federal courts have equitable jurisdiction, which allows them to grant relief when it is in accord with equitable principles, including such bases as a lack of adequate remedy at law and the avoidance of a multiplicity of suits. So I lose no sleep over finding a basis in positive law for suits challenging executive action—it is the patterns and habits of equity jurisdiction.

I would not, however, follow Jim in distinguishing public law and private law cases. In part, that is due to a theoretical point about remedies: Public law

25. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332-33 (1999).

26. Transcript of Oral Argument at 26-27, 115, Trump v. CASA, Inc., Nos. 24A884, 24A885, 24A866, 2025 WL 1773631 (U.S. June 27, 2025).

27. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) (linking the role of federal courts in public law matters to the practice of common law courts and declining to cite *Grupo Mexicano*).

28. Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010) (rejecting the government's argument against equitable intervention in a novel context without citing *Grupo Mexicano*).

29. *See* Pfander & Wentzel, *supra* note 11.

30. *See* Marshall v. Marshall, 547 U.S. 293, 308 (2006); *Grupo Mexicano*, 527 U.S. at 318; Gordon v. Washington, 295 U.S. 30, 36 (1935).

remedies are built on the foundations of private law remedies. Moreover, the authority on which *Grupo Mexicano* relied included both public and private law cases.[31] Finally, equity considers private and public interests in every case and does not sharply distinguish public and private law.

III. How much of the remedial load should we expect the injunction to shoulder, and should some of it be picked up by other remedial claims, such as mandamus, quo warranto, and declaratory judgment?

SB: Not all of the cases challenging the current administration's actions are a good fit for injunctions, and the judicial instinct to always use injunctions is reminiscent of "if all you have is a hammer, everything looks like a nail."

To be specific, in a suit about whether an office-holder is entitled to an office, we should be talking about quo warranto, which is at least arguably an adequate remedy at law. That allows a cleaner shot at the legal question, without having the courts directly supervise the executive branch.

If the payment of funds under a statute or a contract is a nondiscretionary duty, then that would be a promising candidate for mandamus rather than an injunction. For example, the impoundment of USAID funds may lend itself more naturally to mandamus, compelling a nondiscretionary payment, than to a broad injunctive order.

And in some cases, like the birthright-citizenship case brought by individual plaintiffs, what the plaintiffs really want is not an injunction at all but rather a declaratory judgment about citizenship. They should get that—immediately.[32]

Where I think Jim and I would be more likely to diverge is that he looks at all these robust legal remedies in the past and says they can all be taken on board by equity. I agree that the law/equity line is somewhat porous, and historically movement has happened in both directions. But I also think there is value in distinguishing legal and equitable remedies, especially because they are different

31. For example, the Court cites four cases for the proposition that the federal courts' equity jurisdiction "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." *Grupo Mexicano*, 527 U.S. at 318 (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)). These are *Atlas Life Ins. Co.*, 306 U.S. 563, an insurer's suit against a beneficiary; *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949), a suit by Chinese schools against the governor of Hawaii; *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), a suit by noteholders against a corporation; and *Gordon*, 295 U.S. 30, a suit brought against the Pennsylvania Secretary of Banking by holders of assets in a bank he had seized.

32. *See* FED. R. CIV. P. 57, advisory committee's note ("A declaratory judgment . . . operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion . . . .").

in how much they allow courts to manage the parties.[33] The legal remedies tend to be low-management, and thus lower conflict. There is ample value—right now especially—in finding remedial forms that allow the courts to say what the law is, while carefully picking their battles on when they are going to give direct orders to the executive branch.

JP: This question strikes me as central to the debate over how to conceptualize equity and the prerogative writs today. We live in a world where the Federal Rules of Civil Procedure have abolished the writs of mandamus and scire facias but have preserved the right of individuals to secure those forms of relief through civil action or motion. Similarly, the Rules govern practice on the writs of quo warranto and habeas corpus to some extent.[34] In a post-merger world, we can no longer speak of mandamus or quo warranto relief; we should instead speak of relief in the nature of mandamus or quo warranto.[35] As a practical matter, many of these claims for relief will come to federal court in the form of an application for injunctive relief, and will point to precursors in the history of the prerogative writs. Sam and I are calling on federal judges to master a great deal of law and equity. I would add that merger was predicated on the idea that the pith and marrow of the old remedies would remain available through civil actions.[36]

Hence, when we think about the availability of such remedies today, we might fairly ask the injunction to take on the complexion of some aspects of earlier practice. When we examine the manner in which King's Bench, say, administered remedies through the writ of mandamus, we find an emphasis on developing a rule-based approach that coheres well with some aspects of common law practice. One advantage of this rule-based approach: It allowed courts to offer the relatively speedy relief (to restore to office, to compel

33. *See* Bray, *supra* note 8, at 559-62, 593.

34. *See* FED. R. CIV. P. 81(a)(4); *cf.* Harris v. Nelson, 394 U.S. 286, 290 (1969) (concluding that the rules of discovery do not govern habeas proceedings but that federal courts have ample power under the All Writs Act to order the production of evidence in connection with a factual inquiry into the legality of detention).

35. *Cf.* 28 U.S.C. § 1361 (conferring jurisdiction on the district courts to entertain any action "in the nature of mandamus" to compel an officer to perform a duty owed to the plaintiff). The historic function of the writ of quo warranto was to challenge an incumbent office-holder's authority; had President Trump proceeded in court by quo warranto to oust Wilcox and Harris from federal office, *see supra* note 4 and accompanying text, they would have had their day in court. When an individual has been denied or removed from office without judicial process, mandamus relief to restore was appropriate. But mandamus, as such, has given way to relief in the nature of mandamus, administered by federal courts in civil actions that may entail injunctive relief. *See, e.g.*, Williams v. Fanning, 332 U.S. 490, 494 (1947).

36. *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 679 (2014) (explaining that the adoption of the Federal Rules of Civil Procedure did not alter "the substantive and remedial principles" governing practice in the federal courts (quoting 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1043, at 177 (3d ed. 2002))).

payment of appropriated funds, or, for a more worldly example, to compel the parish priest to bury a parishioner) that the prerogative writs were expected to provide.[37] The temporary restraining order (TRO) helps answer the quest for a speedy remedy, but it remains provisional. A mandamus from King's Bench settled the matter once and for all.

Sam understandably decries a merits-first approach to preliminary injunctive relief, an approach that may distract from a focus on preserving remedial options down the road.[38] But history teaches us that some government decisions are clearly wrong; courts have traditionally asserted the power to say so and to invalidate the decision. That's the function of habeas corpus, to override a wrongful detention decision, and of mandamus, to compel the government to take action wrongly withheld. The instinct behind many of the TROs and preliminary injunctions that have greeted the Trump Administration finds more support in the rule-based attitude of common law courts than in the more thoughtful or ruminative practice of the courts of equity as in Sam's description.

Perhaps we should conceptualize the work of lower courts today as issuing a declaration of rights coupled with some kind of equitable decree to preserve the status quo pending the finalization of that declaration. Call it a declaration-plus. Such decisions have the advantage of finality, relative expedition, and find historic justification less in the workways of the eighteenth-century courts of equity (legendary for the stately pace at which they proceeded) than in their common law counterparts.

37. *See* THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS 108-09 (1853) (explaining that King's Bench would compel burial in accordance with customs of the parish; remedies were available in the ecclesiastical courts but "not in so speedy a manner as by mandamus"); H. Howard Hassard, *Extent to Which Availability of Ordinary Remedy Defeats Issuance of Writ of Prohibition*, 22 CAL. L. REV. 537, 540 (1934) (noting that the writ of prohibition's attraction in part was its provision of a speedier remedy than by appeal). On mandamus to compel payment, see *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524 (1838).

38. *See* Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809, 839-40 (2025).

IV. SB: What is interlocutory injunctive relief for? In other words, I would like to know if you agree that interlocutory injunctions should aim at preserving the efficacy of the court's ultimate remedies.[39] That argument strongly supports, say, prohibiting the shipment of immigrants to prisons in El Salvador, though it cuts against a preliminary injunction requiring federal payments to NGOs outside the United States.

JP: Sam's paper offers a sensible set of guideposts that lower courts might use in reflecting about the issuance of preliminary injunctive relief. I was especially delighted to learn that concern with the preservation of the status quo has been a hallmark of equity for much longer than previously understood. But as I tried to explain in my answer to question three, sometimes the need for expedition leads to shortcuts that may slight the reflective judicial process that we both agree would be best in an ideal world. I'm struck that Harvard's research funding suit against the federal government seeks a declaration of rights, speedily, rather than a TRO.

V. JP: If I may, I will return the favor by asking for Sam's view of the salience of the patent revocation model of litigation under the writ of scire facias, as adapted for use in the United States, for the current debate over universal injunctive relief.[40]

SB: Jim's paper is a masterful recounting of the history of this writ—or it certainly seems so to me, since everything I know about scire facias I have now learned from Jim and his coauthor Mary Zakowski. But I am less sure about its salience for the debate. I am inclined to conceptualize the cancellation of patents as being more like an in rem action than an in personam action (and I would think the same way about the equitable remedy of cancellation for a contract or other legal instrument). In rem actions are different. Nevertheless, I recognize that one could draw broader implications. Regardless, like mandamus and group litigation, the writ of scire facias shows the creativity of the remedial toolbox at common law and in equity.

39. *Id.*

40. *See* James E. Pfander & Mary Zakowski, *Non-Party Protective Relief in the Early Republic: Judicial Power to Annul Letters Patent*, 120 NW. U. L. REV. (forthcoming 2026). Anticipating Sam's concern, we find evidence that equity acts both in personam and in rem and that the in rem features of the scire facias proceeding were incorporated into the divisible, in personam world of equity.

VI. Assuming the Court places limits on the universal injunction, either in the birthright-citizenship cases or in another context, what practical impact will the inevitable turn to nationwide classes have on the practical availability of broad relief from unconstitutional executive action?

JP: The answer will of course depend in part on the nature of the limits. If the Court rejects universal or non-party-protective injunctions as incompatible with the strictures of Article III, then that will foreclose all such relief even where authorized by Congress. The current debate between Justices Gorsuch and Kavanaugh would appear to present the question of how far: Justice Gorsuch voiced a willingness to invalidate such relief broadly, whereas Justice Kavanaugh would preserve APA-style relief to set aside agency action as a general matter in certain circumstances.[41] I share the view that Congress should be understood to have power to assign decisional authority to lower federal courts that was understood to affect non-parties, as it did throughout the nineteenth century.[42] Some forms of congressionally approved all-or-nothing judicial decision-making remain in place today, such as the power of federal courts to repeal or annul patents and thereby confer benefits on non-parties. The birthright-citizenship cases confronted the Court with the chaotic consequences of a patchwork approach to legality.

If instead of a wholesale invalidation the Court erects thoughtful guideposts to the issuance of non-party protective relief, then things will look very different in the lower courts. The set of thoughtful guideposts might well include many that Sam identifies in his work on preliminary injunctions, which encourages lower federal courts to think slow, rather than fast, to preserve their power to decree effectively down the road, to consider factors other than the merits as they reflect on the scope of relief.[43] One challenge for this way of thinking stems from the pace at which the Trump Administration has rolled out what I might charitably call legally dubious executive orders; thinking slow in this context may allow the executive branch to evade judicial review through preemptive action, as with the removal of persons from the United States.

I am interested in the decision to certify a habeas class action by a federal judge sitting in the Southern District of Texas.[44] The Court's own decision, granting injunctive relief on behalf of a putative class of habeas petitioners in

41. *Compare* United States v. Texas, 143 S. Ct. 1964, 1980-81 (2023) (Gorsuch, J., concurring in the judgment), *with* Griffin v. HM Fla.-ORL, LLC, 144 S. Ct. 1, 1-2 & n.1 (2023) (Kavanaugh, J., statement respecting the denial of the application for stay).

42. For example, prize cases, naturalization proceedings, and patent revocation suits all resolved issues that could affect the rights of non-parties. *See* Pfander & Zakowski, *supra* note 40, at 3, 11-15.

43. *See* Bray, *supra* note 38, at 871.

44. *See* J.A.V. v. Trump, 349 F.R.D. 152, 160 (S.D. Tex. 2025).

the Northern District of Texas, appears to head in much the same direction.[45] The class action strikes me as a sensible approach to slowing down the pace of process-free removals; with a floating class action in place, newly detained individuals in Texas will enter the class and become entitled to the same legal protections that the district court put in place for the earlier arrivals. That resembles the form of class litigation that the Court has otherwise approved for those challenging the conditions of confinement.

Yet the government has a first-mover advantage in selecting the district of confinement and can obviously choose districts that have no such order in place. That reality argues for the wisdom of a system-wide remedial power to secure the due process protections at issue in the Texas litigation. Justice Alito's dissent in *A.A.R.P.* identifies some of the challenges that applications for such relief, via class certification, may present.[46] Preventing unlawful removals justifies preliminary injunctive relief under Sam's thoughtful guideposts, given the difficulty of securing return once individuals leave the country.[47] The Court must decide whether to press the demand for system-wide relief into a potentially cumbersome class action format (with perhaps the possibility of consolidated treatment through the JPML) or work within the emerging framework of universal injunctions to deal with remedial concerns that it evidently took seriously in the birthright citizenship argument.

SB: I agree with what I take to be Jim's prediction that in *Trump v. CASA, Inc.*, the Court will rein in universal injunctions, and I agree that what happens next will largely depend on how the Court does so. My prediction is that (1) the Court will reject non-party injunctive relief as a general matter, with certain qualifications or exceptions; and (2) it will not expressly ground that rejection in Article III, for reasons of constitutional avoidance and to steer clear of answering the Administrative Procedure Act question. The devil, of course, is in the details of those qualifications or exceptions. The Court will face three key questions.

The first question is about terminology. Should these be thought of as "exceptions," i.e., as instances where universal injunctions *are* permissible, or as "qualifications," i.e., as lying outside of the category "universal injunctions" and helping to demarcate it? I think the latter is better, and I define "national" or "universal" injunction accordingly.[48] I concede that as long as the terms are clear, the debate is largely semantic.

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45. *See* A.A.R.P v. Trump, 145 S. Ct. 1364, 1369 (2025) (per curiam) (approving classwide relief on behalf of a putative class).

46. *Id.*at 1375-77 (Alito, J., dissenting).

47. Notably, the Court relied on the government's stonewalling in the Maryland Abrego Garcia case as it reflected on the need for a pre-removal stay to ensure due process in Texas. *Id.* at 1368.

48. *See* Bray, *supra* note 17, at 419.

The second question is about form. Are the qualifications/exceptions categories of cases, or are they something looser, like aims or focal considerations that judges should take into account? That question is beguiling because one qualification/exception is sure to be "when a broad injunction is needed to give a party complete relief." That qualification/exception can be considered a category (i.e., the set of cases in which a party requires a broad injunction) or an aim (i.e., in giving an injunction, courts should try to give the party complete relief). In my view, the aim or focal consideration approach quickly founders when it gets to things like "avoiding irreparable injury to non-parties" or "protecting fundamental constitutional rights." At that point the exceptions swallow the rule. I support categorical qualifications, and in a blog post before the oral argument in *Trump v. CASA, Inc.*, I outlined six such qualifications: complete relief, representative suits, in rem suits, mandamus, an exercise of Congress's case-definition power, and jurisdiction-preservation.[49]

The third question is how to define "complete relief." The Court could simply say that "complete relief" is a ground for a broad injunction, or it could give more content and boundaries to the idea, in this vein:

> Sometimes, in order to give a remedy to the plaintiff, a court has to give relief that benefits nonparties. If A is burning vast piles of trash, and neighbor B sues to get an injunction stopping the nuisance, that injunction will benefit all the neighbors, whether they are parties or not. This has long been accepted in equity. However, invoking "complete relief" does not usually justify a broad injunction in challenges to government action. For example, money could be paid to some USAID funding recipients without paying money to others; in the cases before the Court, an injunction could protect some plaintiffs from executive action related to birthright citizenship (whether individual plaintiffs individually, states qua states with respect to their proprietary interests, or associational plaintiffs for their members) without protecting anyone else. When there are cases in which a universal injunction is the only way to protect the plaintiff from injury, it often turns out that there should be no injunction at all. That could be because there is a serious disproportion between the plaintiff's meager claimed injury and the broad remedy sought (e.g., the DACA case, where Texas alleged additional spending on drivers' licenses;[50] or the initial case in what eventually became *Trump v. Hawaii*, where Washington alleged a reduction in sales tax receipts[51]), or it could be that a highly attenuated standing claim of the plaintiff is why the remedy has to be really broad

49. Samuel Bray, *The Universal Injunction Cases, Part 4: The Court's Options*, DIVIDED ARGUMENT (May 13, 2025), https://perma.cc/AJ66-ZMYL.

50. Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

51. Washington v. Trump, No. 17-cv-00141, 2017 WL 6817677, at *6 (W.D. Wash. Oct. 11, 2017) (moving for a temporary restraining order in an antecedent to *Trump v. Hawaii* and asserting as one basis for standing "injury to [the states'] economies, including the loss of tourism revenue and tax revenue"); Washington v. Trump, No. C17-0141, 2017 WL 462040, at *7 (W.D. Wash. Feb. 3, 2017) (granting a TRO premised on *parens patriae* standing and proprietary standing, with the latter resting on harm to "the operations and missions of [the states'] public universities" and harm to their "operations, tax bases, and public funds").

> to have any effect (e.g., *FDA v. Alliance for Hippocratic Medicine*[52]). A request for a remedy beyond the plaintiff can be a warning light for either of those problems—disproportionate relief, or attenuated standing.[53]

Whatever answer the Court gives to these questions, I expect much of the attention will shift to class actions. Not every universal injunction would be replaceable with a class action, but many would be. And that would be a good development.

Class actions have three important advantages over universal injunctions. First, a class action is a proper case because there is a symmetry between winning and losing. If the plaintiff class wins, everybody wins; if it loses, everyone loses. That symmetry is absent from the universal injunction. Second, we would be more likely to get proper plaintiffs. Part of class certification will be to get named plaintiffs who have a direct interest at stake—who have a strong claim to "relative standing," to use Richard Re's term.[54] Among the many distortions from the universal injunction is the shift to more peripheral parties, like states. Third, *if* classes are defined with an eye toward promoting percolation—as in circuit-wide or state-wide classes—then the use of class actions would not have some of the epistemic disadvantages of the universal injunction.[55]

I also expect more orders under the All Writs Act to protect the court's ability to certify a class. In *A.A.R.P v. Trump*,[56] decided the day after oral argument in the birthright-citizenship cases, the Court endorsed the use of preliminary injunctions to protect a putative class. Whether or not a class has yet been certified, the protection of the court's jurisdiction is an appropriate use of a preliminary injunction.[57] As with all preliminary relief, courts should exercise restraint, and they should tailor their writs to the case and update them as the shape of the case becomes more clear.

I agree with Jim that temporary restraining orders and preliminary injunctions are especially appropriate when they prevent someone's removal from the country. Given the current administration's position that a person removed to another country is unable to be returned, a status-quo preserving

52. 144 S. Ct. 1540 (2024).

53. Bray, *supra* note 49.

54. Richard M. Re, *Relative Standing*, 102 GEO. L. J. 1191, 1195-96 (2014); *see also* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 156-157 (2023).

55. In *Trump v. Washington*, one of the cases heard with *Trump v. CASA, Inc.*, individual plaintiffs sought a class action limited to the state of Washington, but the district court's grant of a universal injunction obviated the need for class certification. *See* Individual Plaintiffs' Response to Application for a Partial Stay at 1-3, Trump v. Washington, No. 24A885, 2025 WL 1773631 (U.S. June 27, 2025).

56. 145 S. Ct. 1364 (2025).

57. *See* Bray, *supra* note 38, at 851 ("Like the writs approved by the All Writs Act, preliminary injunctions are issued by courts 'in aid of their . . . jurisdictions.'" (quoting 28 U.S.C. § 1651)).

injunction is an essential device for a court to maintain the efficacy of its ultimate remedial options.