2013

In Defense of Implied Injunctive Relief in Constitutional Cases

John F. Preis
University of Richmond, jpreis@richmond.edu

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ABSTRACT

If Congress has neither authorized nor prohibited a suit to enforce the Constitution, may the federal courts create one nonetheless? At present, the answer mostly turns on the form of relief sought: if the plaintiff seeks damages, the Supreme Court will normally refuse relief unless Congress has specifically authorized it; in contrast, if the plaintiff seeks an injunction, the Court will refuse relief only if Congress has specifically barred it. These contradictory approaches naturally invite arguments for reform. Two common arguments—one based on the historical relationship between law and equity and the other based on separation of powers principles—could quite foreseeably combine to end implied injunctive relief as we know it.

In this Article, I defend the federal courts' power to issue injunctions in constitutional cases without explicit congressional authorization—a practice known as "implying" a suit for relief. The defense rests on two proofs, both largely historical. First, I show that the historical relationship between law and equity has largely been misunderstood in the realm of injunctive relief. Second, I show that implied injunctive relief does not contravene separation of powers principles because Congress and the federal courts have, since the Founding, viewed implied injunctive relief as permissible and even appropriate. These proofs do not account for policy concerns that might impact the inquiry, but they do suggest that such concerns must be extraordinarily compelling to overcome the federal courts' centuries-old power to imply injunctive relief in constitutional cases.

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* Professor, University of Richmond School of Law. For their thoughtful and generous help, I thank Hamilton Bryson, Jessica Erickson, Jim Gibson, Alex Glasshausser, John Greabe, John Jeffries, Corinna Lain, Doug Rendleman, and Kevin Walsh. I thank also the participants in the Summer 2012 panel on constitutional remedies at the Southeastern Association of Law Schools annual conference, participants at the Fifth Annual Junior Federal Courts Conference, and participants at a faculty colloquy at Wake Forest University School of Law.

INTRODUCTION

It is one thing to have a constitution, but it is quite another to enforce it. What is needed is some mechanism to make rights written on paper—what James Madison called mere "parchment barriers"—come alive in the lives of individual persons.[1] In the United States, one of the most prominent enforcement tools is the civil rights action, an action brought by the victim of a constitutional violation against the perpetrator. In such actions, the Constitution is made real through either damages or injunctive relief.

Who is in charge of civil rights actions? Congress, mostly. Congress has the power to create or abolish civil rights actions, and barring narrow exceptions, the federal courts are obliged to follow such choices.[2] In regulating these actions, Congress does not create or abolish the constitutional rights themselves, of course; it merely defines the avenues through which the rights shall be enforceable. If a plaintiff wants to know the remedies available for a constitutional violation, therefore, the best place to look is in the U.S. Code.

The U.S. Code is the best place to look, but it is not the only place. If the statute books do not create or prohibit a suit for relief, plaintiffs frequently turn to the federal

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[1] THE FEDERALIST NO. 48, at 424 (James Madison) (Clinton Rossiter ed., 1961).

[2] *See, e.g.*, Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329–30 (1938) (holding that Congress may bar the federal courts from enjoining labor strikes, even where a case presents a constitutional issue). The federal courts need not follow a congressional bar on civil rights actions if such actions are needed to "maintain[ ] a regime of lawful government." Daniel J. Meltzer & Richard H. Fallon, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991). While less than ideal, such a regime can tolerate "the denial of particular remedies, and sometimes of individual redress." *Id.*

courts for assistance. Plaintiffs in these circumstances will ask the courts to create—or "imply"—a civil rights action on their own. At present, the availability of implied actions depends, strangely enough, on whether the relief sought is monetary or injunctive. Suits for monetary relief are typically difficult to obtain from the courts. In the Supreme Court's view, creating an action for damages is a legislative task, not a judicial one.[3] Justice Scalia put it most memorably in a frequently quoted 2001 concurrence, stating that the implied damages action is "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[4]

Suits for injunctive relief, in contrast, are much easier to obtain. In the absence of congressional direction, the Court is typically comfortable "assum[ing] common-law powers" to create such actions. Instead of demanding congressional authorization, the Court simply asks the "straightforward" question "whether [the] complaint alleges an ongoing violation of federal law."[5] If such a violation exists, and Congress has not affirmatively barred the action, then a suit for injunctive relief will be available.

This incongruous approach to implied constitutional actions has naturally given rise to arguments for change. One group of scholars has argued the Court's stingy approach to damages ignores the historic relationship between law and equity. For hundreds of years, the argument goes, damages have been considered the "ordinary" remedy for a violation of law while injunctive relief has been considered a "drastic and extraordinary" remedy.[6] This historic relationship, which has never been affirmatively disclaimed, suggests that damages should be *at least* as available as injunctions, if not more. To arrange the doctrine differently "gets the traditional interplay between law and equity exactly backwards."[7] If the Court is to respect history, therefore, it should dramatically *increase* the availability of implied constitutional damages.

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[3] *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 389–90 (1983); *see also* Alex Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *after* Minneci, 90 WASH. UNIV. L. REV. (forthcoming 2013) (manuscript at 8–11), *available at* http://www.ssrn.com/abstract=2042175 (explaining the separation of powers concerns underlying the Court's implied damages jurisprudence).

[4] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Justice Scalia recently repeated his view in the 2011 term. *See* Minneci v. Pollard, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring).

[5] Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1639 (2011) (internal quotation marks omitted).

[6] Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395 (1971) ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

[7] Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1135 (1989); *see also* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 301 (1995) (arguing that the "most damning argument" against the Court's stingy damages jurisprudence is how it "perverts the usual treatment of damages"); Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional*

This is one response to the incongruity, but there is another. Instead of making damages actions more available, the Court could instead withdraw the easy availability of injunctive actions, thus making them *harder* to obtain than damages actions. This response would not only pay heed to the historical relationship between the two actions, but it would also pay heed to separation of powers principles—principles that have long animated implied damages actions but which, inexplicably, have been absent from implied equitable actions.[8]

There is good reason to think the Court might ultimately choose this latter path. Just last term, the Court heard an important case involving implied injunctive relief. In *Douglas v. Independent Living Center of Southern California*,[9] a plaintiff asked the Court to imply an injunctive action under the Supremacy Clause.[10] The Court found a way to duck the issue,[11] but Chief Justice Roberts dissented for himself and Justices Scalia, Thomas, and Alito. The dissenters would have rejected the plaintiff's request because Congress had not authorized such an action and for the Court to do so on its own "would raise the most serious concerns regarding . . . the separation of powers . . . ."[12]

Adjudication in the Federal Courts, 84 N.Y.U. L. REV. 681, 713–15 (2009) (arguing that the Court's approach to damages "invert[s] the traditional understanding of equity" and that the Court's "inflexible dichotomy between prospective and retrospective . . . constitutional suits [cannot] be justified"); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542–43 (1972) ("If a federal court acting under a general grant of jurisdiction may appropriately give equitable relief based upon the Constitution, there is no readily apparent reason why the same court would not have similar power to grant a remedy at law in cases in which such a remedy might be appropriate for the effectuation of a constitutional guarantee."); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 578 (1986) ("Furthermore, if the defendant might, in theory, be enjoined from violating the legislation, what reason could be given for denying the plaintiff the less intrusive remedy of damages?").

[8] Professor Richard Fallon recently noted the absence of separation of powers concerns in the Court's implied injunction jurisprudence:

> The Court . . . has treated suits for injunctions against ongoing constitutional violations strikingly differently from [constitutional damages] actions. In cutting back on [damages actions], the Court has said that the decision whether to authorize damages remedies for constitutional violations is more appropriately made by Congress than the courts and that judges should be wary of recognizing "implied" causes of action. By contrast, the post-*Brown* Court, so far as I am aware, has never suggested that injunctions against ongoing constitutional violations are constitutionally problematic in the way it now believes [damages] actions to be.

Richard Fallon, *Jurisdiction Stripping Reconsidered*, 96 VA. L. REV. 1043, 1113 (2011).

[9] 132 S. Ct. 1204 (2012).

[10] *Id.* at 1208–09.

[11] After oral argument but before an opinion had been issued, a federal agency changed its view of the applicable law, thus substantially altering the question presented. A five-justice majority thus remanded the case to the lower courts for consideration of the new question presented. *See id.* at 1208.

[12] *Id.* at 1213 (Roberts, C.J., dissenting).

Though Roberts's position only commanded four votes, there is good reason to believe that a fifth vote is well within reach.[13]

To be sure, Roberts's dissent in *Douglas* is narrow. It stops short of sweeping away all implied injunctive relief in constitutional cases, preferring instead to focus only on Supremacy Clause claims. The dissent does, however, highlight the potential force of separation of powers logic in this field.[14] As Professor Stephen Vladeck has argued, "Taken to its logical extreme, the Chief[ ] [Justice's] reasoning might even extend to suits for injunctive relief to enforce specific constitutional provisions (such as the Fourth Amendment)," rather than simply Supremacy Clause cases.[15]

Thus, if the Court truly cares about the historical relationship between law and equity, and truly cares about deferring to congressional prerogatives, it may not be long before implied injunctive relief is no longer available in constitutional cases.

In this Article, I explain why this reasoning is flawed and why the federal courts have the power to imply injunctive relief in constitutional cases. I do so by tracing the remedy's long development from fifteenth-century England to twentieth-century America. This development shows that: (1) the availability of implied monetary relief and the availability of implied injunctive relief have not been tightly bound together in any particular relationship and (2) federal courts having jurisdiction over a dispute have, from the Founding, enjoyed the power to create injunctive actions without explicit authorization from Congress. Together, these points rebut any suggestion that implied injunctive relief should be curtailed on historical and separation of powers grounds.

This defense of implied injunctive relief is valuable for two important reasons. First, much of the current scholarship on the availability of injunctive relief in constitutional enforcement focuses not on the history of equity, but on the costs and benefits of injunctive relief.[16] This is valuable work, but the Court cares deeply about history in this field, having repeatedly defined its equitable powers as equal to those of the "High Court of Chancery in England at the time of the adoption of the Constitution."[17]

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[13] Stephen I. Vladeck, Douglas *and the Fate of* Ex Parte Young, 122 YALE L.J. ONLINE 13, 14 (2012), http://www.yalelawjournal.org/2012/04/30/vladeck.html (arguing that, because "Justice Kennedy . . . had . . . argued for an analogous result in [a prior case], there may already be five votes" in favor of Chief Justice Roberts's view).

[14] *See Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting).

[15] *See* Vladeck, *supra* note 13, at 17.

[16] *See, e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (arguing that "limitations on damages, together with modern expansions of injunctive relief . . . [create] a rolling redistribution of wealth from older to younger, as the societal investment in constitutional law is channeled toward future progress and away from backward looking relief"). *See generally* Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) (arguing that, in certain contexts, damages are preferable to injunctions in constitutional enforcement because high transaction costs prevent efficient equitable remedies).

[17] Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 318 (1999) ("[E]quity 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 . . . ."); *see also,*

Second, the defense contributes new authority to the ongoing debate over the legitimacy of "constitutional common law," a species of law that includes "remedial rules drawing their inspiration and authority from, but not required by . . . various constitutional provisions."[18] Scholars have long debated whether such judicial lawmaking (implied constitutional actions being merely one example) is permissible and this Article provides significant evidence that the Founding Generation would have seen implied injunctive relief as legitimate.[19]

The Article proceeds chronologically in three steps. Part I begins in England hundreds of years before America was founded. It traces legal and equitable actions from their founding to the eighteenth century and shows that the two actions were not closely tied together in any particular relationship. The Article then turns to America in Part II. That Part shows how equity's detachment from the law was carried over to America, both by congressional edict and judicial practice. Untethered from legal actions, federal equitable actions thus grew into powerful tools of constitutional enforcement during the late nineteenth century and largely remain with us today. Part III then addresses the modern era. This was an era of statute, and the survival of implied injunctive relief thus turned on whether Congress's legislative directives explicitly or implicitly deprived the courts of their power to issue the remedy. None of the major legislation during this era accomplished this deprivation[20] and the authority to create injunctive actions thus remains intact today.

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e.g., Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949); Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945); Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 568 (1939); Gordon v. Washington, 295 U.S. 30, 36 (1935). There are two articles that do look at the issue historically. *See* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004) (discussing judicial implied relief in England and early America); John Harrison, Ex Parte Young, 60 STAN. L. REV. 989 (2008) (discussing the federal courts' exercise of equitable jurisdiction in the early twentieth century). Both articles are important, but neither focuses specifically on English equity in the eighteenth century or American equity in the nineteenth century—both of which are foundational to the federal courts' modern approach to implied injunctive relief.

[18] Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

[19] *See generally* RICHARD FALLON, IMPLEMENTING THE CONSTITUTION (2001) (describing and defending the judicial creation of doctrinal tools used to implement constitutional norms); Joseph Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 134 (1985) (arguing that federal courts have no authority to "impose implementing 'details' that are not constitutionally required"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (providing a framework for determining when federal courts may exercise a law-making function); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (arguing that constitutional concerns are pervasive in administrative law and the resulting doctrine is a type of constitutional common law); Thomas S. Schrock & Robert C. Welsh, *Reconsidering The Constitutional Common Law*, 91 HARV. L. REV. 1117, 1138–40 (1978) (challenging the legitimacy of constitutional common law).

[20] *See infra* Part III.

Although the past exerts immense power over the Court's current approach to implied injunctive relief, policy concerns should not be ignored. These concerns—ranging from democratic accountability[21] to economic efficiency[22]—could conceivably militate *against* implying injunctive relief. I do not consider those arguments here. Instead, I merely argue that if the Court intends to pay heed to the historical roots of its power—as it so often professes to do in this field—the case for a judicial power to enjoin unconstitutional conduct is extraordinarily strong.

I. LAW AND EQUITY IN ENGLAND

The fate of implied injunctive relief today depends in large part on the past. Not only do arguments for reform depend on the historical relationship between law and equity, but the Supreme Court itself has declared over and over again that 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."[23] It is essential, therefore, to understand the origins and growth of English equity.

This Part takes on that task. It describes how legal and equitable causes of action came to exist and, in particular, how equity regarded the common law. This discussion yields two central insights. First, the existence of an equitable cause of action was not necessarily dependent on a legal cause of action.[24] Courts of equity had the authority to, and did in fact, create causes of action in cases where courts of law would not issue damages. This suggests that the two causes sometimes lived separate lives and that we should be hesitant to yoke the two remedies together. Second, although courts of equity professed a willingness to adhere to common law rights and defer to legal remedies, this deference was narrowly practiced and effectively uncheckable.[25] Equitable remedies thus issued as a matter of course in several categories of cases, making them far less "extraordinary" than typically believed.

A. Law

It is often best to start at the very beginning. In the realm of English adjudication, the very beginning is 1066, the year of the Norman Conquest. Before that time, disputes in what was to become England were resolved primarily through a crude system of

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[21] *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that judicial lawmaking is unwise in part because it is democratically illegitimate).

[22] *See, e.g.*, Kontorovich, *supra* note 16, at 823–24 (arguing that damages will be more efficient than injunctive relief in certain circumstances).

[23] Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 318 (1999); *see also, e.g.*, Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949); Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945); Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 568 (1939); Gordon v. Washington, 295 U.S. 30, 36 (1935).

[24] *See infra* Part I.B.1.

[25] *See infra* Part I.B.2.

"communal justice."[26] Justice was had, or not, at the hands of a "folk-assembly" gathered at the local village or manor.[27] Disputants might be persuaded by their neighbors to give up their differences, or the crowd might appeal to supernatural authority for intervention.[28] If the gathering failed to yield a resolution, the parties would be left to muddle on. After the Norman Conquest, however, an alternative avenue of resolution presented itself: a direct appeal to the king.

Take, for example, a dispute from the year 1114. In that year, Richard, the Abbot of York, was at odds with a man by the name of Geoffrey de Spineto.[29] Mr. Spineto had been fishing in the lake of Hornsea, a lake the monastery claimed it had received as an estate gift years earlier.[30] Apparently having no luck with local resolution, the Abbot appealed to King Henry I for assistance.[31] The Abbot explained the situation to the King, who then resolved the matter by issuing a "writ."[32] A writ was simply a letter from the crown ordering that some act be taken.[33] In the Abbot's case, the writ decreed that "Richard abbot of York shall hold freely the [lake] of Hornsea."[34]

By the twelfth century, "knights and abbots [were] constantly rushing to the king, trying to obtain a writ of prompt redress for some alleged wrong."[35] The process became so common that the king handed the process off to his close assistant, the lord chancellor.[36] The chancellor in turn began to issue writs to local officials, each writ describing the "steps to be taken to determine a controversy or secure a right."[37] There was no formal law at this point. Local officials simply resolved disputes according to the instructions in the writ, as well as general notions of what was "right," according to "reason, religion, [and] morals as well as . . . established and unmistakable custom."[38]

As the centuries passed, certain types of disputes occurred routinely enough that the chancellor stopped issuing distinct writs for each case. Instead, Chancery (the office

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[26] J. H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 4 (1979).

[27] *Id.*

[28] *Id.* at 4–5.

[29] *See* William Farrer, *An Outline Itinerary of Henry I*, 34 ENG. HIST. REV. 303, 370 (1914).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 179 (1936).

[34] Farrer, *supra* note 29, at 370.

[35] R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 241 (1959).

[36] Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 441 (2003).

[37] RADIN, *supra* note 33, at 179; *see also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 22 (1969) (explaining that free tenants could go to royal court to obtain a writ "directing the lord to do right to them").

[38] RADIN, *supra* note 33, at 181. Often, the writ would simply order the judge to "do right" by the injured party. *See* MILSOM, *supra* note 37, at 22; VAN CAENEGEM, *supra* note 35, at 486 ("I order you to do full right to the abbot of Abington, in respect of his sluice which, the men of Stanton have broken.").

of the chancellor) created a variety of standardized writs.[39] Each writ contained a "complete set of substantive, procedural, and evidentiary law, determining who has to do what to obtain the unique remedy the writ specifies for particular circumstances."[40] For example, if a person suffered a punch in the face, he would likely pursue the standardized writ of trespass *vi et armis*.[41] That writ promised a plaintiff damages, but only if the plaintiff presented the evidence listed in the writ, and did so in the manner defined by the writ.[42]

Taken together, the collection of writs enforceable in English courts of law comprised the *common law*. Lawyers and jurists, however, did not think of the law in the categorical terms we do today. There was no such thing as "tort law," for example; there was only a set of writs that addressed interference with the person.[43] Nor was there a general law of "civil procedure," for each writ came with its own "mini civil procedure system."[44] The same went for rules of evidence as well as remedies.[45]

If a writ was applicable to a plaintiff's case, the plaintiff was said to have a "cause of action."[46] Thus, a person who suffered a punch in the face was said to have a "cause of action for trespass *vi et armis*."[47] Our modern ears have become numbed to the phrase "cause of action," but if it is studied for a moment, the phrase is actually quite descriptive. To say that a victim of physical abuse had a "cause of action" in eighteenth-century England was to say that the plaintiff had sufficient "cause" for taking some "action" in court. His lawsuit was *justified* because a preexisting writ permitted him

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[39] Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 10–11 (1926) ("An action was begun by the issuance of a writ appropriate to the form of action; in time these writs became standardized."); VAN CAENEGEM, *supra* note 35, at 178.

[40] H. Brent McKnight, *How Then Shall We Reason, The Historical Setting of Equity*, 45 MERCER L. REV. 919, 929 (1994).

[41] JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO AMERICAN LEGAL INSTITUTIONS 103–04 (2009) (explaining that this type of writ was obtained for a wrong committed "with force and arms").

[42] *Id.*

[43] BAKER, *supra* note 26, at 49 ("There was a law of writs before there was a law of property, or of contract, or of tort."); *see also* PAUL BRAND, THE MAKING OF THE COMMON LAW 96–97 (1992) ("The use of standard forms of writ . . . helped to point judges and lawyers in the direction of conceptualizing English law in terms of a series of discrete forms of action, each corresponding to one particular type of writ, each offering a particular type of remedy for particular constellations of factual circumstance . . . .").

[44] LANGBEIN, *supra* note 41, at 96.

[45] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915 (1987) ("Distinct procedural characteristics developed for different writs. Each writ implied a wide range of procedural, remedial, and evidentiary incidents, such as subject matter and personal jurisdiction, burden of proof, and methods of execution.").

[46] *Id.* at 935 ("The term 'cause of action' was at least as old as the fifteenth century. Like the forms of action under the writ system, the term implied a set of circumstances for which there was a known remedy.").

[47] LANGBEIN, *supra* note 41, at 103–04.

an avenue for a specific type of relief.[48] We are in the habit today of separating the cause of action from substantive right, procedure, and remedy, but that was not the practice in England. Right, procedure, and remedy were all wrapped into one—together called the "writ." If the events giving rise to a plaintiff's injury were described in the writ, the plaintiff was able to prove them in the manner specified by the writ, and the plaintiff desired the remedy dictated by the writ, the plaintiff had a cause of action. If the plaintiff's case could not be fit within a writ, he was out of luck because common-law judges had little power to modify writs to fit new circumstances.[49]

B. Equity

Although the common-law courts were a vast improvement over the "communal justice" system that existed before 1066, the courts still drew criticism. Writs did not cover every injustice and, by the fourteenth century, Chancery had stopped issuing new writs.[50] Moreover, even when a writ applied, its "precise and technical rules" might put relief beyond reach.[51] Dissatisfaction with the courts led prospective litigants to skip the courts and appeal directly to the king for relief.[52] The king, of course, was not confined by the terms of any writ.[53] He was free to issue whatever order he desired, just as he had originally done soon after the Norman invasion.[54] In the thirteenth and fourteenth centuries, as more and more plaintiffs bypassed the common-law courts and came to him directly for relief, the king began (again) referring the disputes to the lord chancellor.[55] Instead of issuing a new writ to address the plaintiffs' claims, the chancellor began to resolve the disputes on his own.[56]

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[48] BRAND, *supra* note 43, at 96 ("[L]itigants were allowed to initiate litigation *only* through a [recognized] writ." (emphasis added)); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 20 (8th ed. 1861) ("In the courts of common law, both of England and America, there are certain prescribed forms of action [i.e., writs], to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case, he is remediless."); Bellia, *supra* note 17, at 786 ("To establish that one had a cause of action under English common law . . . one had to establish the facts that entitled one to judicial relief through an established form of proceeding [i.e., writ].").

[49] *See* Main, *supra* note 36, at 440 ("[P]recise and technical rules of pleadings, procedure and proof cabined judicial discretion" at common law.).

[50] *Id.* at 442–43.

[51] *Id.* at 440 ("[T]he universe of writs was fixed and their construction by law judges narrowly circumscribed; precise and technical rules of pleadings, procedure and proof cabined judicial discretion within the form of action."). Judges were forbidden to depart from the terms of the writ. *See* F.W. MAITLAND, EQUITY, ALSO, THE FORMS OF ACTIONS AT COMMON LAW 298 ("In the Middle Ages discretion [in the realm of writs] is entirely excluded; all is to be fixed by iron rules.").

[52] *See* Main, *supra* note 36, at 440–41.

[53] *Id.* at 441.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 441–42.

By the fourteenth century, a distinct court arose under the chancellor—the Court of Chancery.[57] Chancery practice at the beginning was free-form; plaintiffs simply had to tell the chancellor their story.[58] The chancellor was usually an ecclesiastic, not a trained lawyer.[59] As such, he issued relief on ethical, not legal, grounds.[60] His "primary function and concern was not with the [plaintiff] but with the [defendant] and the good of his soul."[61] If the defendant had acted contrary to fundamental principles of justice (as determined by the chancellor) the plaintiff prevailed.[62] Unlike common-law courts, juries had no role in equity.[63] Nor, for many centuries, did stare decisis.[64] Judgments conformed only to the view of the presiding chancellor, a system of justice that some derided as arbitrary.[65]

Over time, Chancery's decisions fell into a rough pattern such that there came to be a vaguely definable "law of equity."[66] With this development, an equitable "cause of action" could be said to exist. That is, there existed multiple situations in which, given Chancery's historic propensity to act, plaintiffs had "cause" for taking "action" in that court.[67]

Plaintiffs had cause for going to Chancery in two types of situations. One situation involved the enforcement of claims created anew by equity. Take, for example, the law of trusts and mortgages. Chancery developed this law as the feudal system declined and new forms of property ownership became desirable.[68] The common law, with its rigid adherence to stare decisis and writ practice, was unable to adapt to these new

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[57] Steele, *supra* note 39, at 11 (noting that the "practice of referring to the Chancellor all of these special appeals to the king led to the establishment of a tribunal which by the time of Edward III (1327–1377) had become recognized as a distinct and permanent court, with its separate jurisdiction and mode of procedure and its seat at Westminster").

[58] Main, *supra* note 36, at 442–43 n.80.

[59] HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY 4 (1936).

[60] *See* WILLIAM F. WALSH, A TREATISE ON EQUITY 4 (1930); Subrin, *supra* note 45, at 918–19 ("The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's conscience.").

[61] A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 398–99 (1975).

[62] *Id.* at 399.

[63] LANGBEIN, *supra* note 41, at 289–90.

[64] *Id.* at 351–53 (describing the "doctrinalization" of Chancery in the eighteenth century).

[65] The most famous critique is likely that of John Selden:

> Equity is A Roguish thing, for Law [we] have a measure . . . . Equity is according to [the] conscience of him [that] is Chancellor, and as [that] is larger or narrower, [so] is Equity. Tis all one as if they should make [the] Standard for [the] measure [we] call A foot, to be [the] Chancellor's foot . . . .

JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., Quaritch 1927) (1689).

[66] Main, *supra* note 36, at 441–42.

[67] *Id.*

[68] LANGBEIN, *supra* note 41, at 272.

circumstances.[69] Chancery, not so confined, was able to adapt and thus developed new and distinct equitable claims.

The second situation in which a plaintiff had cause for filing in Chancery—and the one most relevant to this Article—involved Chancery's provision of new and distinct remedies for the violation of preexisting legal rights. Chief among these new remedies were injunctions for torts and specific performance for breaches of contract.[70] In these situations, equity by necessity had to work out an arrangement with the common law as to what law would be applied and when it would even hear a case. Equity worked this out in two ways. First, equity purported to follow common-law rules in its issuance of injunctive relief, and second, equity purported to withhold relief altogether if an adequate remedy could be had at law. As explained below, however, these rules did not tightly constrain equity in its provision of injunctive relief.

1. Equity Follows the Common Law (Sort Of)

Suppose that a plaintiff desired an injunction barring an ongoing trespass to his property. Such a case implicated both the common law and equity—the common law provided the law of trespass and equity provided injunctive relief. Given this, where should the plaintiff file suit: in a common-law court or in equity? A plaintiff could file at law and ask the court to issue an injunction, or file in equity and ask the court to apply common-law rules of trespass. Common-law courts, adhering closely to the precise terms of longstanding writs, would not normally issue injunctive relief. Thus, the standard approach was to file in Chancery and have the court apply the common law.[71] Equity was happy to oblige this request and the practice soon took the form of the maxim "equity follows the law."[72] That is, equity would issue injunctive relief for common-law violations, but in doing so, it would follow the common law as defined by courts of law. An injunction could only be had in equity if the plaintiff would have been able to collect damages for a past harm in the same circumstance.

As with all maxims, however, this one was not perfectly true. While it is true that equity *usually* followed the common law, it is not true that the common-law cause of action was perfectly transported into equity. We are in the habit today of dividing law into substance and procedure, with the forum court applying its own procedure and borrowing the substantive law from another jurisdiction.[73] If this is a difficult task

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[69] *Id.*; MAITLAND, *supra* note 51, at 7.

[70] *See* Main, *supra* note 36, at 443.

[71] LANGBEIN, *supra* note 41, at 287.

[72] *Id.*

[73] This differentiation is required in choice of law circumstances, which are common in countries with multiple legal systems, such as the United States. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 463–74 (1965) (explaining choice of law analysis for state law actions filed in federal court); Tanges v. Heidelberg N. Am., Inc., 710 N.E.2d 250, 252 (N.Y. 1999) (explaining New York's choice of law analysis—which is typical of many states—for lawsuits that touch multiple states).

today,[74] it was virtually impossible to do in early modern England. The law was simply a collection of writs that prescribed which steps to take to procure certain types of relief.[75] Indeed, to the extent the law could be labeled at all, it was *entirely* procedural.[76] Thus, it was no easy task for a court of equity to pick from a common-law writ the precise provisions that defined the "right" and leave behind the "procedure." On many occasions, therefore, equity issued a remedy in cases that had their doctrinal origin in the common law but that would not have been successful in a common-law court.

Take, for example, injunctive relief for waste. Waste was a common-law cause of action against tenants who had damaged the property entrusted to them. The cause of action at law only extended to plaintiffs who had a definable interest in the property, typically the fee owner.[77] Sometimes, however, waste was obviously being committed by a tenant and the putative plaintiff's interest only amounted to a contingent remainder.[78] The common-law courts found this interest too conjectural to give rise to a cause of action for waste. Equity, however, intervened to protect those contingent interests through injunction.[79]

Herein lies the problem with the blanket statement that "equity follows the law."[80] On the one hand, equity followed the law because it only acted where actual waste was being committed. On the other hand, equity ignored the law by providing a cause

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[74] In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the most recent major choice of law case before the Supreme Court, no justice was able to collect four other votes to create a controlling majority opinion. 130 S. Ct. 1431 (2010).

[75] *See supra* notes 39–49 and accompanying text.

[76] JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING 18 (1969) (explaining that substantive law grew out of procedure: "Courts [were] organized to handle a series of specific cases, the decisions of which gradually developed theories of rights and liabilities . . . . [O]ur rights and liabilities as defined by Substantive Law, had their origin in and developed out of Procedural Law."); HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883) (describing substantive law as "secreted in the interstices of procedure"); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 381 (5th ed. 1956) ("[S]ubstantive law [is] discussed in terms of procedure. The rights of the parties [are] expressed in the form of writs and pleading . . . ."); Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1050–51 (2002) (discussing nineteenth-century shift in the common law towards distinct categories of substance and procedure).

In his *Commentaries*, Blackstone argued that substance and procedure were actually distinct concepts. *See* Main, *supra* note 36, at 461–64 (discussing Blackstone's attempt to separate substance and procedure). At that time, however, his characterizations were more of a normative aspiration than a descriptive account. *See* PLUCKNETT, *supra*, at 381–82; Alan Watson, Comment, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 804–05 (1988).

[77] *See* 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 259 (2d ed. 1966) (1938).

[78] WALSH, *supra* note 60, at 136 ("At law a contingent remainderman could not sue the tenant for waste because he had only a possibility of an estate, not an actual fee in remainder.").

[79] *Id.*; *see also* 2 STORY, *supra* note 48, § 913, at 95 ("[T]here are many cases where a person is dispunishable at law for committing waste, and yet a court of equity will enjoin him.").

[80] LANGBEIN, *supra* note 41, at 287.

of action to a plaintiff that would not have had one at law. Is a cause of action defined simply by the harm it addresses, or is it defined by the universe of persons empowered to collect a remedy for a certain harm? Or is it defined by both concerns? This question may be meaningful to modern lawyers, but it was unimportant—or even unintelligible—to equity in eighteenth-century England. Equity did not label and sort the common law; it approached its task much less methodically, guided by the overall goal of ameliorating the harshness of the common law. This necessarily involved a departure from the common-law cause of action in various instances.

Chancery's willingness to enjoin waste that was not actionable at law is not the only such example. Consider for instance the doctrine of accident. A common application of this doctrine involved lost bonds. If a bondholder, for example, sought to collect on his bond in a common-law court, but could not present the bond itself (because he had lost it, for example), the court would typically deny relief.[81] Chancery saw matters differently, however. Chancery permitted the bondholder to declare by affidavit that he had ownership of the bonds but that they were lost or destroyed.[82] If the court found to its satisfaction that the plaintiff did in fact own the bonds in question, it would enforce the agreement as though the bonds had in fact existed.[83]

In this case, too, it is difficult to see how Chancery followed the common law. On the one hand, Chancery did not necessarily create a new cause of action; an action on a bond was a simple breach of contract action that existed at law for centuries. On the other hand, Chancery awarded a remedy where common-law courts would have denied relief. In this instance, plaintiffs had "cause" for going to Chancery where they would not have had "cause" for going to a common-law court.

Other examples of this behavior—of equity generally following the common law but refusing to replicate it—are not hard to locate.[84] Justice Story, the foremost expert on English and American equity, summed up the matter this way:

> In short, it may be correctly said, that the maxim, that equity follows the law, is a maxim liable to many exceptions; and that it cannot be generally affirmed that where there is no remedy at law

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[81] 1 STORY, *supra* note 48, §§ 81–84, at 83–88.

[82] 1 *id.* at 85.

[83] 1 *id.*

[84] *See* 1 *id.* § 64, at 55 (discussing equity's willingness to "award a perpetual injunction" in cases where fraud in relation to a marriage contract was perpetrated); 1 *id.* § 64a, at 56 (discussing cases in which the "statutes [of limitations] would be a bar at law, but in which equity would, notwithstanding, grant relief"); 1 *id.* § 64b, at 57 (stating the general rule that equity follows the "same modes of construing the language and limitations of" legal and trust estates, but noting exceptions that are "as well known as the rule itself"); 1 *id.* § 184, at 185–86 (describing the many cases in which courts of equity, "in relieving against [fraud], often go, not only beyond, but even contrary to, the rules of law"); 1 *id.* § 446, at 423 (explaining how the action of account (which was used to force a commercial relation to "account" for funds entrusted to him) could be maintained in equity against "personal representatives of guardians, bailiffs, and receivers" although such defendants were not suable at common law).

> in the given case, there is none in equity; or, on the other hand, that equity, in the administration of its own principles, is utterly regardless of the rules of law.[85]

In sum, although equity often adhered to the key elements of the common law, the court did not see itself as precisely bound by causes of action at law. At the time of the American Founding, it was not uncommon for Chancery to enforce the common law through equitable remedies even where the common law might not itself make damages available.[86]

2. Equity Defers to Monetary Relief (Sort Of)

Although equity enjoyed, to some extent, control over its own causes of action, equitable relief was still subject to a jurisdictional rule known as the "adequate remedy rule."[87] This limit, however, did not restrict Chancery nearly as much as might be thought.

The rule grew out of Chancery's ascendancy during the fourteenth and fifteenth centuries. During this time, Chancery practice became so robust that the common-law courts no longer saw Chancery as supplementary to the common law; they saw it as a rival.[88] Chancery practice even antagonized Parliament.[89] By the sixteenth century,

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[85] 1 *id.* § 64b, at 57. The historian William Holdsworth has also noted the limitations of this maxim:

> We have seen that, from the earliest times, the Chancellors had emphasized the principle that equity follows the law . . . . On similar principles equity must put the same construction on statutes as that put upon them by the common law. But, if necessary, it would, both in respect to the common law and the statute law, go beyond the law, and extend the principle underlying the law to cover analogous cases which fell under the same principle; and, in order to follow out the consequences of its own principles it might be necessary to make departures from the strict legal rules.

12 HOLDSWORTH, *supra* note 77, at 259.

[86] Professor Anthony Bellia has explained that, although equity may have enjoyed significant discretion early on, that discretion mostly disappeared by the eighteenth century. *See* Bellia, *supra* note 17, at 789–92. It is true that equity became much more rule-bound during the colonial era. *See* LANGBEIN, *supra* note 41, at 351–54. But this does not mean that equity was *as rule-bound as* the common law, or that the equitable cause of action closely tracked the common-law cause of action. The evidence above suggests that relief in equity was, on the whole, marginally more forthcoming than in law. In any event, even if equitable discretion at the Founding was limited, equity by then already had established its power to issue injunctive relief in several categories of cases that, in the late nineteenth century, would frequently appear in federal courts. *See infra* notes 101–17, 216–49 and accompanying text.

[87] *See* Main, *supra* note 36, at 451, 477.

[88] LANGBEIN, *supra* note 41, at 329–35; Main, *supra* note 36, at 446–47 (describing the "jealousy and conflict" between the two courts).

[89] LANGBEIN, *supra* note 41, at 329.

the common-law courts had become closely aligned with Parliament while Chancery remained tied to the Crown.[90] Further, Parliament at this time was increasingly at odds with the Crown over constitutional authority. Parliament no longer recognized the Crown's claim to absolute power,[91] and thus was apt to resist the powerful claims of the Crown's pet court, Chancery.[92] Thus, equity's ever expanding docket was more than a petty jurisdictional squabble; it was a challenge by the Crown to the authority of Parliament.

Out of this contentious duel was born a compromise. The compromise worked as follows: "Chancery would not duplicate the work of the common law courts, but it would do other judicial work that the common law courts had never done."[93] Or, put differently, "equity would take jurisdiction only if there were no adequate remedy at law."[94] If a plaintiff came to Chancery seeking damages for injury to his person, the chancellor would turn him away because an "adequate remedy at law" existed through the writ of trespass.[95] If a plaintiff sought an injunction for repeated or ongoing trespasses, Chancery could assert jurisdiction over the case because damages were not adequate to resolve the plaintiff's problem.

There can be no doubt that the adequate remedy rule limited equitable jurisdiction to some extent. The rule, however, had far less bite than its terms suggest. This was so for four reasons, three doctrinal and one political.

a. Adequate by Comparison

The adequate remedy rule in practice required legal remedies to be much more than simply "adequate." The remedies had to be *as adequate as* the remedies provided by Chancery.[96] Moreover, the concept of adequacy was highly malleable. Professor

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[90] *Id.*

[91] *Id.* ("The conflict [between courts of law and equity] became embedded in the larger constitutional controversy about the respective powers of the king (and his Council) vis-à-vis those of Parliament and the common law courts.").

[92] *Id.*; Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 257, 260 (Donald Fleming & Bernard Bailyn eds., 1971) ("By the late sixteenth century, and especially with the accession of the Stuarts, the court of chancery was closely associated with the royal prerogative and became the target of opposition.").

[93] DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 20 (1991).

[94] *Id.*

[95] *Id.*; LANGBEIN, *supra* note 41, at 103.

[96] *See, e.g.*, Lewis v. Lechmere, (1721) 88 Eng. Rep. 828 (K.B.) 829; 10 Mod. 503, 506 (holding that jurisdiction in equity was available even where a legal remedy was available because the "remedy . . . had at law, was not a remedy adequate to what [the plaintiff] had in this Court"). For examples of legal remedies that were available but considered less useful than the equitable remedy, see 1 STORY, *supra* note 48, § 80, at 83; § 443, at 421, § 535, at 522; § 649, at 623; §§ 661–62, at 633; § 702, at 678.

Thomas Main has noted that, to be adequate, "the remedy at law had to be as 'plain,' 'certain,' 'prompt,' 'adequate,' 'full,' 'practical,' 'just,' 'final,' 'complete,' and 'efficient' as the remedy in equity."[97] Obviously, "this language left much to the discretion of the chancellor, and consistent with the general principle of equity to address new or unforeseen circumstances, the equities in each case controlled the court's exercise of that broad discretion."[98] Thus, if Chancery was determined to take jurisdiction in a particular case, it was not hard to find the legal remedy inadequate.

b. Once Established, Never Lost

Chancery and the common-law courts existed side by side for hundreds of years. Over time, common-law remedies occasionally evolved to the point that they might be considered adequate. Even in these instances, however, Chancery refused to give up jurisdiction.[99] The court reasoned that, having obtained jurisdiction over a particular type of case in years past, it could not be divested of that jurisdiction through innovation at the common law.[100] Thus, if equitable relief was once available, it remained available—even if admittedly adequate common-law remedies had developed in the intervening years.

c. Ordinary at Times

The application of the "adequate remedy rule" is how injunctions came to be characterized as extraordinary. If injunctions could only be had when a legal remedy was unavailable, injunctions were special, not routine. They were, in other words, "extraordinary."

The moniker "extraordinary," however, is misleading. It may have been true that damages were awarded far more often than injunctions in eighteenth-century England. But calling injunctive relief "extraordinary" on this basis obscures the fact that, in several categories of cases, injunctions were available as a matter of course. In these cases, legal relief was per se inadequate and the injunction was the "ordinary" remedy. For our purposes, three categories of such cases are most important.

Suits involving a prospective interest in real or personal property. Equity was nearly always willing to intervene by injunction to protect a plaintiff's interest in real

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[97] Main, *supra* note 36, at 451–52.

[98] *Id.* at 452.

[99] 1 STORY, *supra* note 48, § 64i, at 62–63 ("[I]f, originally, the jurisdiction has properly attached in equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases, when they formerly rejected it.").

[100] 1 *id.* § 64, at 63 ("[I]t cannot be left to courts of law to enlarge, or to restrain the powers of courts of equity at their pleasure . . . . Being once vested legitimately in the court, it must remain there, until the legislature shall abolish, or limit it.").

property. If a plaintiff contracted to buy land but the buyer backed out, injunctive relief (also known as "specific performance") could be had.[101] The same rule applied if the plaintiff's land was subject to injury through trespass or waste,[102] or if his rights to personal property were in jeopardy.[103] In all of these circumstances, Chancery had come to believe that the plaintiff's right of ownership and possession was so distinctive that damages could never be adequately measured.[104] Additionally, even if damages could be calculated, the defendant might not cease his wrongful behavior and the plaintiff would be forced to bring an action at law over and over again.[105]

Suits involving prospective business interests. Equity routinely intervened to protect through injunction the trade interests of plaintiffs.[106] Thus, a plaintiff with an exclusive franchise could obtain an injunction protecting the franchise.[107] Similarly, plaintiffs possessing valid patents or copyrights could obtain injunctive relief.[108] Chancery also imposed injunctions in cases involving exchange of money, stocks, and financial instruments.[109] Trade secrets were also protected by injunction[110] and fraudulent sales were enjoined.[111] The justification for injunctive relief in these circumstances was similar to that in the property realm. The merchant or inventor's loss of competitive

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[101] 2 STORY, *supra* note 48, § 908, at 90–91.

[102] ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 179–95, 259–75 (1839) (discussing waste and nuisance); 2 STORY, *supra* note 48, §§ 928–29, at 110–12.

[103] 2 STORY, *supra* note 48, § 956, at 139.

[104] 2 *id.* § 932, at 113; EDEN, *supra* note 102, at 277–306, 307–35 (discussing injunctions to restrain infringement of patents and copyright).

[105] 2 STORY, *supra* note 48, § 930, at 112 (explaining equity's historical willingness to grant an injunction to avoid a "multiplicity of suits").

[106] 2 *id.* § 927, at 107 ("[A]n injunction will be granted against a corporation, to prevent an abuse of the powers granted to them to the injury of other persons.").

[107] 2 *id.* § 927, at 108 ("[A]n injunction will be granted in favor of parties, possessing a statute privilege or franchise, to secure the enjoyment of it from invasion by other parties.").

[108] In a study of copyright injunctions issued by Chancery in the seventeenth and eighteenth centuries, Professor Gómez-Arostegui has concluded:

> In the year 1789, and in all the years preceding it in which the Chancery heard infringement cases, the inadequate-remedy-at-law requirement played no active role in deciding whether to issue a copyright injunction. No court opinion or order in a copyright case ever required an affirmative showing of inadequacy, nor did other contemporary materials suggest one was required. It was not argued by plaintiffs, as far as can be discerned from the records, nor did it ever form the basis for denying a motion. On the contrary, the historical record suggests that in copyright cases, legal remedies were deemed categorically inadequate.

H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate Remedy at Law Requirement*, 81 S. CAL. L. REV. 1197, 1201 (2008).

[109] 2 STORY, *supra* note 48, §§ 954–55, at 138.

[110] 2 *id.* § 952, at 137.

[111] 2 *id.* § 954, at 137.

advantage was incredibly difficult, if not impossible to calculate.[112] Moreover, if injunctive relief was not issued, the wrongful behavior might easily persist.[113]

Suits involving a defense not recognized at law. This category of equitable suits differs in form from the first two. In those cases, the injunction was necessary because damages would fail to adequately remedy the harm alleged; in these cases, the injunction was necessary to ensure that an equitable defense would not be forfeited in a court of law.[114] For example, if a plaintiff charged a defendant with breach of contract in a common-law court, the defendant often could not raise the defense of fraud; common-law courts only permitted the defense in limited circumstances.[115] In these situations, the defendant would go to Chancery and ask for an injunction barring the plaintiff from continuing his suit at law, a request Chancery would honor.[116] In barring litigants from pursuing common-law relief, Chancery essentially barred enforcement of the common law generally (to the extent it ran afoul of equity). Chancery would issue such injunctions in an enormous variety of circumstances.[117]

In the three circumstances discussed thus far, injunctive relief was not extraordinary, it was the norm. Thus, while it may be true that injunctions, when viewed against the entire body of remedies, were extraordinary, it is not true when specific categories of cases are considered. In the circumstances above, injunctive relief would have been easily accessible.

d. Not Legal, Political

On its face, the adequate remedy rule seemed to preserve for courts of law at least some of their historic jurisdiction. As we have seen, however, the superiority of injunctive relief over damages made it an ordinary remedy in several categories

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[112] 2 *id.* § 927, at 107.

[113] In the case of copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book . . . but . . . may also be injuring [the plaintiff], to an incalculable extent, in regard to the value and disposition of [the plaintiff's] copyright, which no inquiry for the purpose of damages could fully ascertain.

2 *id.* § 932, at 113.

[114] [I]n all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience, that he should use that advantage, a court of equity will interfere, and restrain him from using that advantage which he has thus improperly gained . . . .

2 *id.* § 885, at 73; *see also* EDEN, *supra* note 102, at 14–68.

[115] 2 STORY, *supra* note 48, § 885, at 73; WALSH, *supra* note 60, at 492.

[116] 2 STORY, *supra* note 48, § 885, at 73.

[117] 2 *id.* § 885, at 73 ("[T]he occasions on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances.").

of cases.[118] In grasping this, it is important to appreciate how exactly equity got away with this. That is, how did equity manage to declare, ipso facto, that legal remedies were inadequate—even in cases where such remedies were likely available?

The key to Chancery's success in this realm lies in the fact that *it was Chancery, not courts of law, that determined whether legal remedies were adequate or not.* Chancery managed this feat through an innovative (and contentious) use of its injunctive power: the enjoining of common-law adjudication.[119] If Chancery believed equitable jurisdiction was appropriate, it routinely barred the parties from filing a companion suit in a common-law court.[120] Chancery enforced its injunctions through imprisonment, so parties were apt to take this order seriously.[121]

Courts of law, in contrast, had no injunctive power. Without such power, they had had no way of barring litigants from resorting to courts of equity.[122] Chancery could thus determine which cases it would hear. In terms of the adequate remedy rule, Chancery could decide for itself whether a plaintiff had an adequate remedy at law. In practice, this meant that the "limits on equitable jurisdiction were enforced only by equity's sense of self-restraint and by the risk of political reaction."[123] For this reason, and the three others above, the adequate remedy rule had little legal bite and Chancery had significant power to award relief where it saw fit.

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In sum, English law and equity worked in distinctive ways. The existence of a cause of action for damages was controlled by the writ. Each writ precisely defined the way in which a suit was to be adjudicated. Common-law judges had no power to invent new writs or vary the terms of a writ, though judges could enforce statutes through preexisting writs if the harm suffered by the plaintiff fit within the writ.

In contrast, a cause of action in Chancery was far less restricted. In issuing injunctions, Chancery attempted to "follow the common law" but did not view the common-law writ as binding. In these situations, it is accurate to say that Chancery created a cause of action where none had existed before. Chancery's injunctive power was limited to an extent by the "adequate remedy rule," which gave injunctions their "extraordinary" characterization. The rule had little bite, however, because Chancery itself was

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[118] *See supra* notes 101–17 and accompanying text.

[119] *See supra* notes 77–79 and accompanying text.

[120] 2 STORY, *supra* note 48, § 885, at 73.

[121] LANGBEIN, *supra* note 41, at 286.

[122] *See* LAYCOCK, *supra* note 93, at 21 ("In any case of conflict between legal and equitable rules, the equitable rule controlled, because the equity court could enjoin the proceedings at law. The rules of the common law were enforceable only so long as the equity judges did not become dissatisfied with them."); MAITLAND, *supra* note 51, at 257 ("The Chancellor could say to a person 'You must not go to a court of law,' and the court of law had no power to say 'You must not go to a court of equity.'").

[123] LAYCOCK, *supra* note 93, at 21.

in charge of applying it and interpreted it narrowly. Moreover, the "extraordinary" characterization of injunctive relief is misleading because Chancery issued injunctions as a matter of course in several situations.

II. FEDERAL EQUITY AT THE FOUNDING AND BEYOND

The Founding Generation was familiar with English equity practice. The Constitution itself makes clear that the federal judiciary would have jurisdiction over certain cases "in law *and* equity."[124] What the Constitution did not specify, however, was what role federal equity would have in constitutional enforcement. As we know today, however, "equitable relief has become the standard remedy for most constitutional violations, and one which is available essentially as a matter of right."[125] In this Part, I identify the roots of the federal courts' modern approach to equity.

The roots are twofold. First, as in England, federal equity lived a life separate from law. At the Founding, Congress obliged the federal courts to follow state law in common-law actions, but permitted the courts to develop their own "common law of chancery" in equitable actions.[126] Thus, as long as the courts could obtain subject matter jurisdiction over a suit in equity, they were free to determine whether a cause of action should exist or not.[127] Second, federal equity was affected by the dramatic economic and social changes of the late nineteenth and early twentieth centuries. These changes put before the Court numerous important constitutional cases that were perfectly fit for equitable relief. These cases involved prospective rights to property, prospective rights to business interests, or legal actions in which equitable defenses might not be recognized—all cases in which injunctive relief had long been an ordinary, not extraordinary, remedy.

A. Equity Unleashed

If the federal equity power was to grow, it had to be free of any significant constraint. At its founding, federal equity escaped constraint in three important ways. First, the federal courts' equitable jurisdiction was placed in the same court as that of law, thus significantly reducing the political restraints that had hemmed in English equity.[128] Second, Congress gave the federal courts the freedom to create a distinctly federal law of equity—a law that could be (and was) detached from state common law. Federal courts were not obliged to, and did not in practice, "follow the common law."[129]

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[124] U.S. CONST. art. III, § 2 (emphasis added).

[125] Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 1008 (1998).

[126] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 563 (1852).

[127] *Id.* at 563–64.

[128] *Id.* at 563; LAYCOCK, *supra* note 93, at 21.

[129] *See* discussion *infra* Part II.A.2.

Third, the federal courts not only adopted English equity's weak "adequate remedy rule," but the courts watered down the rule even further by declaring state remedies *per se* inadequate.[130]

1. One Court, Two Sides

In England, law and equity had long been administered by separate court systems. In America, however, the Founders combined the two jurisdictions into a single court system. Federal courts were given the power to adjudicate "suits of a civil nature at common law or in equity" that fell within one of the courts' subject matter grants.[131] Under this system, a particular judge might hear a common-law action in the morning and then in the afternoon hear an equitable action.[132] The choice to put the two jurisdictions into a single court may seem like a purely administrative decision based on the expediencies of the day. And perhaps it was. It was a decision, however, that was to have important effects on the federal equity power.

As explained in the preceding Part, the rivalry between law and equity (and by extension, Parliament and the Crown) led to a jurisdictional compromise.[133] Equity would only take jurisdiction if there was no adequate remedy at law. This compromise put equity in the driver's seat, however, for it was equity that had the power (using injunctions) to determine whether legal remedies were adequate or not.[134] Under this arrangement, the "limits on equitable jurisdiction were enforced only by equity's sense of self-restraint and by the risk of political reaction."[135]

By placing jurisdiction over both law and equity before the same judges, Congress effectively removed one of the tools that kept English equity in check. Unlike an English court of equity, a federal judge would have no concern that the provision of equitable relief would raise the ire of a separate court of law. Cases at law or in equity were decided by the same judge. A judge could hardly fear that he would insult himself by taking equitable jurisdiction.[136]

Without the "risk of political reaction," much of the federal courts' equitable jurisprudence would depend on its "sense of self-restraint."[137] Of course, federal courts

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[130] *See* discussion *infra* Part II.A.3.b.

[131] *See* Judiciary Act of 1789, § 11, 1 Stat. 78; U.S. CONST. art. III, § 2.

[132] LANGBEIN, *supra* note 41, at 382 ("Each federal district court was conceived to have a law side and an equity side, even though the same judge presided in both.").

[133] *See supra* notes 88–96 and accompanying text.

[134] *See supra* notes 122–23 and accompanying text.

[135] LAYCOCK, *supra* note 93, at 21.

[136] *Id.* ("After law and equity were committed to the same judges, or at least to judges selected by the same political process, the political reasons for restraining equity largely faded away.").

[137] *Id.*; *see also* WALSH, *supra* note 60, at 133–34 (commenting on how the merger of law and equity into a single court ended the "jealousy, hostility and competition" which had animated much of equity law).

would be obliged to obey congressional orders prescribing or proscribing particular relief, but as explained below, the courts faced few restrictions in this regard during the nineteenth century.[138] Thus, to a considerable extent, the federal courts use of equitable remedies depended simply on whether injunctions were appropriate to the goals of the court, whatever those goals might be.

2. A "Common Law of Chancery"

When Congress created the federal courts in 1789, it faced a difficult question: when sitting in diversity, which law should the trial courts apply?[139] For cases at law, Congress hit upon an easy solution. Federal courts would follow state law.[140] For example, if a Virginian punched a Marylander in Baltimore, and the Marylander brought suit in federal court seeking damages, the court would apply Maryland law—likely the writ of trespass.[141]

When it came to equity cases, however, Congress did not order federal courts to follow state law. The reason was simple: equity in the states was in disarray at the

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[138] *See* discussion *infra* Part III.

[139] Diversity was the federal courts' chief basis of jurisdiction at the Founding. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79. The courts did not acquire their general federal question jurisdiction until 1875. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

[140] *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 ("[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."); Temporary Process Act, ch. 21, § 2, 1 Stat. 93, 93 (1789) (stating that the "modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same"). The Temporary Process Act was made permanent two years later in the Permanent Process Act. *See* Permanent Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792) (stating that the procedures followed in the federal courts "shall be the same as are now used in the [federal] courts [as prescribed by the Temporary Process Act]"). Note that § 34 of the Judiciary Act of 1789 as presently amended is also referred to as the Rules of Decision Act. *See, e.g.*, William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1516 n.14 (1984); *see also infra* Part III.C.

[141] To be sure, federal courts sometimes drew instead upon a body of "general common law." *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 11–12 (1842). The prominence of general common law is often overestimated, however. Federal courts did develop a common law that was disconnected with any particular state, but the courts usually refrained from applying it to matters of "peculiarly local concern." Fletcher, *supra* note 140, at 1527–28. In the nineteenth century, this was no insignificant category of cases. As Professor Kristin Collins has recently explained, "with certain important exceptions, including the general common law, conformity [with local law] was the general and expected practice." Kristin A. Collins, *'A Considerable Surgical Operation': Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 264–65 (2010); *see also id.* at 253–54 ("[F]ederal judges enjoyed considerably greater power to apply nonstate, judge-made principles when sitting in equity than when sitting in law—greater, even, than the power they were allowed under the *Swift* doctrine.").

Founding. To begin with, many states refused to recognize equity at all.[142] Equity's reputation was marred by "the lack of jury trial[s], . . . abuses by colonial governors while serving as chancellors, and . . . resentment over the discretionary powers and royalist associations of the English Court of Chancery."[143] Even if a state desired to institute a court of equity, however, equity practice was haphazard because "English precedents were inaccessible and not well settled."[144]

Without a coherent body of equity law at the state level, Congress had little choice but to establish a *general* law of equity that was unconnected to any particular state.[145] In the Permanent Process Act of 1792, Congress directed federal courts to adjudicate equitable actions "according to the principles, rules, and usages which belong to courts of equity . . . as contradistinguished from courts of common law."[146] In this same statute, Congress also gave the federal courts the power to make "alterations and additions as the . . . courts respectively shall in their discretion deem expedient," and specifically permitted the Supreme Court to enact rules of equity that it "shall think proper."[147]

This left it to the federal courts to develop and maintain their own law of equity. Almost immediately, the courts adopted the practices of their English predecessors. The first Chief Justice, John Jay, directed the federal courts to "consider[ ] the practices of the courts of the King's Bench and Chancery in England, as affording outlines for the practice" in equity.[148] In the ensuing decades, the federal courts would several times enact their own distinctive rules of equity.[149] Equity was thus not only distinctively federal, but distinctively within the control of the federal courts.

This understanding of federal equity was on display in the prominent case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*[150] The case involved a dispute

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[142] 1 STORY, *supra* note 46, § 56, at 62 n.1 ("Equity jurisprudence scarcely had an existence, in any large and appropriate sense of the term, in any part of New England, during its colonial state."); Collins, *supra* note 141, at 266–68.

[143] CANDACE S. KOVACIC-FLEISCHER ET AL., EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 8 (8th ed. 2011); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54 (2d ed. 1985) ("Hostility to chancery was widespread in the 18th century.").

[144] AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 162 (3d ed. 1950); *see also* LANGBEIN, *supra* note 41, at 353 ("Chancery law reporting remained primitive into the middle of the eighteenth century.").

[145] One might wonder why the Founders, with their suspicion of unchecked discretion, would adopt equity jurisdiction for the federal courts in the first place. Kristin Collins explains that, while some Founders disapproved of equity jurisdiction, the jurisdiction was ultimately approved because "the practical need for equity power was overwhelming. Without equity jurisdiction, federal courts would have no power in actions raising issues of fraud, mistake, hardship, or trusts." Collins, *supra* note 141, at 269.

[146] *See* Permanent Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792).

[147] *Id.*

[148] Hayburn's Case, 2 U.S. (2 Dall.) 409, 411 (1792).

[149] The rules were reported in the U.S. Reports. *See* 226 U.S. 627, 629 (1912); 42 U.S. (1 How.) xii (1842); 20 U.S. (7 Wheat.) v–xiii (1822).

[150] 54 U.S. (13 How.) 518 (1852).

between the owners of a bridge over the Ohio River and the state of Pennsylvania.[151] Pennsylvania alleged that the bridge had been built too low and that, as a result, ships were unable to pass under it and commerce into the state was impeded.[152] This impediment amounted to a nuisance, argued the state, and was grounds for injunctive relief.[153]

The Court granted the injunction.[154] In doing so, the Court was forced to take up the argument that the suit was not authorized by state law. Were the suit one at law, this would have been dispositive, for

> [i]t is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law . . . . The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.[155]

The suit was *not* brought under the common law, however. By seeking injunctive relief, Pennsylvania had invoked the federal judiciary's equitable powers. In exercising these powers, the Court explained:

> [T]he courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the *common law of chancery*, and since the organization of the government, it has been observed.[156]

To be sure, the federal court did not gain power over the case *only* because the plaintiff sought equitable relief. Without some basis for federal subject matter jurisdiction, a federal court would have had no such power.[157] But once a federal court obtained

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[151] *Id.* at 521.

[152] *Id.* at 557.

[153] *Id.*

[154] *Id.* at 564, 625.

[155] *Id.* at 564 (quoting Wheaton & Donaldson v. Peters, 33 U.S. (8 Pet.) 591, 595 (1834)).

[156] *Id.* at 563 (emphasis added).

[157] As the Court explained it:

> Chancery jurisdiction is conferred on the courts of the United States with the limitation "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." The rules of the High Court of

subject matter jurisdiction over a suit, it was authorized to exercise complete control over the suit under the federal "common law of chancery." This power included the decision whether or not to even recognize the cause of action in the first place.

What is conspicuously absent in *Wheeling Bridge* is any mention of equity "following the law."[158] Recall from above that Chancery in England often (but not always) "followed the law," i.e., issued equitable relief where a legal right existed under the common law.[159] An injunction would normally only issue in a trespass case if the plaintiff could later obtain damages for the finished harm. This kept equity somewhat in line with common-law norms. In *Wheeling Bridge*, however, the Court made no effort to follow Virginia law (which would have controlled in a suit at law). Even though the Court presided over a common law of chancery, it had previously declared that the "practice[s] of the courts of the King's Bench and Chancery in England . . . afford[ ] [the] outlines for the practice."[160] So if Chancery often followed the law in England, why shouldn't federal courts also do so in America?

The reason is because the federal courts sat atop a federalist system. "Following the law," therefore, would challenge the federal courts' commitment to federal supremacy and uniformity. Take the matter of supremacy. If a court were to issue injunctive relief to enforce federal rights only where a cause of action at law would have existed, the enforcement of federal law would be subject to the whims of state law. Indeed, if federal courts followed the law, they might end up simultaneously *ignoring* the law—the law of the constitutional supremacy. This was of obvious concern to the Court in *Wheeling Bridge*. Although there was state law that addressed the issue, Congress had already exercised authority over the Ohio River by issuing licenses and approving interstate compacts.[161] With a federal interest established, it made little sense to resort to

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> Chancery of England have been adopted by the courts of the United States. *And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a State court.*

Id. (emphasis added).

[158] Also absent is any discussion of whether damages were an adequate remedy sufficient to preclude equitable relief. The federal courts' application of the adequate remedy rule is discussed below. *See infra* text accompanying notes 167–89.

[159] *See supra* text accompanying notes 71–86.

[160] Hayburn's Case, 2 U.S. (2 Dal.) 409, 413 (1792).

[161] *Wheeling*, 54 U.S. (13 How.) at 565. The Court explained it thus:

> [Congress has] regulated navigation upon [the Ohio River], . . . by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And [Congress has] expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, "that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the

state law to determine if it would supply a cause of action at law, for "[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river."[162]

The other reason for federal equity to ignore state law was the goal of uniformity. Lawmakers and judges of the nineteenth century considered uniform federal law important to economic growth and the effectiveness of federal leadership.[163] Professor Kristin Collins has explained how the federal courts' nineteenth-century equity jurisprudence was in substantial part "a response to contemporary concerns about disuniformity."[164] If the state law were to control the availability of federal equity, then the law of equity could differ in each state. The federal courts did not want this, however; they wanted the law of equity to be "the same in all states of the union."[165]

Wheeling Bridge is only one case, but it is emblematic of the Court's equity jurisprudence of the era.[166] The availability of a cause of action in federal equity was under the control of the federal courts and was not tethered to common-law rules. As a general matter, Congress stayed out of the way, too—except for imposing one limitation that turned out to be rather modest.

> territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States."

Id.

[162] *Id.* at 566.

[163] *See, e.g.*, Collins, *supra* note 141, at 315.

[164] *Id.* at 256. Professor Collins also argues that federal courts used their equity jurisprudence to provide a federal judicial presence in states that, because they became part of the Union after 1789, would have otherwise lacked the benefits of federal adjudication. *Id.* at 291–330.

[165] Boyle v. Zacharie, 31 U.S. (6 Pet.) 635, 658 (1832). *See generally* Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835).

[166] *See also* Allen v. Balt. & Ohio R.R. Co., 114 U.S. 311, 316–17 (1885) ("Where the rights in jeopardy are those . . . which the Constitution of the United States [confers], . . . jurisdiction in equity [is] vested by the Constitution of the United States, and . . . cannot be affected by the legislation of the States."); Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868) (stating that federal jurisdiction "is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union"); Neves v. Scott, 54 U.S. (13 How.) 268, 272 (1851) ("Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are . . . ."); Bennett v. Butterworth, 52 U.S. (11 How.) 669, 674–75 (1850) ("Whatever may be the laws of Texas [regarding pleading] . . . they do not govern the proceedings in the courts of the United States . . . . [If a party asserts an equitable claim, he] must proceed according to the rules which this court has prescribed . . . regulating proceedings in equity in the courts of the United States."); *Boyle*, 31 U.S. (6 Pet.) at 658 ("The chancery jurisdiction given by the constitution and laws of the United States is the same in all states of the union . . . ."); United States v. Howland, 17 U.S. (4 Wheat.) 108, 112 (1819) ("The powers and practice of the Circuit Courts, in Chancery cases, are not to be controlled by the local laws of the states where those Courts sit. They are the same throughout the Union.").

3. A Modest Limitation, Made More Modest

Even though Congress gave the federal courts enormous discretion in managing federal equity, it did restrain them slightly by imposing the traditional limitation applied in English Chancery: the adequate remedy rule. In Section 16 of the Judiciary Act of 1789, Congress barred equity from taking jurisdiction "in any case where plain, adequate and complete remedy may be had at law."[167] As noted above, the rule in England had less bite than its terms might suggest, however, for four reasons: (1) "adequacy" required that the legal remedy be not just adequate on its own, but as fitting and appropriate as the remedy in equity; (2) having once obtained jurisdiction, equity refused to relinquish it, even if a remedy at law was invented; (3) there were clear categories of cases in which legal remedies were considered per se inadequate; and (4) it was equity, not law, that determined whether legal remedies were adequate.[168] As explained below, each of these applied in federal equity, thus sustaining in the federal courts the expansive jurisdiction known to Chancery. Not only that, but the federal courts even narrowed further the remedies that would qualify was adequate, thus enlarging its equitable jurisdiction even more.

a. A Modest Limitation

In the federal courts' view, the statutory declaration of the adequate remedy rule charted no new ground. The rule was "merely declaratory" of the traditional "rules of equity on the subject of legal remedy."[169] It is not surprising, therefore, to see that the federal courts closely followed the English understanding of the rule.

First, the federal courts, like Chancery, demanded a great deal out of a legal remedy before declaring it "adequate." An early case, *Baker v. Biddle*,[170] illustrates this high bar well. There, the court declared that a legal remedy will be considered inadequate if "the remedy is doubtful, difficult, not adequate to the object, not so complete as in equity, . . . [or] not so efficient and practicable to the ends of justice and its prompt administration."[171] Nor would equitable jurisdiction be foreclosed, the court held, "where the competency of law falls short of the *equum et bonum* of the case, [or] where there is some difference in the remedy."[172] Speaking of the adequate remedy rule in 1819, Justice Bushrod Washington, riding circuit, explained that "the ground of the equity jurisdiction is not that the common law courts are incompetent

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[167] Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.

[168] *See supra* Part I.B.2.

[169] Boyce's Ex'rs v. Grundy, 28 U.S. (3 Pet.) 210, 215 (1830).

[170] 2 F. Cas. 439, 446 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1831) (No. 764).

[171] *Id.* at 446.

[172] *Id.*

to afford a remedy, but that such a remedy is *less complete than the court of equity*, from the nature of its organization, is capable of affording."[173] Numerous other cases confirm this approach.[174]

Second, the federal courts adopted the same categories of per se inadequacy as English equity. Disputes involving a prospective interest in real or personal property were routinely resolved through injunctive relief.[175] So too did the Court award injunctive relief in cases involving prospective business interests.[176] And finally, federal

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[173] Harrison v. Rowan, 11 F. Cas. 666, 668 (Washington, Circuit Justice, C.C.D.N.J. 1819) (No. 6143) (emphasis added).

[174] *See, e.g.*, Kilbourn v. Sunderland, 130 U.S. 505, 515 (1889) (stating that, although relief could have been had at law, the remedy was not as "efficient as the remedy which equity would confer under the same circumstances"); *Boyce's Ex'rs*, 28 U.S. (3 Pet.) at 215 ("[Even though action at law was available], [i]t was obviously not an adequate remedy, because it was a partial one. The complainant would still have been left to renew the contest upon a series of suits; and that probably after the death of witnesses."); United States v. Howland, 17 U.S. (4 Wheat.) 108, 115 (1819) ("[T]he remedy in Chancery, where all parties may be brought before the Court, is more complete and adequate, as the sum actually due may be there, in such cases, ascertained with more certainty and facility . . . ."); Hayden v. Thompson, 71 F. 60, 63 (C.C.D. Mo. 1895) (invoking equity in actions involving fraud by twenty four creditors even though legal remedy was available because multiple "actions at law [would not be] as efficient, as practical, and as prompt to attain the ends of justice as this suit in equity"); *Rowan*, 11 F. Cas. at 668 ("[T]here are a number of cases in which . . . the ground of the equity jurisdiction is not that the common law courts are incompetent to afford a remedy, but that such a remedy is less complete than the court of equity, from the nature of its organization, is capable of affording."); *see also supra* note 96.

[175] *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564–65 (1851) (prohibiting the building of a bridge that would have impeded travel along the Ohio River); Osborn v. Bank of U.S., 22 U.S. (19 Wheat.) 738 (1824) (awarding injunction to protect federal franchise); *Rowan*, 11 F. Cas. at 666 (resolving a dispute between a trustee and the beneficiaries).

[176] *See, e.g.*, Rast v. Van Deman & Lewis Co., 240 U.S. 342, 355 (1916) (holding, with regard to state regulation restricting the use of coupons, "that the condition of complainants' businesses and of the property engaged in them was such that the statute, if [the regulation were] exerted against complainants and their property, would produce irreparable injury"); Am. Sch. of Magnetic Healing v. MacAnnulty, 187 U.S. 94, 100 (1902) (holding equitable relief proper because that postal inspector's refusal to deliver mail to a mail-order business would result in "eventually embarrassing, crippling, breaking up, and destroying complainants' legitimate business"); City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 12 (1898) ("It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with the business of the plaintiff."); Watson v. Sutherland, 72 U.S. (5 Wall.) 74, 79 (1866) ("Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law. Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief.").

courts were also willing to enjoin prosecutions at law where the legal action would contravene the equitable rights of the would-be defendant.[177]

Third, like Chancery, federal equity refused to give back its jurisdiction when law invented an obviously adequate remedy. As the Court put it in *Harrison v. Rowan*, where a case falls within one of the "general branches of equity jurisdiction" that has been recognized over time, "it is no objection to its exercise that the party may have a remedy at law."[178] The common law (to the extent it could ever displace a federal equity action to begin with)[179] could not be redesigned to take equitable jurisdiction away.

Fourth, and briefly, just as in English equity, there was little that controlled equity in its determination of legal adequacy.[180] In fact, federal courts were even more free than Chancery to declare legal relief inadequate. As noted above, federal judges possessed both legal and equitable jurisdiction and thus had no concern that disregarding legal relief would bring adverse consequences from the law side of the docket.[181]

b. Made More Modest

The adequate remedy rule was thus a modest limitation on the federal courts. Yet the Supreme Court limited it further by holding that an entire swath of remedies were per se inadequate: remedies available only in state court.[182] An early explanation of

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[177] *See, e.g.*, Tanner v. Little, 240 U.S. 369, 374 (1916) (making an injunction available because, if the "prosecuting attorney of the county . . . enforce[s] the provisions of the statute," the plaintiff "will lose many customers and a large amount of trade and suffer thereby great loss and injury"); Davis v. Wakelee, 156 U.S. 680, 686 (1895) ("Bills in equity to enjoin actions at law are not infrequently brought by defendants in such actions to enable them to avail themselves of defences which would not be valid at law."); Wehrman v. Conklin, 155 U.S. 314, 316 (1894) (approving "bill in equity brought by the [plaintiffs] to enjoin the [defendant] from prosecuting an action of ejectment in the court below, against the appellees, to recover possession of the lands in controversy"); Drexel v. Berney, 122 U.S. 241, 252 (1887) (allowing defendant in civil suit to "resort[ ] to a court of equity to enforce a defence to an action at law"); Grand Chute v. Winegar, 82 U.S. (15 Wall.) 355, 376 (1872) (refusing a bill in equity only because the plaintiff possessed "[a complete] defence to the suit at law"); Phx. Mut. Life Ins. Co. v. Bailey, 80 U.S. (13 Wall.) 616 (1871) (recognizing that a plaintiff could obtain an injunction only if the defense he expected to rely upon was not recognized at common law); Hipp v. Babin, 60 U.S. (14 How.) 271, 277 (1856) (stating that injunctive relief would be available, upon a proper showing, for "preventing suits" at law); *see also* 2 STORY, *supra* note 48, § 874, at 189.

[178] *Rowan*, 11 F. Cas. at 668.

[179] *See infra* Part II.B.2.

[180] *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity' . . . flexibility rather than rigidity has distinguished [equity jurisdiction]." (quoting Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943))).

[181] *See supra* text accompanying notes 131–37.

[182] *See, e.g.*, Mayer v. Foulkrod, 16 F. Cas. 1231 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 9341) (holding that federal courts may afford a common-law remedy to enforce a state law, but cannot exclude the equitable jurisdiction of the court).

this came from Justice Story, riding circuit, in *Mayer v. Foulkrod*.[183] In that case, the defendant argued that federal equity jurisdiction was unavailable "because the plaintiff might have maintained an action [at law] in the state court."[184] Story rejected this argument out of hand:

> No objection can be made to the jurisdiction of the equity side of [this court], but that there is complete and adequate remedy on the other side of *this court*. It is no argument to say that the plaintiff may have such a remedy . . . in the state court. The conclusive answer is, that the plaintiff is under no obligation to resort to that jurisdiction.[185]

Mayer states a rule that was consistently followed in the federal courts.[186] The rule was based on two concerns. First, where Congress had provided federal courts with subject matter jurisdiction (usually diversity, but later, federal question as well) plaintiffs therefore possessed a *constitutional right* to sue in federal court.[187] A state, being

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[183] *Id.* at 1235.

[184] *Id.* at 1234.

[185] *Id.* (emphasis added).

[186] *See, e.g.*, Petroleum Exploration v. Pub. Serv. Comm'n of Ky., 304 U.S. 209, 217 (1938) ("It is settled that no adequate remedy at law exists, so as to deprive federal courts of equity jurisdiction, unless it is available in the federal courts."); Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935) ("If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford."); Risty v. Chi., R.I. & Pac. Ry. Co., 270 U.S. 378, 388 (1926) ("[The proposed alternative remedy] is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."); Chi., B. & Q. R.R. v. Osborne, 265 U.S. 14, 16 (1924) ("[The proposed alternative remedy] can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough."); Smyth v. Ames, 169 U.S. 466, 516 (1898) ("One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."); Arrowsmith v. Gleason, 129 U.S. 86, 99 (1889) (stating, in response to the assertion that a Missouri probate court provided relief, "[t]he Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system"); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429 (1868) (rejecting a state remedy as an adequate alternative because a "citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal").

[187] *Payne*, 74 U.S. (7 Wall.) at 429 (noting that a "citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal").This reasoning is dubious, *see* Sheldon v. Sill, 49 U.S. 441 (1850), but it nonetheless played a role in the Court's decisions in this field.

subordinate to federal rights, could not take that federal right away.[188] Second, the federal courts preferred to maintain a clear line between federal law and equity.[189] If state law remedies were part of the equation, the line between law and equity would constantly shift, and do so on a state-by-state basis.

B. Opportunity Knocks

In the prior section, I explained how the federal courts came to possess a robust power over equity. The power to issue relief is, of course, important, but the mere existence of this power does mean that federal equity was destined to become an established tool of constitutional enforcement. This would only happen if the power met opportunity. This is exactly what happened in the decades surrounding the turn of the twentieth century. In that era, dramatic social, economic, and political changes put before the Court significant numbers of constitutional cases that were perfectly fit for the Court's equitable powers.[190] As a result, the federal courts' *power* to issue injunctive relief in constitutional cases was converted into standard *practice*.[191]

1. Powerful Forces

In the late nineteenth and early twentieth centuries, the country was in a period of incredible change. This was the era of the railroad, of the corporation, of mass production.[192] Population skyrocketed by forty percent in the fifteen years ending in 1893, most of it in urban centers rather than on the farm.[193] Commerce crossed state lines at will and the American economy began to nationalize. Americans were increasingly working for somebody else, often for a large and distant corporation.[194]

This "spectacular and sudden consolidation of economic power . . . worried many ordinary people."[195] A major concern was that "not all segments of society benefitted

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[188] *Payne*, 74 U.S. (7 Wall.) at 430 (stating that federal jurisdiction "is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union").

[189] *See* Note, *Effect of the Existence of an Adequate Remedy at Law in the State Courts on Federal Equity Jurisdiction*, 49 HARV. L. REV. 950, 952 (1936).

[190] *See* discussion *infra* Part II.B.1–2.

[191] *See* discussion *infra* Part II.B.2.

[192] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 85 (1998); TONY FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 100–02 (1979); Edward A. Purcell, Ex Parte Young *and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931, 936–37 (2009).

[193] *See* FREYER, *supra* note 192, at 99–100.

[194] *Id.* at 99 ("By about 1870, . . . the independent merchants who had controlled the American economy from virtually the beginning gave way to a new industrial order dominated by large corporations.").

[195] ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM 27 (1983).

from the unbridled operation of the market economy."[196] The result was "[c]onvulsive reform movements [that] swept across the American landscape from the 1890s to 1917."[197] Farmers fought corporate control of grain prices, industrial laborers demanded safe working conditions, urban dwellers complained of filth and overcrowding in city tenements, and small merchants deplored the monopoly power of corporate "trusts."[198]

Local and state governments often answered the call for reform.[199] They passed laws setting tariffs, imposed new taxes, and required licenses for certain activities.[200] The federal government also caught the reform spirit. Congress enacted new laws to bust up monopolies[201] and created a federal agency—the Interstate Commerce Commission—to regulate all manner of business activity.[202] Not all reforms arose from government activity, however. By unionizing, laborers were often able to obtain improved wages and working conditions.[203]

Big business was, of course, dismayed by these so-called reforms. The problem for business was two-fold. First, some reforms (such as rate caps) cut into corporate profits directly.[204] Second, the scattering of regulations throughout the nation made it difficult to operate a national business.[205] Businesses could perhaps live with taxes and rate caps if they were nationally uniform, but a variety of these laws made interstate commerce much more difficult.[206]

Business was not about to take these developments lying down. To fight back, however, businesses had to choose the appropriate forum. State legislatures and courts were unattractive fora because the political climate in reform-minded states was decidedly anti-business.[207] Congress was little more attractive because it had already shown its sympathy for reform and, in any event, had failed to address the regulatory disuniformity that pervaded the country.[208] The most attractive forum left was the federal courts.[209] The courts were well positioned for this task, having a "new tier of

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[196] ELY, *supra* note 192, at 85.

[197] LINK & MCCORMICK, *supra* note 195, at 1; *id.* at 29.

[198] *Id.* at 1–2, 26–28; ELY, *supra* note 192, at 101.

[199] ELY, *supra* note 192, at 85.

[200] *Id.*; FREYER, *supra* note 192, at 102.

[201] *See* Sherman Antitrust Act, §§ 1–2, ch. 647, 26 Stat. 209 (1890).

[202] LINK & MCCORMICK, *supra* note 195, at 37–38.

[203] *Id.* at 27.

[204] *See* FREYER, *supra* note 192, at 102.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 107 (recording Judge Taft's view that business preferred federal courts because of the "deep-seated prejudice entertained against them by the local population"); Purcell, *supra* note 192, at 937 (noting corporations' "widespread and often intense suspicion of state courts").

[208] FREYER, *supra* note 192, at 112.

[209] *Id.* ("This left the federal judiciary as the lone national institution capable of bringing a degree of uniformity and unity to the law governing interstate corporate enterprise, a fact clearly recognized by most leaders of big business."); Purcell, *supra* note 192, at 937–38 ("A deep faith in the integrity, independence, and capabilities of the national judiciary—fervent

intermediate federal courts of appeals,"[210] a grant of federal question jurisdiction,[211] and a constitutional amendment at their disposal that was specifically designed to limit state power.[212] They had also shown their sympathy for uniform national law by creating a general federal law of contracts and, increasingly, torts.[213]

Big business thus flocked to the federal courts to defend itself. The federal courts found themselves the arbiter of a massive national debate over the relationship between business and government. These lawsuits "placed intense pressure on the Court to honor two fundamental principles: first, that there were constitutional limits on governmental power and, second, that the courts would enforce those limits."[214] How was the Court to honor these principles? Scholars have noted several doctrinal responses,[215] but, for our purposes, the most relevant is the Court's use of its injunctive power.

2. Perfect Opportunities

The collision between big business and big government put before the federal courts a large number of cases that were perfectly fit for injunctive relief.[216] As explained above, the federal courts' willingness to issue injunctive relief depended in large part on the adequacy of damages. Moreover, damages were considered per se inadequate in certain types of cases, particularly those involving: (1) prospective injury to property rights; (2) prospective injury to business interests; and (3) attempts to escape inequitable suits at law.[217] Not surprisingly, these were the exact sort of cases

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among the comfortable classes, the legal profession's eastern elite, and most of those who sat on the federal bench—confirmed the wisdom of [resorting to federal courts].").

[210] Judiciary Act of 1891, ch. 517, 26 Stat. 826, 828; Purcell, *supra* note 192, at 937.

[211] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470; Purcell, *supra* note 192, at 933.

[212] U.S. CONST. amend. XIV; ELY, *supra* note 192, at 82 ("Adoption of the Fourteenth Amendment in 1868 opened new possibilities for federal supervision of state legislation."); Purcell, *supra* note 192, at 933 ("[T]he Fourteenth Amendment provided a pivotal constitutional mandate that undergirded the transformation.").

[213] *See* FREYER, *supra* note 192, at 73–94 (explaining the legal and historical context behind *Swift v. Tyson*). *See generally* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (holding that certain commercial disputes should be resolved by general common law, not the common law of a particular state).

[214] Purcell, *supra* note 192, at 936–37.

[215] *See, e.g.*, ELY, *supra* note 192, at 82–100 (describing developments in substantive due process, takings law, Contract Clause suits, and federal tax power); *id.* at 938 ("Thus, in response to those varied considerations and pressures, the Court began in the 1890s to expand the scope of national law, strengthen its own ability to supervise the nation's legal system, and alter the rules of federal jurisdiction to ensure that legally, socially, and economically important cases could more easily be brought in the federal trial courts.").

[216] *See* Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 242–43 (1936) ("About 1890, . . . numerous suits to enjoin the enforcement of state legislation began to be brought in the federal courts, and were sanctioned by the Supreme Court.").

[217] *See supra* text accompanying notes 101–17.

that businesses brought before the courts. Businesses did not just want damages for a burdensome regulation; they wanted the regulation nullified. Roughly speaking, the cases fell into four types: tax cases, rate cases, labor cases, and general regulatory cases.[218] In each instance, the federal courts issued injunctive relief freely—so freely in fact that Congress, as we shall see in Part III, was eventually forced to put limits on the courts' powers.

Tax Cases. One common legislative tool of the era was the tax, whether it be on income, property, or some sort of activity. Government taxation naturally instigated lawsuits challenging the taxes.[219] These suits were perfectly made for federal equity. Often times, non-payment of the tax would result in a levy on property. Such a levy "reduced [the] marketability of [the] property" and amounted to a classic business injury.[220] Other times, non-payment of the tax would put at risk a business license. This risk included the "ultimate loss of livelihood" or at least a temporary "suspension of business, [that is] not easily measured in dollars and cents."[221] Even where a tax debt was not attached to any property, its enforcement was often accompanied by significant additional penalties for nonpayment.[222] The federal courts sometimes viewed these penalties as so substantial that they, in effect, coerced a citizen into paying the tax instead of challenging the tax at law. Where such coercion existed, legal remedies were inadequate and taxpayers could bring a suit in equity barring enforcement.[223]

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[218] *See infra* Part II.B.2. One might also create a category for certain types of corporate litigation that frequently arose in equity. *See, e.g.*, Note, *The Case-Concept and Some Recent Indirect Procedures for Attacking the Constitutionality of Federal Regulatory Statutes*, 45 YALE L.J. 649, 649 (1935) ("Stockholders' suits and cases framed in reorganization proceedings have been conspicuous weapons in recent phases of the constitutional battle between business and the New Deal."). In these suits, plaintiffs often challenged the constitutionality of a particular law by alleging that, by following a particular law, a corporate officer was acting ultra vires. To determine whether the officer's action was ultra vires or not, the federal court had to determine whether the law was constitutional or not. *See, e.g.*, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). I do not include these suits here because they were not traditional injunctive actions; rather, they were brought on the equity side of the court because they typically involved some form of trust law. Trust law was distinctively equitable and had no existence under the common law. *See supra* text accompanying notes 68–69.

[219] *See* Purcell, *supra* note 192, at 945 (describing how, in the late nineteenth century, federal courts "began to scrutinize state taxation more thoroughly and more frequently, and federal injunctions against state taxes grew in number and prominence").

[220] John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 434 (1930).

[221] *Id.*

[222] *Id.* at 433.

[223] *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233 (1936); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934); Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) ("[I]n view of the entire absence under the local law of any remedy enforceable by the plaintiff, if the tax be paid and afterwards held invalid by the final decree, we are of opinion that the application for an interlocutory injunction should have been granted . . . ."); Air-Way Elec.

Rate Cases. Another common regulatory tool of the era was rate setting. States often established commissions to set rates for all sorts of public utilities, the most prominent and contentious being railroads. Railroads often sought an injunction barring the rates from taking effect, and these suits were uncontroversial applications of the federal courts' injunctive powers.[224] At a very minimum, equitable relief was appropriate because the rates "impose[d] a continuing duty sanctioned by a penalty."[225] Aside from the penalty, it would be virtually impossible to determine the effect of the rates on the business. Would consumers purchase the same amount even at the higher price? This was a complex economic question that equity had long considered more appropriately resolved by injunction rather than damages.[226]

Equitable jurisdiction was also easily established by utilities who wished to escape from inequitable legal actions. The famous case of *Ex Parte Young*[227] is an excellent example. In *Young*, a railroad challenged rates set by the state of Minnesota. The railroad sought an injunction barring Edward Young, the attorney general of the state, from enforcing the rates.[228] The state argued that equitable jurisdiction was inappropriate because the railroad had a remedy at law—namely the defense of unconstitutionality in a state prosecution.[229] This avenue of relief—though undeniably available—was ultimately unacceptable because the penalties for violating the statute were so steep that no reasonable railroad employee would risk the penalty simply to challenge the statute.[230] The remedy at law was thus inadequate and injunctive relief was appropriate.[231]

Labor Cases. Another significant type of case meriting federal injunctive relief was the labor dispute. During this era, unions vigorously pressed employers for improvements in pay and working conditions. When these improvements were not forthcoming,

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Appliance Co. v. Day, 266 U.S. 71 (1924); Davis v. Wallace, 257 U.S. 478 (1922); Shaffer v. Carter, 252 U.S. 37 (1920); Ohio Tax Cases, 232 U.S. 576 (1914); Allen v. Balt. & Ohio R.R., 114 U.S. 311 (1884); Litchfield v. County of Webster, 101 U.S. 773 (1879).

[224] *See* David E. Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 HARV. L. REV. 379, 398–400 (1930); Purcell, *supra* note 192, at 945 ("After 1890, the federal courts increasingly issued injunctions to block state regulatory actions and began using due-process ideas to justify 'rate-making' injunctions and by the early twentieth century they were hearing a wide variety of equitable suits challenging state efforts to establish or regulate the rates charged by railroads and other public utilities.").

[225] Lockwood et al., *supra* note 220, at 439.

[226] *See supra* text accompanying notes 106–13, 176.

[227] 209 U.S. 123 (1908).

[228] *Id.* at 129–30.

[229] *Id.* at 163 ("It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case.").

[230] *Id.* at 165 ("We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment . . . , but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.") (citation omitted).

[231] For explanation of this basis for the injunction in *Ex Parte Young*, see Harrison, *supra* note 17.

union bosses called for strikes. Employers then ran to the federal courts seeking an injunction forcing workers to cease their strike. Like the other cases discussed above, these cases too were well-fit for injunctive relief, most obviously because an interruption in business was a classic ground for the injunction.[232] Thus, "[b]y the first decade of the twentieth century the lower federal courts were enjoining more and more strikes, boycotts, organizing campaigns and other labor-union activities, and their injunctions grew in both the sweep of their prohibitions and the frequency of their use."[233] Indeed, in the early twentieth century, then–Sixth Circuit Judge William Howard Taft admitted that he "issued injunctions against labour unions, almost by the bushel."[234]

In re Debs[235] is perhaps the most famous labor injunction case. *Debs* involved a federal court's order that striking railroad employees return to work or else face termination by the railroad. The employees violated the injunction and their leader, Eugene Debs, was prosecuted for contempt.[236] Debs argued in the Supreme Court that his contempt charge was invalid because the trial court had no original power to issue the injunction.[237] The Court squarely disagreed, noting the value of equity in maintaining the supremacy of federal law:

> No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. . . . To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.[238]

With regard to the assertion of judicial power, Debs later remarked "the ranks were broken, and the strike was broken up . . . not by the Army, and not by any other power, but simply and solely by the action of the United States courts in restraining

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[232] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 48 n.5 (1930) ("[T]he man carrying on a business has a certain sort of property right in the good will or the successful conduct of that business.").

[233] Purcell, *supra* note 192, at 946.

[234] Letter from William Howard Taft to Charles P. Taft (Aug. 27, 1901), *in* H. TAFT, RECOLLECTIONS OF FULL YEAR, at 223 (1914). For a discussion of Taft's labor jurisprudence, see Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921*, 37 BUFF. L. REV. 1, 70–76 (1989).

[235] 158 U.S. 564 (1895).

[236] *Id.* at 572–73.

[237] *Id.* at 577.

[238] *Id.* at 578 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819)).

us from discharging our duties as officers and representatives of the employees."[239] After *Debs*, the injunction became the face of federal regulation.[240]

General Regulatory Cases. Aside from tax, rate, and labor cases, there are a number of cases that are best grouped under the label "general regulatory." These cases arose from governmental efforts to regulate professions, the manufacture or sale of goods, and the use of land.[241] No doubt other types of cases could be added. The common ground for injunctive relief in all of these cases is that the law "imposes a duty of continued action or inaction" with regard to property or business interests.[242] A state might force a person to obtain a license in order to sell certain services,[243] prohibit companies from using certain products,[244] or forbid the use of land in some way.[245] Such continued interference with prospective business or property interests lied within the heartland of the federal courts' equity powers. A regulated entity, even if able to obtain relief in damages, would simply be forced to return to court again and again.[246]

Injunctions could also be justified by the regulated entity's need to escape from a coercive legal proceeding. Because there was usually no clear common law right to engage in a particular trade, the validity of a regulation could only be tested by violating the regulation in question.[247] Like tax regulations, these regulations typically carried penalties for disobedience.[248] These penalties, if substantial enough, were considered coercive and thus became a predicate to preemptive injunctive relief of the sort employed in *Ex Parte Young*.[249]

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Together, these four categories of equitable actions established beyond a doubt the federal courts' equitable power to issue injunctive relief in constitutional cases. As

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[239] U.S. STRIKE COMM'N, REPORT ON THE CHICAGO STRIKE OF JUNE–JULY, 1894, S. EXEC. DOC. NO. 53-7 (3d Sess. 1895), *reprinted in* OWEN M. FISS & DOUGLAS RENDLEMAN, INJUNCTIONS 20 (2d ed. 1984).

[240] *See* Purcell, *supra* note 192, at 946.

[241] Lockwood et al., *supra* note 220, at 436.

[242] *Id.*

[243] *See, e.g.*, Douglas v. Noble, 261 U.S. 165 (1923); Bratton v. Chandler, 260 U.S. 110 (1922); McNaughton v. Johnson, 242 U.S. 344, 345 (1917); Crane v. Johnson, 242 U.S. 339 (1917).

[244] Weaver v. Palmer Bros., 270 U.S. 402, 415 (1926).

[245] Nectow v. Cambridge, 277 U.S. 183, 184 (1928); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[246] *See supra* text accompanying notes 105, 169–74.

[247] Lockwood et al., *supra* note 220, at 437 ("Those [persons] embraced within the terms of a statute of this type find themselves subjected to a burdensome limitation on their freedom of conduct, existing and effective independently of any action at law to enforce it, as to the validity of which no test may be had at law in the absence of a breach of its provisions.").

[248] *Id.*

[249] *See supra* text accompanying notes 227–30.

discussed in the next section, the courts' equitable power would persist through the remainder of the twentieth century, even with the enactment of statutes that plausibly touched this power.

III. FEDERAL EQUITY IN MODERN TIMES

By 1930, the constitutional injunction was a well-established aspect of federal judicial power. At that time, one commentator would write that "[w]herever the point has been discussed, the courts have assumed that jurisdiction to enjoin the enforcement of unconstitutional statutes was clearly a part of the general equity powers, which inevitably followed from the English practice of enjoining acts beyond the scope of official authority."[250] In the decades after 1930, however, federal equity increasingly had to take account of legislation affecting judicial review.

During that time, the Court acknowledged that Congress, if it so desired, could deprive the federal courts of the authority to issue injunctions in constitutional cases.[251] The hard question in the twentieth century would be how clearly Congress had to specify its desires. The level of clarity demanded of Congress in turn depended on the degree to which the Court believed its power to issue injunctive relief sprang from its federal question jurisdiction.[252] If federal question jurisdiction includes a free-standing power to issue injunctive relief, then Congress may only bar such relief if it speaks with exceptional clarity.[253] This requirement flows from the principle that Congress must speak clearly when it attempts to deprive the federal courts of jurisdiction.[254] In contrast, if federal question jurisdiction does not bestow on federal courts the power to issue injunctive relief, statutory prohibitions of the remedy may be much more easily found.[255]

As noted in Part II, the federal courts in the nineteenth and early twentieth centuries squarely believed that the grant of subject matter jurisdiction carried with it the power to issue injunctive relief (provided the standard requirements for equitable

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[250] Lockwood et al., *supra* note 220, at 431 n.23.

[251] *See, e.g.*, Lauf v. E. G. Shinner & Co., 303 U.S. 323, 327 (1938). This assumes that there existed some other mechanism through which government could be forced to obey, on average and over the long term, constitutional requirements. *See generally* John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663 (2009).

[252] Elgin v. Dep't of Treasury, 1325 S. Ct. 2126, 2132–34 (2012).

[253] *See, e.g.*, *id.* at 2141 (2012) (Alito, J., dissenting) (refusing to find that Congress deprived the federal courts of the power to issue injunctive relief because it is "established practice for th[e] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution") (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

[254] *See, e.g.*, *id.*; Mims v. Arrow Fin. Servs., Inc., 132 S. Ct. 740, 749 (2012) (requiring explicit statement by Congress before finding federal courts lack jurisdiction under 28 U.S.C. § 1331).

[255] *See, e.g.*, *Elgin*, 132 S. Ct. at 2132 (holding that the power to issue an injunction was divested if "Congress' intent to preclude district court jurisdiction was fairly discernible in the statutory scheme") (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994)).

relief were met).[256] The survival of the courts' implied equitable power during the twentieth century therefore would turn on whether that belief persisted or waned. Below, I explain how the federal courts have largely retained that belief, and why they are justified in doing so. I do so by examining the Court's approach to several important legislative enactments, including several anti-injunction statutes, the Federal Rules of Civil Procedure, a revision to the Rules of Decision Act, 42 U.S.C. § 1983, and the Administrative Procedure Act.

Before beginning this discussion, one matter deserves attention. The reader will note that this Part contains no discussion of the adequate remedy rule. In the nineteenth century, this rule was an often-noted aspect of the Court's equity jurisprudence though, as noted above, its effect was relatively minor.[257] By the mid-twentieth century, however, the rule had faded almost entirely from view, especially in the realm of constitutional enforcement. In the definitive study of the subject, Professor Douglas Laycock documented how courts in the twentieth century came to see constitutional rights as intangible, something that can "never [be] bought or sold in any market."[258] "This is why injunctions are the standard remedy in civil rights . . . litigation," Laycock writes.[259] "[A] damage award" he continues, can never "replace the right to vote, equal representation, an adequate hearing, integrated public facilities, minimally adequate treatment in a state prison, free speech, religious liberty, education, freedom from employment discrimination, freedom from unreasonable searches and seizures, or any similar civil or political right."[260] Thus, even though the adequate remedy rule has never been affirmatively abrogated, it has ceased to play a meaningful role in the federal courts' equitable jurisprudence.

A. Anti-Injunction Statutes

Although federal equity was a well-established aspect of constitutional enforcement at the turn of the twentieth century, it was not necessarily popular. Business was obviously happy to have an ally in its fight against regulation, but state and local governments were furious at federal intervention in local matters, as were those whom these governments had been attempting to protect.[261] Complaints of excessive judicial interference found their way to Congress and, in the 1930s, Congress barred federal injunctive relief in three of the types of cases discussed above (rate, tax, and labor cases).[262] In *forbidding* injunctions in certain cases, however, Congress only *confirmed* the courts' freestanding authority to issue injunctive relief without prior authorization.

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[256] *See supra* text accompanying note 186.

[257] *See supra* Parts II.A.3.a–b.

[258] LAYCOCK, *supra* note 93, at 41.

[259] *Id.*

[260] *Id.* (citations omitted).

[261] *See* Lockwood, *supra* note 220, at 426–27.

[262] *See* Rate Injunction Act, Pub. L. No. 105-175, ch. 283, § 1, 48 Stat. 775 (1934) (codified as amended at 28 U.S.C. § 1342 (2006)); Tax Injunction Act, Pub. L. No. 75-332, ch. 726,

The first of the three statutes addressed the courts' perceived excesses in labor injunctions. Enacted in 1932, the law stated that "no court of the United States, . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute."[263] The second, which came in 1934, was enacted in response to the federal courts "interfere[nce] wholesale with public utility rate orders."[264] In that statute, Congress ordered that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement . . . of an administrative board or commission of a State, or any rate-making body of any political subdivision . . . ."[265] Finally, in 1937, Congress responded to complaints that the federal courts were "free and easy with injunctions" in tax cases.[266] The result was a statute stating that "no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy, or collection of any tax . . . of any State . . . ."[267]

Two observations about these statutes are important. First, it is notable that, in each instance, Congress conceived of the matter as one of *jurisdiction*. This is consistent with the federal courts' view that their equitable power springs from Congress's grant of subject matter jurisdiction to the court (normally, diversity or federal question jurisdiction).[268] The simple use of the term "jurisdiction" is not definitive, for Congress

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§ 1, 50 Stat. 738 (1937) (codified as amended at 28 U.S.C. § 1341 (2006)); Norris-LaGuardia Act, Pub. L. No. 72-65, ch. 90, § 1, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–04 (2006)).

[263] § 1, 47 Stat. at 70.

[264] England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 431 (1964) (Douglas, J., concurring).

[265] § 1, 48 Stat. at 775.

[266] *England*, 375 U.S. at 431 (Douglas, J., concurring). States in this era were in dire need of funds and corporations often attempted to delay or even cancel their tax burdens by heading to federal court. A Senate report endorsing a ban on injunctions put it thusly:

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

S. REP. NO. 75-1035, at 2 (1937); *see also* Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780, 783 (1946) (noting that federal courts were "readily amenable to persuasion that the state remedy was inadequate," thus laying the groundwork for a federal injunction).

[267] § 1, 50 Stat. at 738. *See generally* Frederick C. Lowinger, Comment, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736 (1979) (detailing the effects of the Tax Injunction Act).

[268] *See supra* text accompanying note 131.

has not always been precise in its use of the word "jurisdiction."[269] Still, it lends significant support to the view that the power to issue injunctive relief upon a violation of federal law inhered in the courts' general jurisdictional grants.

The second—and more important—observation is that, by divesting federal courts of the power to issue injunctions in specific types of cases, Congress implicitly confirmed that the courts enjoyed a freestanding authority to issue injunctive relief. If Congress was barring injunctive relief, the power to issue such relief in a constitutional case must have *preexisted* the statutes and would thus presumably remain available in cases outside their scope.

Mid-century scholarship and case law confirm this understanding. In 1948, Herbert Wechsler addressed the federal courts' remedial power in a significant paper.[270] He observed first that "federal substantive law [often] prescribes rights and duties without also providing for their [manner of] vindication."[271] The absence of instructions as to vindication in turn invites inquiry into whether "Congress meant to relegate [enforcement to] state legal systems or assumed, on the contrary, that [remedies] would come from interstitial legislation of the federal courts . . . ."[272] Wechsler explained that the answer was "uncertain[ ]" when it came to damages actions.[273] With regard to suits for injunctive relief, however, the answer was clear: "[T]he presumption is in favor of the federal judiciary in cases where the remedy invoked is equitable."[274]

Professor Wechsler's account is echoed by Louis Jaffe's work about a decade later.[275] Speaking of the federal courts' power to issue relief, Jaffe explained, "Congress . . . may indeed exclude judicial review. But judicial review is the rule. It rests on the congressional grant of general jurisdiction to the Article III courts."[276] Another decade later, other scholars were repeating the same view.[277]

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[269] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90–91 (1998) (noting that even a statutory provision that uses the word "jurisdiction" may not relate to "subject-matter jurisdiction").

[270] Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948).

[271] *Id.* at 241.

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401 (1957).

[276] *Id.* at 432.

[277] *See, e.g.*, Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 322–23 (1967) ("More often, the nonstatutory review action [*i.e.*, an action for injunctive relief not specifically authorized by statute] is based upon a jurisdictional section of title 28 of the United States Code, such as section 1331, the general 'federal question' jurisdictional grant . . . ."); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 395 (1970) (explaining that injunctive relief is presumptively available if federal question jurisdiction exists); Alfred Hill, *Constitutional*

Case law during this era adopted the same approach. In *Mulford v. Smith*,[278] for example, the Court was asked to enjoin federal officers from imposing penalties on the sale of tobacco under the Agricultural Adjustment Act.[279] In assessing whether the district court had the power to issue injunctive relief, the Court first determined that Congress had given district courts subject matter jurisdiction over "all suits and proceedings arising under any law regulating commerce."[280] Having found a general basis for subject matter jurisdiction, the Court then inquired whether Congress, by some more particular statute, had withdrawn the power to issue relief.[281] The Court addressed one possible bar to relief, but quickly dismissed it because it "applie[d] only to a suit to restrain assessment or collection of a tax."[282] Having answered these two questions, the Court held that it had the authority to issue injunctive relief (provided that no adequate alternative existed).[283] Nowhere in *Mulford* did the Court look for, much less demand, explicit authorization from Congress that the Agricultural Adjustment Act could be enforced through injunction.

Numerous other cases fit the *Mulford* model.[284] When landmark injunctive actions like *Brown v. Board of Education*[285] and *Cooper v. Aaron*[286] came along in the 1950s, it was a foregone conclusion that the federal courts could enjoin unconstitutional action without a specific statutory authorization.[287] These cases contained no discussion at

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Remedies, 69 COLUM. L. REV. 1109, 1137 (1969) ("Where the conduct is of a kind that would not be the basis of a damage action at common law, considered apart from the statutory or constitutional provision that has been violated, the officer is undoubtedly subject to remedies of an equitable nature . . . .").

[278] 307 U.S. 38 (1939).

[279] *Id.* at 45.

[280] *Id.* at 46 (quoting 28 U.S.C. § 41 (1934) (internal quotation marks omitted)).

[281] *Id.* at 46.

[282] *Id.*

[283] *Id.* at 46–47 (finding that "no action at law would be adequate to redress the damage . . . inflicted").

[284] *See, e.g.*, Leedom v. Kyne, 358 U.S. 184, 190 (1958) (holding that jurisdiction to issue injunctive relief was obtained under "statutory provisions governing the general jurisdiction") (quoting Switchmen's Union v. Nat'l Mediation Bd., 320 U.S. 297, 300 (1943)); Bd. of Governors of the Fed. Reserve Sys. v. Agnew, 329 U.S. 441, 444 (1947) (holding that federal courts have statutory authority to issue injunctions against bank boards in certain cases); Stark v. Wickard, 321 U.S. 288, 290, 310 (1944) (holding that federal courts have authorization to issue injunctions under an agriculture statute); *see also* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do."); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) ("When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.").

[285] 347 U.S. 483 (1954).

[286] 358 U.S. 1 (1958).

[287] The cause of action that would be used today, 42 U.S.C. § 1983, was not recognized

all of federal judicial power to enjoin unconstitutional conduct. This is not to say that injunctive relief was uncontroversial in the latter half of the twentieth century. It certainly was. The complaints of this era, however, were aimed at structural reform injunctions that *affirmatively* commanded various reforms, not injunctions that merely prohibited unconstitutional action.[288] The debate, in other words, was about the reach of the courts' equitable prescriptions, not their historical power to imply injunctive causes of action.

B. The Federal Rules

Another major legislative event of the twentieth century was the adoption of the Federal Rules of Civil Procedure in 1938.[289] Before that moment, lawsuits in the federal courts were litigated according to an amalgam of state and federal laws, some statutory and some judicially created. The Federal Rules changed this. The Rules replaced the many different legal and equitable actions with "one form of action," a so-called "civil action."[290] No longer would plaintiffs rely on a writ of trespass, or seek a writ of ejectment. The law underlying these actions was retained, but the formalities were dispensed with. The goal of the Rules was to "take off all the labels, abolish all the different forms of actions, and thus clear the way for the joinder of legal with equitable claims."[291]

By their title alone, the Federal Rules declared that certain matters were distinctly *procedural* and others, by having been excluded from the Federal Rules' scope, were *non-procedural*. What was the cause of action then, procedural or non-procedural? Or, put differently, did the Federal Rules modify the courts' concept of the "cause of action?" The answer, it turns out, depends on whether the suit was traditionally legal or equitable. Prior to the Federal Rules' enactment, legal claims filed in federal court were, as explained in Part II, controlled by state writs.[292] These writs were often all-encompassing, dictating matters that today would be classified as procedural, substantive, and remedial.[293] When the rules took effect, the state *procedural* law was displaced by a single "civil action," but other law was left intact.[294] This bred confusion, for the

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until 1961. *See infra* Part III.D.1. Thus, these suits and most other civil rights actions were brought using implied injunctive actions.

[288] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995) (school finance); Hutto v. Finney, 437 U.S. 678 (1978) (prison conditions); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (school busing).

[289] FED. R. CIV. P.

[290] FED. R. CIV. P. 2.

[291] ABA, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. OCTOBER 6, 7, 8, 1938 AND OF THE SYMPOSIUM AT NEW YORK CITY OCTOBER 17, 18, 19, 1938 275 (Edward H. Hammond ed., 1938).

[292] *See supra* text accompanying notes 139–41.

[293] *See supra* text accompanying notes 49, 74–76.

[294] FED. R. CIV. P. 2.

writ (or equivalent state law device) had long been the source of the plaintiff's "cause of action."[295]

If federal procedure now controlled the writ, from where did the plaintiff's cause originate? The new Federal Rules obviously did not displace state tort law itself, but they did seem to displace the routine implements of tort law, such as the writ of trespass. Professor Anthony Bellia has documented this confusion in detail and shown how our modern understanding of the cause of action has ignored these nuances.[296]

Professor Bellia's account focuses mostly on legal, rather than equitable, actions. The distinction is crucial, however. Because equity was controlled by federal law all along, the new Federal Rules did not disrupt the equitable cause of action in a similar way. To be sure, the Federal Rules clearly applied to equitable suits and those actions were accordingly pleaded differently after 1938. But mediating the relationship between two different species of federal law (the Federal Rules and equitable common law) was far different than mediating the relationship between state and federal law. The abolition of state law forms of action created a vacuum in federal damages practice and forced federal courts to figure out the proper origin of the damages cause of action—whether it be part of the new Federal Rules themselves or as part of the substantive law.[297] No such vacuum was created in equity. Federal courts simply assumed that their preexisting equitable authority was unaffected by the new Federal Rules. The cases discussed just above in Part III.A—all post-1938—illustrate this well.[298]

Other cases address the issue more directly. As one federal judge wrote soon after rules were enacted, "[t]he distinction between Law and Equity, abolished by the new rules, is a distinction in procedure and not a distinction between remedies."[299] Another judge put it this way:

> While the rules effect a unity of procedure they do not effect a merger of remedies. Legal and equitable remedies, while they may be administered in the same proceeding, must be administered

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[295] *See supra* text accompanying notes 48–49; *see also* Bellia, *supra* note 17, at 783 ("At the time of the American Founding, the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance.").

[296] Bellia, *supra* note 17, at 850–51 ("It was only after . . . the establishment of one 'civil action' [in the Federal Rules] that the question would arise: Do federal courts have authority to create or infer remedies for federal statutory violations? Whatever the practice of English and state courts had been in this regard, it does not establish that the federal constitutional structure contemplated the same practice in federal courts.").

[297] *Id.* at 846–48 (arguing that in ascertaining the existence of a cause of action, "[s]ome courts applied substantive principles that evolved from the forms of action to civil actions brought under a code. . . . [While other courts found that] the new procedural code, which displaced the forms of action, supplied a remedy").

[298] *See supra* notes 278–88 and accompanying text.

[299] Bellvance v. Plastic-Craft Novelty Co., 30 F. Supp. 37, 39 (D. Mass. 1939).

> separately as heretofore. It is not intended that the remedies shall be either jointly or interchangeably administered at the will or demand of the litigants. The rights and remedies of the respective parties remain unaffected.[300]

Numerous other sources confirm this account.[301] Thus, even though the Federal Rules dramatically changed federal procedure, and unsettled legal causes of action, they did not substantially affect the federal courts' practice of issuing injunctive relief.

C. Revision of the Rules of Decision Act

In 1948, Congress amended the Rules of Decision Act—a statute dating back to the Founding and one we have discussed already.[302] Recall that when Congress created the federal courts and bestowed them with diversity jurisdiction, it had to instruct them on what law to apply in those cases.[303] Congress ordered the courts to apply "the laws of the several states . . . as [the] rules of decision in trials at common law."[304] By its terms, the statute only addressed "trials at common law"; where federal courts were acting in equity, they were free to create their own "common law of chancery."[305] In this way, law and equity in the federal courts developed on different tracks.[306]

In 1948, this changed. As part of a major revision of the Judicial Code, Congress ordered the federal courts to follow "[t]he laws of the several states . . . as [the] rules

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[300] Fitzpatrick v. Sun Life Assurance Co. of Can., 1 F.R.D. 713, 715 (D.N.J. 1941).

[301] Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected."); New England Mut. Life Ins. Co. v. Barnett, 39 F. Supp. 761, 761–63 (D. Ala. 1941) (similar), *rev'd on other grounds*, Barnett v. New England Mut. Life Ins. Co., 123 F.2d 712 (1941); Williams v. Collier, 32 F. Supp. 321, 323 (D. Pa. 1940) (similar); Grauman v. City Co. of N.Y., 31 F. Supp. 172, 173–74 (S.D.N.Y 1939) (similar); 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE; CIVIL 3D § 1043 (2002) ("The rules have not abrogated the distinction between equitable and legal remedies. Only the procedural distinctions have been abolished."); Armistead Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 262 (1939) ("Of course, [the new Rules are] applicable only to procedure. It is still quite proper to speak of equitable rights, equitable remedies and equitable titles . . . ."). For an account of the Federal Rules' lack of effect on federal equity, see Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127, 130 (1943).

[302] *See supra* notes 139–47 and accompanying text.

[303] *Id.*

[304] *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

[305] Pennsylvania v. Wheeling & Belmont Bridge, Co., 54 U.S. (13 How.) 518, 563 (1852); *see also* Permanent Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792) (directing federal courts to adjudicate equitable actions "according to the principles, rules, and usages, which belong to courts of equity . . . as contradistinguished from courts of common law").

[306] *See supra* text accompanying notes 145–66.

of decision in *civil actions*,"[307] rather than just at "trials at common law."[308] This change gave rise to the inference that Congress took from the courts their power to create a "common law of chancery," thus disapproving the courts' power to imply injunctive relief in constitutional cases.

This inference does not carry the day, however. The Rules of Decision Act, both at the beginning and after the 1948 amendment, was aimed at diversity cases.[309] The Act explicitly accommodated a different approach for federal question suits, however. In these actions, federal courts were exempted from following state law "where the Constitution or treaties of the United States or Acts of Congress" provided a rule of decision.[310] The effect of the 1948 Act depends, therefore, on whether an equitable action was brought under a court's diversity or federal question jurisdiction. In diversity cases, federal courts were obliged to follow the state equity law. In federal question cases (which would include constitutional challenges), however, the court was free to apply the traditional rules of equity it had developed throughout the nineteenth and early twentieth century.

This conclusion is supported by the committee report from the 1948 Act itself. The committee explained that the amendment constituted merely a "change[ ] . . . in phraseology."[311] The Act endeavored to "clarify the meaning of the Rules of Decision Act in light of the Federal Rules of Civil Procedure."[312] The Federal Rules, as will be recalled, merged legal and equitable pleading rules in 1938.[313] Under the Rules, there would be a single code of pleading for all "civil action[s]."[314] Having recast all federal cases as civil actions, Congress returned to the Rules of Decision Act a decade later to update that statute. The committee report further notes that the Rules of Decision Act, even before the 1948 Amendment, "has been held to apply to suits in equity."[315] The committee is undoubtedly referring here to *Guaranty Trust v. York*,[316] a diversity case in which the Court held that original Rules of Decision Act "was equally applicable to equity suits."[317]

Further support for this interpretation of the 1948 Act comes from Herbert Wechsler's contemporaneous article, *Federal Jurisdiction and the Revision of the*

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[307] Judicial Code and Judiciary Revision Act of 1948, ch. 646, § 1652, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652 (1948)) (emphasis added).

[308] § 34, 1 Stat. at 92.

[309] Wechsler, *supra* note 270, at 241.

[310] § 1652, 62 Stat. at 944.

[311] H. COMM. ON THE REVISION OF LAWS, 79TH CONG., REP. TO ACCOMPANY H.R. 7124 A139 (Comm. Print 1946).

[312] *Id.*

[313] *See supra* Part III.B.

[314] FED. R. CIV. P. 2.

[315] REP. TO ACCOMPANY H.R. 7124, at A139.

[316] 326 U.S. 99 (1945).

[317] *Id.* at 104.

Judicial Code.[318] Professor Wechsler was one of the most prominent jurisdiction scholars of the era and his view carries considerable weight. He saw the statute as merely directing federal courts to follow state equity law in diversity cases.[319] The Act did *not* address, except by implication, the power of federal courts to imply causes of action where "federal substantive law" creates the rights in question.[320] In those situations, federal courts would be left to discern whether Congress expected the courts to refer to state law for the cause of action, or create one of its own. Wechsler observed that "it seems plain now that the presumption" is that the federal courts may create a cause of action on their own "where the remedy invoked is equitable."[321]

Finally, this interpretation is also supported by the Supreme Court's unbroken practice of implying injunctive relief before and after the 1948 amendment.[322] Thus, the 1948 revision to the Rules of Decision Act did not modify the federal courts' standing power to imply suits for injunctive relief to enforce the Constitution.

D. § 1983 and the Administrative Procedure Act

In the mid-twentieth century, two statutes rose to the fore as tools for judicial review—one against state officials[323] and one against federal officials.[324] Neither statute, however, displaced the federal courts' general power to imply injunctive relief in constitutional cases.

1. § 1983

42 U.S.C. § 1983 provides a cause of action, in law or equity, to any person "depriv[ed] [by a state official] of any rights, privileges, or immunities secured by

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[318] *See* Wechsler, *supra* note 270.

[319] *Id.* at 241 ("In so far as rights and duties have not been created by federal law they must, if they exist at all, derive their being from state sources. The question when creation of such rights or duties is committed to the action of the federal judiciary is unaffected by the [1948 Act], which retains the substance of the vital qualifying language: state laws govern . . . 'except where the constitution, treaties or statutes of the United States shall otherwise require or provide.'").

[320] *Id.*

[321] *Id.* Though finding this rule "plain," Wechsler nonetheless regretted that the 1948 Act did not make it explicit. He stated that the issue should not

> be left merely to an implication . . . . There should . . . be a companion section . . . provid[ing] that for enforcement of all federal rights and duties the federal courts are authorized to grant all remedies afforded by the principles of law, unless an Act of Congress otherwise requires or provides. This would eliminate all doubt that the courts of the United States administer a wholly federal jurisprudence in so far as they are dealing with the remedial consequences of the federal law . . . .

Id.

[322] *See supra* notes 278–87 and accompanying text.

[323] 42 U.S.C. § 1983 (2006).

[324] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 701–06 (2006)).

the Constitution . . . ."[325] The statute rose to prominence in the mid-1960s, but its roots extend much further back in time. In the aftermath of the Civil War, the newly freed blacks living in the South found themselves without any meaningful legal protection.[326] Racist organizations were numerous and unchecked by state officials. Lynchings and other abuses were a common occurrence. Dismayed by this lawlessness, Congress enacted the Ku Klux Act in 1871.[327] In the law, Congress created two types of enforcement powers. First, federal prosecutors were given the power to criminally prosecute state officials who violated federal constitutional rights.[328] Second, individual citizens were given a cause of action—whether in law or equity—to challenge constitutional violations visited upon them by state officials.[329]

In the years after the law's enactment, federal prosecutors used the statute to prosecute rogue state officials.[330] Individual citizens, however, never made use of the private cause of action.[331] The reasons for this are unclear.[332] What is clear is that the statute laid dormant until a different civil rights era—the 1960s. In 1961, a man by the name of James Monroe sued several Chicago police officers for damages caused by their unlawful search and seizure.[333] He relied upon the until-then ignored § 1983. In the landmark case of *Monroe v. Pape*, the Court held that the statute did in fact provide Monroe with a cause of action for damages.[334]

The text of § 1983 clearly extends a cause of action for "an action at law [or a] suit in equity . . . ."[335] Thus, to the extent that *Monroe* holds that § 1983 provides a cause of action for damages, it would certainly hold that the statute does the same for equitable relief. After 1961, therefore, the federal courts might have had little need for the implied cause of action in suits against state officers. Why imply a cause of action when one has been explicitly provided? And moreover, if one has been explicitly provided for certain situations, doesn't that impliedly divest the federal courts of authority to imply relief in other situations?

The problem with this logic is that the implied equitable action grew up long before § 1983 was enacted and became an entrenched constitutional remedy long before § 1983 was discovered in 1961. The key question in discerning the effect of a statute

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[325] § 1983.

[326] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 425–44 (1st ed. 1988).

[327] Ku Klux Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985 (2006)).

[328] *Id.* § 2 (codified at 18 U.S.C. §§ 241–42 (2006)).

[329] *Id.* § 1 (codified at 42 U.S.C. § 1983 (2006)).

[330] FONER, *supra* note 326, at 457–58.

[331] *See generally* Louise Weinberg, *The Monroe Mystery Solved: Beyond the 'Unhappy History' Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737.

[332] *Id.*

[333] Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of N.Y., 463 U.S. 658 (1978).

[334] *Id.* at 187.

[335] 42 U.S.C. § 1983 (2006).

on the implied equitable action is whether Congress, by providing one cause of action, intended to rescind all others. Were the Court to hold today that Congress meant to bar implied causes of action in 1871, the Court would somehow have to explain how the implied injunctive action remained a routine tool of constitutional enforcement during the ensuing ninety years.

Not only that, but the Court would have to explain its approach to the implied injunctive action since 1961. Since that time, § 1983 has served as an avenue for injunctive relief quite often. But not every case falls within the parameters of the statute.[336] In those instances, the Court has not questioned its inherent power to issue injunctive relief. Take the case of *Verizon Maryland, Inc. v. Public Service Commission of Maryland*,[337] in which Verizon sought an injunction barring a Maryland commission from issuing an order that, in Verizon's view, violated the Federal Communications Act.[338] One issue in the case was whether Verizon could even maintain the suit. Writing for the Court, Justice Scalia approved the cause of action simply:

> Verizon seeks relief from the Commission's order on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, and its claim thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.[339]

Nowhere in *Verizon* did the Court consider whether the affirmative grant of relief through § 1983 was essential to the plaintiff's suit. Indeed, the Court's analysis was quite similar to that employed in the wake of the anti-injunction statutes discussed above. The Court considered § 1331 the ordinary "mechanism" for "district-court review" and thus looked to whether any provision of the Telecommunications Act impliedly stripped jurisdiction from the courts.[340] Interpreting the statute, the Court found its language "not enough to eliminate jurisdiction under § 1331."[341] Thus, federal question jurisdiction remained and the Court was free to issue injunctive relief.

In sum, § 1983 does not impliedly divest the federal courts of their inherent power to issue injunctive relief. This conclusion fits the statute's nineteenth-century origin and the Court's numerous cases implying injunctive relief without regard to § 1983.

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[336] Section 1983 only provides a cause of action to enforce "rights," and not every provision of law creates an affirmative right. *See, e.g.*, Adar v. Smith, 639 F.3d 146 (5th Cir. 2011) (holding that the Full Faith and Credit Clause does not create a right and thus is not enforceable using § 1983).

[337] 535 U.S. 635 (2000).

[338] *Id.* at 640; Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–61), *amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 56 (codified as amended at 47 U.S.C. § 251 (2006)).

[339] *Verizon*, 535 U.S. at 642 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)).

[340] *Id.* at 644.

[341] *Id.* at 643.

2. Administrative Procedure Act

The Administrative Procedure Act, or APA, provides a cause of action to persons "seeking relief other than money damages" for a "legal wrong [caused by federal] agency action."[342] The Act was adopted in 1946, well *after* the federal courts had come to view § 1331 as an implied grant of power to enjoin unconstitutional conduct.[343] Unlike § 1983, therefore, it is easier to read the APA as *replacing* the Court's implied cause of action jurisprudence regarding federal officials and, implicitly, barring all causes of action that fall outside its purview.[344]

That interpretation has not prevailed, however, and properly so. Where a constitutional action against a federal official falls outside the scope of the APA's cause of action, plaintiffs may typically resort to review on a so-called "nonstatutory" basis.[345] Evidence in favor of this view shows up soon after the passage of the APA. In 1947, the U.S. Attorney General issued the *Attorney General's Manual on the Administrative Procedure Act*.[346] The manual referred to the APA not as a new regime of judicial review, but as "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions."[347] The two most influential commentators of the era—Louis Jaffe and Kenneth Culp Davis—took a similar view of the statute.[348] And so has the Supreme Court. Take for example, *Leedom v. Kyne*,[349] an important post-APA case. In *Kyne*, a union leader sought a ruling by the National Labor Relations Board (NLRB) that the union was entitled to certain collective bargaining rights.[350] The NLRB ruled against the plaintiff, who then sought review in a federal district court, and later, in the Supreme Court. The NLRB's decision was not reviewable under the

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[342] 5 U.S.C. § 702 (2006).

[343] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 701–06 (2006)).

[344] Agency actions that are not "final" fall outside the APA's grant of judicial review. 5 U.S.C. § 704 (2006); *see* Sackett v. EPA, 132 S. Ct. 1367, 1371–73 (2012).

[345] *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997) (discussing judicial relief from an injury inflicted by the President using "nonstatutory review").

[346] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947), *available at* http://www.law.fsu.edu/library/admin/1947cover.html.

[347] *Id.* at 93.

[348] *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 135 (1998) ("Professor Jaffe mentioned the APA infrequently, and when he did, it was only to note how 'little' the APA affected federal judicial review."); *id.* at 136 (explaining that Davis "uncritically accepted the idea that 'a considerable part of the law of judicial review in the federal courts is judge-made . . . and it does not even purport to be anything but common law'" (quoting 1 KENNETH CULP DAVIS, HANDBOOK ON ADMINISTRATIVE LAW § 234, at 812 (1951))).

[349] 358 U.S. 184 (1958).

[350] *Id.* at 186.

APA because it did not amount to final agency action. Yet the Court reviewed the suit anyway, citing its authority under the "statutory provisions governing [its] general jurisdiction."[351] This approach is consistent with that taken by the Court long before the APA was enacted,[352] and reflects the widely held view that the APA was "a general restatement" of preexisting rules of judicial power, not a new regime of judicial review.[353]

Years later, the Court continued to affirm the principle laid down in *Kyne*. "*Kyne* stands for the familiar proposition," the Court explained in 1991, "that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'"[354] Just the next year, the Court applied the "familiar proposition" in *Franklin v. Massachusetts*,[355] a case testing the constitutionality of the reapportionment of Massachusetts' seats in the House of Representatives. The Court first considered whether the reapportionment decision was reviewable under the APA.[356] Finding that the decision did not constitute "final agency action" and that the "President [was] not an agency" under the APA, the Court denied review on this basis.[357] If the APA displaced all other causes of action, this should have been the end of the case. It was not, however. The Court went on: "Although the reapportionment determination is not subject to review under the standards of the APA, that does not dispose of appellees' constitutional claims."[358] The Court then went on to decide the case "on the merits."[359] *Franklin* thus illustrates that the APA is not the exclusive cause of action for injunctive relief; judicially implied injunctive relief remains available.[360]

Thus, even though the APA created an explicit cause of action against federal officers, the federal courts have not interpreted the statute as precluding other causes of action, and appropriately so. As one commentator summarized it, "There is, in fact, general judicial and scholarly agreement that nonstatutory review was never eliminated and may still be used today. It may be used in cases where the APA fails to provide a plaintiff with a remedy."[361]

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[351] *Id.* at 190.

[352] *See supra* notes 270–87 and accompanying text.

[353] Duffy, *supra* note 348, at 131.

[354] *See* Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 44 (1991) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)).

[355] 505 U.S. 788 (1992).

[356] *Id.* at 796–801.

[357] *Id.* at 796, 801.

[358] *Id.* at 801.

[359] *Id.* at 806 ("We conclude that appellees' constitutional challenge fails on the merits.").

[360] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994). For further examples, see Siegel, *supra* note 345, at 1669–70 ("Nonstatutory review may also be observed today in a whole class of cases in which a plaintiff seeks a declaration that a newly-passed statute is unconstitutional and an injunction against its enforcement.").

[361] Siegel, *supra* note 345, at 1668–69; *see also* Duffy, *supra* note 348, at 147 ("Traced back to its historical origins, this power [to imply injunctive relief] has a statutory basis in the grant of federal equity jurisdiction, which has never been repealed.").

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In sum, legislation throughout the twentieth century did not withdraw the federal courts' longstanding power to create injunctive actions. Congress, to be sure, has the power to enact such legislation. To date, however, it has declined to take such a significant step. The federal courts thus retain today a power they possessed at the Founding: the power to imply injunctive relief in constitutional cases.

CONCLUSION

The Supreme Court is not obliged to live in the past, but it is free to do so if it pleases. In the realm of equity, the Supreme Court has long chosen this path—referring repeatedly to historical practice in resolving questions of judicial power. This Article has shown that the federal courts have long enjoyed the power to enforce the Constitution by creating injunctive actions, even where Congress has not specifically authorized the practice. If the Court—as it has recently hinted—desires to withhold injunctive relief in such instances, it must reckon this approach with centuries of past practices. Requiring congressional authorization may or may not be good policy. It is not, however, faithful to existing law.