

National Injunctions: Historians Enter the Lists

A major new brief in the Seventh Circuit sanctuary city case

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A major new [brief](#) on national injunctions was filed two days ago in the Seventh Circuit sanctuary city case. (My analysis of the district court's first opinion in the case is [here](#), of its second opinion [here](#), and of the appellate panel's opinion [here](#).) The authors are an all-star cast of legal historians and historians of the early Republic from Stanford, Princeton, and Columbia: Amalia Kessler, Bob Gordon, Bernie Meyler, Gregory Ablavsky, Stanley Katz, Hendrik Hartog, and Kellen Funk. These historians have written some of the leading scholarship on American equity (e.g., Kessler on inquisitorial procedure, Katz on colonial equity, Funk on fusion in the Field Code).

Their brief argues in favor of national injunctions. In this post I will highlight three key weaknesses in the historians' argument. In a follow-up [post](#) I'll comment on other specific claims and evidence in the brief.

First, the case that the historians identify as their best case does not support a national injunction. The historians' brief presents *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) as the single best case from the early Republic for establishing this proposition: "Courts of equity could also issue injunctions against government officials, and by doing so, functionally restrain the actions of governments at the municipal, state, and federal levels" (6). They note that the Court "dismissed the case for lack of jurisdiction," but they describe Story's position in the dissent he joined as aligning with national injunctions: he "would have entered an injunction enjoining the State of Georgia and all of its officers and agents from enforcing any Georgia laws in Cherokee territory against anyone" (6; see also 15).

The claim is bold, but there are two problems with it. First, the Court dismissed the case for lack of jurisdiction—not just lack of original jurisdiction, but also lack of *equitable* jurisdiction. The Court admitted it might decide "the mere question of right," i.e., title, "in a proper case with proper parties." But instead "[t]he bill requires us to control the legislature of Georgia, and to restrain its exertion of physical force" (30 U.S. at 20). In other words, Chief Justice Marshall was saying "maybe at law, but not in equity." Second, the plaintiff in the case was not an individual Cherokee who was seeking an injunction against the state and all its officers that would keep them from, in the words of the historians' brief, "enforcing any Georgia laws in Cherokee territory against anyone." The plaintiff was *the Cherokee Nation*. And it was suing as a foreign state defending its territory. The Court did not accept the theory of the Cherokee Nation on this point, but if it had, as the dissent by Justice Thompson did, then the requested injunction would have been plaintiff-protective. It would not have been analogous to a national injunction.

Second, the historians' brief does not address the strong evidence that equitable principles precluded a national injunction. They argue that federal courts failed to grant national injunctions for reasons grounded in "sovereign immunity, jurisdiction, and venue—not the nature of the federal courts' equity powers" (7). It is true there were such limits. Yet they were not insurmountable. (In [Multiple Chancellors](#), page 428, note 40, I list a set of cases in which sovereign immunity could have been avoided.)

But here it is important to look to the evidence that the U.S. Supreme Court thought equitable principles allowed only plaintiff-protective injunctions *against states*. In *Multiple Chancellors* I discuss *Georgia v. Atkins* and *Scott v. Donald*, state cases in which the various limits mentioned in the historians' brief would not apply. The Court insisted on plaintiff-protective injunctions *as a matter of the principles of "a court of equity"* (quoting *Scott*, which is the case that shows this point most clearly). So I agree with the historians' brief that the other limitations were there. But they lack affirmative evidence that there was no background equitable principle of plaintiff-protective injunctions, and the evidence adduced in *Multiple Chancellors* shows that there was. The historians' brief does not cite or discuss *Atkins* and *Scott*.

Furthermore, the historians' brief entirely fails to cite or discuss *Frothingham*. The brief suggests that "[t]he difficulty and expense of maintaining a lawsuit in Washington, D.C., deterred plaintiffs from seeking nationwide injunctions when injunctions against local federal officials would achieve adequate results" (22). And yet *Frothingham* is a striking counter-example. And it was decided by the Court specifically on the intertwined grounds of Article III and equitable principles. It is the central federal case showing that equitable principles leave no room for national injunctions. This is a glaring omission.

Third, it is rather astonishing that the historians' brief defends the national injunction by likening it to the fin de siècle anti-labor injunctions (6, 16-18) and to structural injunctions (24). The former are widely discredited and were expressly rejected by Congress; the latter have been a subject of controversy for fifty years. Whatever view one takes as to the anti-labor and structural injunctions, their weak point is their lack of basis in traditional equity. This is not their strength. I do not think it is much reassurance to say that national injunctions are traditional in equity just like the anti-labor and structural injunctions.

In short, the evidence adduced by the historians' brief does not support the national injunction (e.g., *Cherokee Nation*), the brief fails to confront the evidence that national injunctions were inconsistent with equitable principles (e.g., *Atkins*, *Scott*, *Frothingham*), and it tries to salvage the national injunction by analogizing it to anti-labor and structural injunctions. Nevertheless, the brief does focus attention on the right questions—especially the

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question of whether the national injunction can find a basis in traditional equity. It is a welcome addition to this important debate.

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