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"A CONSIDERABLE SURGICAL OPERATION": ARTICLE III, EQUITY, AND JUDGE-MADE LAW IN THE FEDERAL COURTS

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ABSTRACT

This Article examines the history of judge-made law in the federal courts through the lens of the early-nineteenth-century federal courts' equity powers. In a series of equity cases, and in the Federal Equity Rules promulgated by the Court in 1822 and 1842, the Supreme Court vehemently insisted that lower federal courts employ a uniform corpus of nonstate equity principles with respect to procedure, remedies, and—in certain instances—primary rights and liabilities. Careful attention to the historical sources suggests that the uniform equity doctrine was not simply the product of an overreaching, consolidationist Supreme Court, but is best understood in the context of important and surprisingly underappreciated early-nineteenth-

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century debates concerning judicial reform. During this period, both Congress and the Court were preoccupied with the disuniformity in the administration of the federal judicial system, especially in the farther reaches of the republic. When reform was not forthcoming through legislation, the Supreme Court achieved a modicum of uniformity in the federal courts through the application of a single body of equity principles drawn from federal and English sources. But the Court did not act unilaterally. Congress's repeated acquiescence to, and extension of, the Court's uniform equity doctrine reveals a complex, interbranch dynamic at work.

Retelling the story of nonstate, judge-made law in the federal courts through the lens of equity is not intended to demonstrate that such a formulation of federal judicial power was (or is) correct. Rather, by recuperating the history of federal equity power, this Article illuminates the significant metamorphosis of the meaning of Article III's grant of judicial power. This change has been elided in modern accounts of federal judge-made law in an effort to bolster the legitimacy of a modern vision of federal judicial power.

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INTRODUCTION

The history of judge-made law in federal civil cases is commonly examined through the lens of Section 34 of the Judiciary Act of 1789[1] (the original Rules of Decision Act) and the Supreme Court's famous interpretation of that Act in *Swift v. Tyson*.[2] This Article examines the history of judge-made law in the federal courts, but shifts attention away from Section 34, focusing instead on early-nineteenth-century federal courts' equity powers.[3] This alternative doctrinal perspective

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1. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

2. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842). In this Article, I use the term "judge-made law" and variations thereof to describe judicial decisionmaking in the absence or near absence of statutory or constitutional direction. *Cf.* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (defining "federal common law" as "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional"). While commentators generally use the term "common law" instead of "judge-made law," I use the latter because my focus is on cases brought in equity. Using the term "common law" to describe the judicial exercise of equity power would be needlessly confusing. *See infra* Part I.B. I use the term "common law" in this Article only when discussing judge-made law in the context of cases brought in law. Some readers will object that the use of the term "judge-made law" necessarily and incorrectly imposes a modern gloss on early-nineteenth-century judicial practices because, at that time, it was generally understood that judges declared law, rather than made law. I address this concern later in the article. *See infra* text accompanying notes 367–69.

3. This Article focuses on the federal courts' adjudication of private-law litigation in which a party sought enforcement of traditional equitable rights or remedies, or sought the benefit of procedures available in equity. *See infra* Part I.B.1. The term "equity," or "equity of the statute," was also used more broadly to describe a form of statutory interpretation—employed in law and in equity—that authorized judges to follow a restrictive or expansive interpretation of a statute to "prevent a failure of justice." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 457 (1969). Other scholars have examined the early role of equitable principles as interpretive tools. *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1040–55 (2001) (observing that founding-era judges did not generally resort to the notion of "equity of the statute" to justify non-literal statutory interpretation); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 79–85 (2001) (arguing that the ratification debates are inconclusive about whether the Framers intended to imbue the judiciary with the discretion inherent in the equity of the statute). Equity of the statute is not my focus here. Likewise, I do not consider the debates concerning the scope of federal equity power with respect to remediation of constitutional violations, nor the related debate concerning the federal courts' inherent power to craft equitable remedies in that field. *See, e.g.*, PETER C. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 198 (1990) ("[F]ederal district courts transformed the rudimentary Balance of Equity in *Brown [v. Board of Education*, 349 U.S. 294 (1955),] from a remedial tool to a way of reading the Constitution."); GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 3–4 (1982) (arguing that since the mid-twentieth century, the Supreme Court has distorted the traditional view of equitable principles, resulting in excessive judicial discretion); John Yoo, *Who Measures the Chancellor's Foot: The Inherent Remedial Authority of the Federal*

allows a fresh look at a long-standing debate concerning the historical scope of federal judges' power to apply nonstate, judge-made law, and enables reevaluation of some of the historiographic and doctrinal claims that are often at stake in that debate.[4] The history of federal equity told in this Article challenges the notion that one can make broad generalizations about early-nineteenth-century views regarding the use of nonstate, judge-made law in federal court and instead forces one to recognize that modern conceptions of federal judicial power are just that: modern.

Intense focus on the history of Section 34 can in part be traced to the years leading up to *Erie Railroad Co. v. Tompkins*,[5] and in particular to Charles Warren's research concerning the drafting of Section 34 and his contention that the *Swift* opinion departed from the Judiciary Act of 1789's original intent.[6] A decade later, Justice Louis Brandeis famously relied on Warren's work to repudiate the *Swift* doctrine.[7] For several decades after *Erie*, scholars largely followed Warren's and Brandeis's lead, understanding *Swift*'s ratification of the application of "general common law" in federal courts as a perplexing, ill-advised, or even unconstitutional departure from the otherwise standard practice of applying state law, including "unwritten law," in diversity actions.[8] This characterization of *Swift*'s

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Courts, 84 CALIF. L. REV. 1121, 1123–24 (1996) ("If the remedies needed to correct a constitutional violation lie outside a court's traditional remedial powers, then separation of powers principles require that the answer come from the political branches . . . .").

4. Although Section 34 is often at the center of modern discussions of the metes and bounds of nonstate, judge-made law in early-nineteenth-century federal courts, those debates have certainly extended beyond Section 34. *See, e.g.*, Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 46–64 (2009) (examining the debate over whether federal courts have power to enforce the law of nations without legislative codification); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1039–84 (1985) (outlining early debate over federal courts' common-law powers, with particular attention to common-law crimes); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1254–90 (1985) (explaining how the association of expansive federal power with federal common law shaped political debate between Federalists and Republicans); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 399–418 (1997) (analyzing the history of federal courts' application of customary international law).

5. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

6. *See* Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923); *see also* text accompanying *infra* notes 52–54.

7. *Erie*, 304 U.S. at 72–73 & n.5.

8. As William Fletcher observed in 1984, "[t]he conventional wisdom of modern legal scholarship is that [*Swift v. Tyson*] marked a sudden and dramatic change from prior practice." 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, 1513 (1984).

significance did not go unchallenged. Over time, several scholars marshaled impressive evidence demonstrating that during the early nineteenth century, the application of general common law in federal court was uncontroversial and consistent with contemporary interpretations of Section 34.[9] Nevertheless, the belief that application of nonstate, judge-made law in federal civil actions was, as a general matter, anomalous and problematic during the early nineteenth century continues to inform some modern scholarly and judicial accounts.[10]

The persistence of such views is especially notable given that the modern focus on Section 34 and *Swift* has dwarfed consideration of various classes of federal cases in which Section 34 did not apply or applied in an especially limited fashion, including federal equity cases.[11] Prior to 1938, when law and equity were merged in the federal system, they occupied separate sides of a federal court's civil docket and were subject to distinct choice-of-law principles. As shown in Part I, federal 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

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9. *See id.* at 1516–54; sources cited *infra* note 55.

10. For example, Professor Bradford Clark asserts that "[f]ederal common law is a modern phenomenon," explaining that "[p]rior to this century, the Supreme Court confidently asserted that '[t]here is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union.'" Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1255 (1996) (quoting Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657–58 (1834)); *see also* Kermit L. Hall, *The Courts, 1790–1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 106, 123 (Michael Grossberg & Christopher Tomlins eds., 2008) ("[O]n comparable points of law federal judges had to regard holdings in state courts as the rule of decision in their courts."); EARL M. MALTZ, SLAVERY AND THE SUPREME COURT, 1825–1861, at 149 (2009) ("Prior to 1842 [and the *Swift* opinion], the Court had uniformly held that the legal issues surrounding such a claim [to recover on a promissory note] would be determined according to the common law of New York, pursuant to the Judiciary Act of 1789 . . . ."); sources cited *infra* notes 385–86.

11. Cases brought in equity were not the only subset of cases in which federal courts had significant power to apply nonstate, judge-made law. For example, the federal courts had exclusive jurisdiction over certain types of admiralty cases and exercised significant discretionary powers to apply nonstate admiralty law principles in some such cases. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 514 (2006) ("At least with respect to the high seas, the Supreme Court has long understood the Constitution to displace the local law of individual states."); The Chusan, 5 F. Cas. 680, 683 (C.C.D. Mass. 1843) (No. 2717) (Story, J.) ("The subject-matter of admiralty and maritime law is withdrawn from state legislation, and belongs exclusively to the national government and its proper functionaries."); *United States v. Burr*, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (observing that Section 34 applies in "suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty").

the *Swift* doctrine. Indeed, federal courts generally applied a uniform body of nonstate, judge-made equity principles with respect to procedure, remedial laws, and—in certain instances—the primary rights and liabilities of litigants.[12] Importantly, these principles—which were drawn from federal and English sources—were applied in equity cases not despite, but precisely because of the failure of the forum state's laws to provide adequate relief. Accordingly, the uniform equity principles applied in federal court in the early nineteenth century were not drawn from a common reservoir of general principles available to state and federal judges alike, but rather in many jurisdictions were available in federal court only.

To be certain, some legal historians have considered equity's significance in light of the *Swift* doctrine,[13] and recently a handful of legal scholars have focused on early federal equity power in studies of constitutional remedies, early administrative law, and federal subject matter jurisdiction.[14] Nevertheless, when describing judge-made law in early-nineteenth-century federal courts, legal scholarship and casebooks tend to ignore the equity side of the docket or significantly understate the scope of federal judges' power to apply nonstate, judge-made principles in equity cases.[15] As a consequence of the narrow focus on Section 34 and *Swift*, and of the failure to fully acknowledge the range of sources of law applicable in federal court,

12. *See infra* Part I.B.2.

13. *See* TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 26 (1979) [hereinafter FREYER, FORUMS OF ORDER] (stating that in the early nineteenth century, "[M]any litigants used [federal] diversity jurisdiction in order to gain the benefit of equitable doctrines and procedures"); TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 35 (1981) [hereinafter FREYER, HARMONY AND DISSONANCE] ("[I]n equity . . . federal courts did not consider themselves obligated to follow the state law."); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 222–23 (1977) (discussing the Supreme Court's use of "an independent equity power to establish the principle of negotiability in the federal courts").

14. *See, e.g.*, sources cited *infra* notes 149–52.

15. Other common sources more or less overlook federal equity power when describing the history of judge-made law in the federal courts. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 321–27 (5th ed. 2007); STEPHEN C. YEAZELL, CIVIL PROCEDURE 222–24 (7th ed. 2008). Hart and Wechsler's famous Federal Courts casebook briefly discusses the tradition of federal equity power but gives a strangely contradictory assessment, first declaring that federal courts sitting in equity had substantive lawmaking power, but then describing the cases as "inconclusive." RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 576 (6th ed. 2009); *see also* Fletcher, *supra* note 8, at 1529 (noting that "the federal courts sitting in equity followed local state law").

highly generalized statements about antipathy for nonstate, judge-made law in early-nineteenth-century federal courts are common in treatises and articles that purport to explain the limits on the application of nonstate, judge-made law by federal courts today.[16] This Article demonstrates that such generalizations lack foundation.

The purpose of retelling the story of judge-made law in the federal courts through the lens of equity is not to provide an originalist or quasi-originalist justification for a particular understanding of modern federal judicial power.[17] Rather, by focusing on federal equity, this Article sheds light on the radical transformations that have occurred in our understanding of the judicial power as set forth in Article III and, in that regard, the limitations of originalist methodology in this context. Acknowledging the dynamic and historically contingent nature of our understanding of Article III also raises the question of why, notwithstanding an unchanged textual constitutional mandate, federal equity power and the federal courts' power to apply nonstate, judge-made law have evolved over the decades and centuries. Why did the uniform equity doctrine take hold in the early nineteenth century, surviving multiple direct challenges in the Supreme Court and in Congress? Why is it no longer part of our commonsense understanding of federal judicial power? And why is the story of federal equity's earlier formulation—and its transformation in modern jurisprudence—frequently elided in accounts of judge-made law in the federal courts today?

Part II addresses the first of these questions. One could easily attempt to explain the vitality of the federal uniform equity doctrine using the familiar explanatory trope that animates many accounts of *Swift* and Supreme Court behavior more generally during the early nineteenth century: an overreaching Supreme Court used equity as a means of further empowering itself and the lower federal courts at the expense of state sovereignty.[18] But careful attention to previously unexamined historical sources suggests that such an assessment is simplistic and misleading if applied to federal equity. Instead, this Article argues that the Supreme Court's insistence that lower federal

16. *See, e.g.*, Clark, *supra* note 10, at 1255; sources cited *infra* notes 385–86.

17. William Crosskey offers such an analysis in WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 877–902 (1953).

18. For example, Grant Gilmore confidently asserted that in *Swift*, "[t]he federalizing Supreme Court also succeeded in reversing, for all practical purposes, the outcome of the constitutional debate which had allocated control of the substantive law to the states." GRANT GILMORE, THE AGES OF AMERICAN LAW 30 (1977).

courts apply a uniform body of equity principles is best understood as a response to contemporary concerns about disuniformity and institutional incapacity in the federal judicial system—concerns shared by many jurists and legislators with otherwise substantially different views regarding the proper scope of federal power.

Two heated contests regarding federal equity power originating in Kentucky and Louisiana invite attention to an important and surprisingly overlooked set of issues that preoccupied both the Court and Congress during this period: the spectacular failure of the federal judicial system to serve the needs of the rapidly expanding nation and the related calls for judicial reform.[19] For example, many states that became part of the Union after 1789—the "new states"—were not included in a federal judicial circuit and hence lacked a circuit court.[20] And for nearly four decades, federal legislation governing judicial process in the federal courts simply did not apply in federal courts located in the new states.[21] But despite a constant stream of petitions and complaints, especially from the new states, Congress consistently failed to enact judicial-reform legislation that would have helped ensure uniform federal judicial services throughout the nation. In the absence of legislative judicial reform, the Court sought to secure a modicum of institutional uniformity in the lower federal courts, in part through the development of a uniform corpus of equity principles that applied in federal court.[22]

For some students of the federal courts, the most interesting aspect of the uniform equity doctrine is not why it thrived in the early nineteenth century but that it existed at all. Part III considers why accounts of nonstate, judge-made law in the federal courts tend to marginalize the story of federal equity power told in this Article. There are surely many reasons, but an important factor is that the story of federal equity and its demise does not fit neatly into a standard narrative of continuity that characterizes many accounts of

19. The best analysis of the debates over judicial reform in the nineteenth century remains FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927).

20. *See infra* Part II.A.

21. *See infra* Part II.A.

22. By calling attention to the way institutional pressures and concerns shaped Supreme Court jurisprudence, this Article builds on and contributes to a body of scholarship that focuses on the centrality of institutional dynamics to the development of law. *See infra* Part II.D.

the modern *Erie* doctrine.[23] Thus, even as many jurists and scholars acknowledge *Erie* as "a dramatic reversal in the relation between the federal courts and state law,"[24] they tend to tell the story of judge-made law in the federal courts as a story of the stasis of—or a return to—purportedly timeless federalism and separation-of-powers principles.[25]

This point is demonstrated rather transparently in the minimization of the federal uniform equity doctrine in modern case law. A brief look at Justice Felix Frankfurter's "surgical" treatment of the history of federal equity in *Guaranty Trust Co. v. York*[26] illuminates why the early equity cases are obscured in modern accounts of judge-made law in the federal courts. Under Frankfurter's pen, the robust uniform equity doctrine was largely erased in modern jurisprudence to make way for the "outcome determinative" principle: the notion that the "outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court."[27] Such erasure is not unusual. Indeed, it is symptomatic of the generic conventions of the judicial opinion in our precedent-based system, conventions that harness historical sources as authority while simultaneously erasing any sense of "pastness" from the past and any sense of change in our legal traditions.

I. FEDERAL JUDGE-MADE LAW IN LAW AND EQUITY

Although today we generally speak of one Rules of Decision Act, which applies to all "civil actions,"[28] in fact, the modern vertical choice-of-law doctrine—the determination of whether to apply state, federal, or another body of nonstate law in a given action—is far more complex. Different statutes and standards apply depending on whether the law in question is procedural or substantive. And the most difficult *Erie* questions arise when it is impossible to neatly classify the law at issue as either. The state of affairs in the late

23. *See* Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 275–76 (1973) (arguing that legal history's "most characteristic mark has been an emphasis on continuity and a corresponding deemphasis of change").

24. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 169 (1980).

25. *See infra* Part III.

26. Guar. Trust Co. v. York, 326 U.S. 99 (1945).

27. *Id.* at 109.

28. 28 U.S.C. § 1652 (2006).

eighteenth and early nineteenth centuries was even more complicated. Article III specifies three different substantive fields of competence for federal courts: law, equity, and admiralty.[29] Many accounts of the history of vertical choice-of-law rules in civil cases are framed in terms of the modern concern of whether the law in question is procedural or substantive. Although such a focus is not anachronistic, it obfuscates the categorization most salient to early-nineteenth-century jurists: whether a civil case arose in law, equity, or admiralty. In each of these fields, different statutes and different precedents governed the sources of law that would determine the applicable procedures, the primary liability rules, and the remedies.[30]

This Part examines the vertical choice-of-law doctrines that applied in two tracks of federal litigation, law and equity, and focuses in particular on the underexamined rules governing the exercise of federal equity power. It is fruitful to study law and equity together, in part because they were frequently paired in practice. Some cases could have been brought in law or equity, depending on the specifics of the case and on the remedy sought.[31] Although a particular case might be heard by a federal judge in law or in equity, the normative and doctrinal predispositions of the vertical choice-of-law regimes that applied on these two sides of the federal docket were distinctive. On the law side of the docket, although the details are famously contested and there are important exceptions, it is fair to conclude that there was substantial recognition of the applicability of state law in federal court, absent a controlling federal statute, treaty, or

29. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, . . . [and] to all Cases of admiralty and maritime Jurisdiction . . . .").

30. The situation was more complex than I can reasonably describe in this Article. According to G. Edward White, "[a] precise description of the nature and sources of American law at the time of the Marshall Court requires the designation not only of source categories but of subcategories within those categories and of hierarchies among the categories." G. Edward White, *The Marshall Court and Cultural Change, 1815–35*, *in* HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1, 112 (Paul A. Freund & Stanley N. Katz eds., 1988).

31. For example, the plaintiffs in *Riddle v. Mandeville* first sued for payment on a promissory note on the law side of the federal circuit court in Virginia, Mandeville v. Riddle, 5 U.S. (1 Cranch) 290, 292 (1803), but the Supreme Court found that no action could be brought in law "by the assignee of a promissory note made in Virginia, against a remote assignor." *Id.* at 298. Years later, the same plaintiff filed a bill in equity in the same court. The Supreme Court found that in equity the remote endorsers would be "immediately responsible." Riddle v. Mandeville, 9 U.S. (5 Cranch) 322, 330, 333 (1809). Morton Horwitz provides a careful analysis of the *Riddle* cases and argues that in the 1809 opinion, the Court "invoked an independent equity power to establish the principle of negotiability in the federal courts." *See* HORWITZ, *supra* note 13, at 223.

constitutional provision.[32] This state-law-respecting norm applied to a certain extent to substantive law and, to an even greater degree, to remedial and procedural law. In equity, a significantly different vertical choice-of-law doctrine prevailed. That doctrine empowered federal judges to apply uniform, nonstate, judge-made equity principles without regard to state legal or equity principles, sometimes including those codified in state statutes.[33]

A. Sources of Law in Cases Brought in Law

Article III ensures that federal courts have the power to decide cases "in law,"[34] but defining the contours of this power was left to Congress and the Supreme Court. In particular, Article III says nothing about which sources of law will guide adjudication in federal court (for example, state law, federal law, or the law of nations). Nor does it answer the related question of how much discretion federal judges have in crafting or declaring the law.[35] In the late eighteenth and early nineteenth centuries, Congress and the Court gradually attempted to resolve these ambiguities, but the resulting system for determining which source of law would apply in federal cases was complex. In actions brought at law, different statutes and precedents governed this question, depending on whether the legal rule at issue governed procedures, remedies, or substantive law.

With respect to procedures applicable in law, two judicial process acts directed federal judges to generally conform to the procedural laws of the forum state. Four days after it enacted the famed Judiciary Act of 1789, Congress enacted a temporary process act, which provided 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."[36] This rule was explicitly reconfirmed in 1792 in what is often called the Permanent Process Act, which stated that the processes in common law suits "shall be the same as are now used in the said courts" under the 1789 Process Act.[37]

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32. *See infra* Part II.A.

33. *See infra* Part II.B.

34. U.S. CONST. art. III, § 2.

35. *See* White, *supra* note 30, at 113 (noting "that judges could themselves fashion the rules for deciding which sources to give more prominence than others").

36. Act of Sept. 29, 1789 (Temporary Process Act), ch. 21, § 2, 1 Stat. 93, 93 (emphasis added).

37. Act of May 8, 1792 (Permanent Process Act), ch. 36, § 2, 1 Stat. 275, 276.

Similarly, federal courts deciding cases brought in law generally applied the state remedies and procedures used to execute judgments. Although the distinction between state and federal remedial regimes in law was unlikely to have been significant to determining damage judgments, the federal-state distinction could be very important to the processes available to enforce such judgments. Whether Congress would enact a uniform policy for execution of judgments in federal court was a subject of significant debate in the First and Second Congresses.[38] The Permanent Process Act addressed the issue of conformity with state execution-of-judgment laws, requiring that "writs [and] executions . . . shall be the same as are now used" in the forum state courts.[39] Thus, despite some conflicting evidence and significant exceptions on this point, federal courts sitting in law largely followed state law with respect to remedies and execution of judgments.[40]

Two observations about the process acts are warranted. First, the procedural and remedial conformity required by these acts was static. The Temporary Process Act of 1789 expressly stated that the procedures used in the district and circuit courts in actions brought in

38. *See* Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 426–35 (1930).

39. Permanent Process Act § 2, 1 Stat. at 276.

40. *See* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 453 (2006) (noting that states "retain[ed] legislative authority over their own court procedures and remedial regimes, [and] . . . also insisted that the federal courts recognize and implement the local state execution processes in the cases that they decided"); Warren, *supra* note 38, at 427–28 (noting that the federal courts were "to administer the same remedial justice, that would be administered in the proper state courts" (quoting *Ex parte* Biddle, 3 F. Cas. 336, 337 (C.C.D. Mass. 1822) (No. 1391) (internal quotation marks omitted)). Professor Fletcher concludes that "questions of remedies . . . at law . . . would be determined according to federal court practice." Fletcher, *supra* note 8, at 1530 n.72 (citing Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222 (1818); Mayer v. Foulkrod, 16 F. Cas. 1231, 1234–35 (C.C.E.D. Pa. 1823) (No. 9341)). On this point, however, *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818), and *Mayer v. Foulkrod*, 16 F. Cas. 1231 (C.C.E.D. Pa. 1823) (No. 9341), are better understood as establishing that federal courts would not rely on state classifications of remedies as legal or equitable when determining appropriate treatment of a case in federal court. *Robinson*, 16 U.S. at 222 (observing the need to preserve the traditional distinction between law and equity in federal courts rather than "adopt[ing] the state practice," lest the federal courts "extinguish" in states without equity practice, "the exercise of equitable jurisdiction"); *Mayer*, 16 F. Cas. at 1235 ("[A]s to suits in equity, state laws, in respect to remedies . . . could have no effect whatsoever on the jurisdiction of the court, the act [of 1792] having prescribed a rule, by which the line of partition between the law and the equity jurisdiction of those courts is distinctly marked."). For additional discussion of Fletcher's interpretation of *Mayer*, see *infra* note 129 and accompanying text.

law were to be the same "as *are now used*" in the forum state courts.[41] Because the Permanent Process Act explicitly referenced the Temporary Process Act, federal judges were required to follow state procedure as it existed in 1789.[42] For states admitted to the Union after 1789, Congress in 1828 enacted another process act, which provided that for actions in law, federal courts were to follow state court procedures then in effect,[43] hence providing for static conformity with state procedure as of 1828.[44] Because of the static nature of the conformity requirements found in all three of these acts, federal courts were not obliged to conform with the state legislatures' prospective changes to state court procedural or remedial law. These process acts thus did not require perfect conformity with *all* current state procedural laws.[45] However, federal judges were not left free to apply any common law procedures or remedies. Rather, depending on which process act applied, federal courts were generally required to apply state procedural or remedial law as it existed in either 1789 or 1828.

Second, the process acts gave federal courts some discretionary rulemaking authority. Under the Permanent Process Act, lower federal courts could make "alterations and additions" to state procedures "as [they] . . . in their discretion deem[ed] expedient."[46] That Act also empowered the Supreme Court to prescribe "regulations" as it "shall think proper . . . to any circuit or district

41. Temporary Process Act § 2, 1 Stat. at 93 (emphasis added).

42. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 32 (1825) (observing that the Permanent Process Act "adopt[ed] the State law as it . . . stood [in 1789], not as it might afterwards be made"). Because the Permanent Process Act of 1792 adopted the exact terms of the Temporary Process Act of 1789, the general view was that federal courts sitting in law were to apply state court procedures and remedies as they stood in 1789, rather than in 1792. *But see Mayer*, 16 F. Cas. at 1234 (noting that the process acts established "that the forms and modes of proceeding at common law, as used by [state courts] in 1792" applied in federal cases brought in law).

43. Act of May 19, 1828 (Process Act of 1828), ch. 68, § 1, 4 Stat. 278, 278–79. Note that this meant that in states admitted after 1789, no federal statute explicitly governed judicial process in the federal courts for up to twenty-six years.

44. The events leading up to the Process Act of 1828 are discussed at length below. *See infra* Part II.B.

45. With respect to the execution of judgments, the Process Act of 1828 specifically gave federal courts the authority "to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts," thus allowing but not requiring ongoing conformity with state laws governing execution of judgments. Process Act of 1828 § 3.

46. Act of May 8, 1792 (Permanent Process Act), ch. 36, § 2, 1 Stat. 275, 276.

court concerning" writs, executions, and other processes.[47] Thus, the process acts did not dictate absolute conformity with relevant state law. Although the process acts required federal courts to conform to state procedures and remedies in most instances, departures based on judicial discretion were allowed, and this grant of discretion became a point of serious dispute in the 1820s.[48] Nevertheless, the default rule in cases brought in law was that federal courts were to apply forum state procedural and remedial laws, at least of a certain date.

The process acts did not address the vertical choice-of-law principles applicable to substantive law. Instead, Congress addressed that issue in Section 34 of the Judiciary Act of 1789, which famously required "[t]hat the 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."[49] Section 34's mandate was oblique. Federal statutes, treaties, and the Constitution were to provide the rules of decision in cases in which they governed. But outside of these cases, Section 34 circularly declared that "the laws of the several states" would apply "in cases where they apply."

Without trying to untangle the thicket of opinion concerning Section 34, one can discern two modern schools of thought regarding early-nineteenth-century interpretation of that provision. The first school of commentators concurs with Justice Brandeis's opinion in *Erie*,[50] arguing that absent a governing federal statute, treaty, or constitutional provision, Section 34 commanded the federal courts to apply state statutory and judge-made law.[51] By this logic, the Supreme Court erred in *Swift v. Tyson*, departing from the First Congress's intended allocation of power between the state and federal courts

Scholars in this camp included Charles Warren, who influenced Justice Brandeis's interpretation of Section 34 with his article *New*

47. *Id.*

48. *See infra* Part II.B.

49. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

50. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) ("[T]he purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.").

51. *See, e.g.*, FREYER, HARMONY AND DISSONANCE, *supra* note 13, at 35 ("There seems little room for doubt that the 'laws of the several states' included statutes, decisions by state courts, and vaguely defined 'local customs' . . . ."); sources cited *supra* note 10.

Light on the History of the Federal Judiciary Act of 1789.[52] In *New Light*, Warren argued that "the word 'laws' in this Section 34 was not intended to be confined to 'statute laws,' as Judge Story held in the famous case of *Swift v. Tyson*, but was intended to include the common law of a State as well as the statute law."[53] The basic view that, absent a controlling federal statute, treaty, or constitutional provision, Section 34 was intended to deprive federal judges of the power to apply principles other than the forum states' law—whether common law or statute law—continues to influence some scholars' and jurists' views about the historical and modern scope of federal judge-made law.[54]

Others have taken a different position on the meaning and effect of Section 34, however, arguing instead that it required federal judges to apply state judge-made law in limited situations, if at all. For example, both Wilfred Ritz and William Fletcher have challenged Warren's famous and influential interpretation of Section 34.[55] After examining in detail the archival documents on which Warren relied, Ritz argues that Warren's conclusions concerning the legislative history of Section 34 are "wholly illusory" and that his interpretation of Section 34 is "erroneous."[56] Instead, Ritz argues, Section 34 was intended to ensure that in trials at common law federal courts applied American rather than English common law.[57]

Fletcher provides particularly strong evidence that in the early nineteenth century—well before *Swift* was decided in 1842—Section 34 was consistently interpreted to mandate the application of "local law" (or *lex loci*)[58] but generally not state statutes or state common law unless they were understood to involve matters of "particularly

52. Warren, *supra* note 6.

53. *Id.* at 52 (citing Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842)).

54. *See* sources cited *supra* note 10 and *infra* notes 385–86.

55. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 165 (Wythe Holt & L.H. LaRue eds., 1990); Fletcher, *supra* note 8, at 1514; *see also* White, *supra* note 30, at 972 ("[I]n the period from 1815 through 1835 the federal courts were conceived of as free to follow or to ignore relevant state law as they chose, subject to the dictates of their own established practices[,] . . . despite the language of Section 34 . . . .").

56. RITZ, *supra* note 55, at 9.

57. *Id.* at 148.

58. *See* Fletcher, *supra* note 8, at 1532 ("[T]o the degree that a law was local, the federal courts were required under the *lex loci* principle to follow a state's deviation from the general common law.").

local concern."[59] This was not a minor exception, as *lex loci* would have generally applied in cases concerning title to real property, would have often applied in cases concerning locally recorded instruments (such as wills), and would have sometimes applied in cases concerning negotiable instruments.[60] But in the absence of a local law, federal courts applied law from a number of sources including, perhaps most prominently, the "general common law"—a reservoir of common-law principles that were generally applicable and were not identified with a particular state or sovereign entity.[61] Given that federal judges regularly applied nonstate, judge-made law in the pre-*Swift* era, Fletcher urges that *Swift* did not mark a departure from the original meaning of Section 34—as both Warren and Brandeis concluded—but was instead consistent with the early understanding of that section.[62]

Regardless of how one interprets Section 34, and hence resolves the issue of whether *Swift* departed from existing norms and practices, it remains the case that the law side of the federal docket was characterized to a certain extent by a state-law-respecting norm. Under the process acts, state law usually dictated the procedures used in federal courts, even as the acts allowed for discretionary departures from state procedural law. With respect to legal remedies, it appears that federal courts generally followed state remedial schemes, and that, unless the federal judge exercised his discretion to craft an alternative rule, the process acts generally obliged conformity with existing state laws designed to enforce those remedies. Finally, under Section 34, federal courts generally applied local laws to resolve the substantive rights and liabilities of the parties "in cases where they appl[ied]."[63] Conformity with state law was by no means absolute in actions at law. However, with certain important exceptions, including

59. *Id.* at 1527–28 (noting that "federal courts usually felt obliged to comply with state laws [created by state courts and legislatures] only in subject areas of particularly local concern, such as title to real property"); *id.* at 1532 ("To the degree that a law was general rather than local, federal courts had equal status with state courts in its exposition and development. . . . But to the degree that a law was local, the federal courts were required under the *lex loci* principle to follow a state's deviation from the general common law.").

60. *Id.* at 1536–38.

61. *See id.* at 1517 ("The American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.").

62. *See id.* at 1514.

63. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

the general common law, conformity was the general and expected practice.

B. Sources of Law in Cases Brought in Equity

Scholars and jurists have given considerable attention to Section 34 and the federal courts' application of the general common law in the early nineteenth century, but have given far less consideration to judicial practices on the equity side of the docket. Several legal scholars have noted that federal judges had greater latitude to apply nonstate, judge-made decisional rules when sitting in equity.[64] But many accounts of nonstate, judge-made law in the early-nineteenth-century federal courts simply overlook equity or operate under the view that Section 34 always applied in federal equity cases.[65] Accordingly, the story of judge-made law on the equity side of the docket is usually considered, if at all, as a subplot in the Section 34–*Swift* narrative. As this section demonstrates, that impression is misleading.[66]

Although the law and equity sides of the federal docket were interrelated in important ways,[67] the vertical choice-of-law doctrines that developed on the two sides of the federal docket were both technically and normatively distinctive. On the equity side, the vertical choice-of-law rules were maddeningly complex. But overall, federal judges applied nonstate uniform equity principles to determine the applicable procedures, remedies, and—in certain cases—substantive principles. Those nonstate equity principles were drawn from federal and English chancery sources, statutory and judge-made.

This Section details the development of the uniform equity principles that applied in federal court. First, it briefly describes the tepid reception courts of equity received in many of the colonies, the resulting varied availability of equity in colonial and state courts, and the decision to include equity in Article III and the early judiciary acts. It then considers, in some detail, the Supreme Court's efforts to

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64. *See* sources cited *infra* notes 149–52 and accompanying text.

65. *See, e.g.*, sources cited *supra* note 15.

66. Indeed, it might be more accurate to characterize the general common law and *Swift* as a subplot of the story of federal equity power. After all, in *Swift*, Justice Story referenced the uniformity requirement in equity as support for the application of general common law on the law side of the docket. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 22 (1842).

67. For example, equity jurisdiction was possible only if the remedy available in law was incomplete or inadequate. *See infra* note 90 and accompanying text.

clarify what sources of equity would supply procedural, remedial, and substantive equity principles in federal court. By the 1810s—more than twenty years before *Swift* was decided—horizontal uniformity-of-equity principles within the federal court system was the explicit norm in federal equity cases, rather than vertical conformity with state law or equity. One important implication of the existence of the uniform equity doctrine in the early nineteenth century is that—regardless of what one concludes regarding the acceptance of the general common law under Section 34—analyses of judge-made law in federal courts that draw general conclusions based on judicial practices in actions at law are misleading. Specifically, they tend to mistake a part for the whole of federal judicial practices by failing to account for the commonplace application of nonstate, judge-made equity principles in federal courts in the early nineteenth century.

1. *The Origins of Federal Equity Power.* Equity had a varied reception in the American colonies, and that variation significantly influenced how equity was later applied in federal courts. Both historically and today, the term "equity" refers to a set of rights, remedies, and procedures available ostensibly to ameliorate defects of the common law (such as in the cases of fraud, mistake, and forgery) and to enforce equitable instruments that required the ongoing supervision of a court (such as trusts and guardianships).[68] In eighteenth century England, equity was available in separate courts with equity powers but was not available in the law courts.[69] As a doctrinal matter, a court of equity had jurisdiction only when no remedy was available in law, or when the available legal remedy was incomplete or inadequate.[70]

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68. *See* F.W. MAITLAND, EQUITY 1 (2d ed. 1936) (noting the difficulty of defining equity without a historical explanation and stating that "[e]quity is that body of rules which is administered only by those Courts which are known as Courts of Equity"). *See generally* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 106–13 (4th ed. 2000) (discussing the development of equity courts in England and the relationship between law and equity); *see also infra* notes 141–43 and accompanying text.

69. *See* BAKER, *supra* note 68, at 108 (describing how, from the mid-sixteenth century onward, equity in England was regarded as the "peculiar prerogative" of the Court of Chancery).

70. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33, at 32 (Boston, Charles C. Little & James Brown 4th ed. 1846) (1836) ("Perhaps the most general, if not the most precise, description of a Court of Equity, in the English and American sense, is, that it has jurisdiction in cases of rights, recognised and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.").

Despite equity's association with higher notions of justice and the chancellor's conscience, by the seventeenth century equity had developed a sullied reputation in some sectors. Especially among religious and political dissenters, the English Chancery Court was associated with royal prerogative, judicial overreaching, and standardless discretion[71]—hence, the often-repeated saying that "Equity is a Roguish thing,"[72] measured only according to "a Chancellor's Foot."[73] Even absent ideological objections to equity, its critics complained of complex procedures and endless delay.[74]

At least in part as a consequence of these concerns, several American colonies refused to create separate equity courts. Some of these colonies empowered courts of law, the legislature, or the governor to apply certain equitable principles, but equity practice as traditionally understood was often partially or totally unavailable.[75] Equity's mixed reception in the colonies resulted in significant variation of equity practices in the individual states—variation that was duly noted and lamented in the early nineteenth century. As explained by Justice Story in an 1821 address to the Suffolk Bar in

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71. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 55 (2d ed. 1985) ("Chancery was closely associated with executive power, in turn with the English overlords. Equity also worked without a jury; thus there were no barriers against the use of these courts as tools of imperial policy."); 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."); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1203 (2005) (noting that in the seventeenth century the Chancery Court was "tarred by the conceptual link forged in the revolutionary era between courts drawing on the Roman-canon tradition and the perceived threat of tyranny").

72. JOHN SELDEN, TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 43 (London, E. Smith 1689).

73. *Id.* at 44.

74. *See* BAKER, *supra* note 68, at 111–13 (discussing the basic procedural defects in chancery).

75. *See* Katz, *supra* note 71, at 265–83 (discussing early-American equity practice and opposition to chancery courts in the colonies). Katz urges that, in the colonial period, the primary debates were not over whether equity should be available at all, but whether there should be separate courts of equity. *Id.* at 265. Nevertheless, the states' varied adoption of equity—whether administered by courts of equity, law courts, the legislature, or the executive—appears to have shaped the availability of equity as a mode of adjudication. *See infra* notes 76–82 and accompanying text. *See generally* Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, *in* 2 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 779–809 (Ass'n of Am. Law Schs. ed., 1908) (discussing the operation of courts of equity in the American colonies).

Massachusetts, "equity jurisdiction . . . exists in complete operation in some states, in partial operation in others, and in others again is obsolete, or totally prohibited."[76] Story counseled that, even in jurisdictions in which the state courts enjoyed full equity powers, the "general doctrines of the English Chancery" had been "so modified by local statutes, usages, and decisions, that it would be somewhat hazardous for a lawyer at the chancery bar of Westminster to form an opinion as to the authority to give, or to deny relief."[77] Significantly, Story concluded that "the deviations in America from the established principles of equity were far more considerable than from those of the common law."[78]

Other jurists shared Story's general assessment. In his *Commentaries on American Law*, James Kent described the significant variation in state equity practices.[79] In an 1831 American edition of an English equity treatise, Philadelphia editor Antony Laussat explained that "[t]he Equity powers of the courts under the several state governments, are very various,"[80] and dedicated nine pages of his tome to an exposition of their many forms.[81] In 1841, the editor of *The American Chancery Digest*, Jacob Wheeler, lamented this state of affairs, observing that "we have these numerous separate and independent judicatories, as much uninfluenced and unconnected between themselves as they are with the equity courts of Great Britain, deciding general abstract principles of jurisprudence at variance with each other."[82] The sheer variety in state equity practice and jurisprudence warrants emphasis because it helps to explain the strongly felt need for uniform principles of equity in the federal system.[83]

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76. Joseph Story, An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, at Boston (Sep. 4, 1821), *in* 1 AM. JURIST 1, 22 (1829); *see also* 1 STORY, *supra* note 70, § 56, at 62 n.1 ("Equity Jurisprudence scarcely had an existence, in any large and appropriate sense of the terms, in any part of New England, during its Colonial state.").

77. Story, *supra* note 76, at 22.

78. *Id.*

79. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 163 n.d (New York, O. Halsted, 2d ed. 1832).

80. 1 HENRY BALLOW, A TREATISE OF EQUITY 13 (John Fonblanque & Antony Laussat eds., Phila., John Grigg 3d ed. 1831).

81. *Id.* at 13–21.

82. 1 JACOB D. WHEELER, AMERICAN CHANCERY DIGEST, at xii–xiii (New York, Gould, Banks & Co., 2d ed. 1841).

83. *See infra* Part I.B.2.

Despite misgivings about equity, and despite—or because of—the variation in the availability of equity in colonial and state court systems, the drafters of the Constitution included equity as one of the federal courts' basic powers. Some Antifederalists proclaimed their distrust of equity because of its traditional association with broad judicial discretion and because they worried about the preservation of trial by jury in common law cases.[84] But 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.[85] Relatively little debate concerning Article III occurred at the Constitutional Convention, and the decision to give federal courts powers in equity was no exception.[86] Article III in its final form simply commanded that "[t]he judicial Power" of federal courts "extend to all Cases[] in . . . Equity."[87]

As with much of the design of the federal judicial system, the details of the federal courts' equity powers were left to Congress and the Supreme Court to resolve. In the Judiciary Act of 1789, Congress recognized and formalized the federal courts' equity powers in two provisions.[88] Section 11 of the 1789 Act endowed circuit courts with the authority to decide cases in equity.[89] And in Section 16, Congress simultaneously confirmed the availability of equity in circuit courts

84. The worry was that by empowering a single court with both legal and equitable powers, equity would subsume the law, nullifying the right to jury available in law. *See* HOFFER, *supra* note 3, at 95 ("Anti-federalists immediately seized upon the proposed equity power to warn against the dangers of uncontrolled discretion in the federal courts. They cited as proof of that danger the absence of juries in the chancellors' chamber."); RITZ, *supra* note 55, at 144 (noting that, in debates over equity, the First Congress's "overriding consideration . . . was *trial by jury*, not applicable law" (footnote omitted)).

85. With respect to the Constitutional Convention, Hoffer notes the "relative absence of controversy over equity at the convention" and suggests that there was "a generally perceived need [for federal courts to have equity power] among the delegates." HOFFER, *supra* note 3, at 96–97. Alexander Hamilton observed the necessity of federal equity power. *See* THE FEDERALIST NO. 80, at 480 (Clinton Rossiter ed., 1961) ("There is hardly a subject of litigation between individuals which may not involve those ingredients of *fraud, accident, trust,* or *hardship*, which would render the matter an object of equitable rather than of legal jurisdiction . . . .").

86. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1460 ("Little space in members' sparse notes of the Convention's debates . . . is devoted to the judiciary branch . . . .").

87. U.S. CONST. art. III, § 2.

88. For a discussion of the legislative history relating to the inclusion of equity in the Judiciary Act of 1789, see 1 JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 483–84, 492–94 (1971).

89. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

and memorialized the traditional limitation on equity by making it unavailable "in any case where plain, adequate and complete remedy may be had at law."[90] But nothing in the 1789 Act determined what source or sovereign would provide equity principles in the newly created federal courts.[91]

National legislators trained their attention on federal equity when debating the Temporary Process Act of 1789 and the Permanent Process Act of 1792, but the resulting statutory language provided little clarity regarding what body of equity principles would apply in federal court. In a provision that confused as much as it elucidated, the Temporary Process Act provided that "the forms and modes of proceedings in causes of equity . . . shall be according to the course of the *civil law*."[92] Three years later, Congress returned to the drafting table and produced the Permanent Process Act, which stated that in equity cases, federal courts were to proceed "according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law."[93] Although in its basic contours the Permanent Process Act duplicated the Temporary Process Act, the permanent act shed some light on the temporary act's ambiguous reference to "civil law": the processes to be applied by federal courts sitting in equity were not those to be applied at law, but instead were those that "belong[ed] to courts of equity."[94]

This clarification was partial, as it did not explain which "courts of equity" were to provide the principles for adjudication of federal equity cases. This issue was briefly raised in debates leading up to the enactment of the Permanent Process Act. The slim legislative record suggests that at least some legislators may have believed that the

90. *Id.* § 16, 1 Stat. at 82. Section 16 codified the longstanding limitation on chancery jurisdiction. *See* Mayer v. Foulkrod, 16 F. Cas. 1231, 1233 (C.C.E.D. Pa. 1823) (No. 9341) (observing that "the sixteenth section of the judiciary law . . . does no more than affirm the general principle[s]" that "regulate the jurisdiction of a court of chancery").

91. *See* RITZ, *supra* note 55, at 144 ("The First Congress argued about the extent to which the national courts should be authorized to exercise *any* equity jurisdiction, not over the law to be applied in such equity jurisdiction as they were allowed."). Despite reference to "trials at common law" in Section 34, some early-nineteenth-century commentators and advocates urged that Section 34 required application of state law and equity in actions brought in equity, and some modern commentators have followed their lead. *See infra* note 154. But this was not the prevailing view at the time. *See infra* Part II.C.3.

92. Act of Sept. 29, 1789 (Temporary Process Act), ch. 21, § 2, 1 Stat. 93, 93–94 (emphasis added). Julius Goebel describes the inclusion of the term "civil law" in the Temporary Process Act as "something done in haste." 1 GOEBEL, *supra* note 88, at 534.

93. Act of May 8, of 1792 (Permanent Process Act), ch. 36, § 2, 1 Stat. 275, 276.

94. *Id.*

federal courts would apply nonstate equity procedures, rather than conforming to state equity practice.[95] But the process acts themselves were riddled with ambiguity and failed to resolve the matter. In short, Article III extended the judicial power of the federal courts to cases brought in equity, but neither the drafters of the Constitution nor the early Congresses did much to clarify what, exactly, that would mean in a federal judicial system.

2. *Uniformity in Federal Equity.* Given the ambiguity of the process acts, determining what sovereign or source would provide equity principles in federal court was largely left to federal judges. At the Supreme Court, Chief Justice Jay promulgated an order in 1791 adopting the rules of the Court of Chancery in England to "afford[] outlines for the practice of this court" in equity cases.[96] But in lower federal courts, resort to local equity practice and principles was surely the most natural course in states where equity practice existed. Evidence suggests that in the 1790s, lower federal court judges were indeed applying state equity principles in federal court without correction by the Supreme Court.[97] In the late 1810s, however, the

95. In 1792, prior to the enactment of the Permanent Process Act, the Senate introduced a process bill that would have eliminated the use of civil law in federal equity cases, replacing it instead with directions to follow forum-state equity principles. *See* 3 ANNALS OF CONG. 85 (1792) ("[T]he forms and modes of proceedings in causes of equity . . . shall be, except where the laws of the United States otherwise provide, according to the course which hath obtained in the States respectively in like causes . . . ."). In states without equity courts, the Senate bill would have required federal courts to follow the state equity practices of "the nearest State in which [equity courts] have been instituted." *Id.* The House rejected the equity-conformity requirement and replaced it with language similar to that found in the final version of the Permanent Process Act: federal equity cases were to be conducted "according to the principles, rules and usages, which belong to a court of equity as contra-distinguished from a court of common law." 1 GOEBEL, *supra* note 88, at 545.

96. Rules & Orders of the Supreme Court of the U.S., 5 U.S. (1 Cranch), at xvi (1804) (Rule VII, dated Aug. 8, 1791).

97. *See* 1 GOEBEL, *supra* note 88, at 580–85 (discussing variation in equity practice in the circuit courts in the 1790s). Resort to local equity principles may have been particularly common in early cases involving disputes over titles to real property. *See* Bodley v. Taylor, 9 U.S. (5 Cranch) 191, 221–23 (1809) (relying, in a case brought in equity, on the forum state's court of appeals rulings to determine whether a party could resort "to a court of chancery in order to set up an equitable against the legal title" to a parcel of land, and to determine the legitimacy of titles); *cf.* Gilman v. Brown, 10 F. Cas 392, 401–02 (C.C.D. Ma. 1817) (No. 5441) (finding that no lien existed on property located in Massachusetts under either general principles of equity or, alternatively, on the ground that the absence of chancery courts in Massachusetts meant that no lien was available). But other cases from the first decade of the nineteenth century portended the application of nonstate equity principles in federal court. Riding circuit, for example, Chief Justice Marshall observed that Section 34, by its own terms, applied to "suits at common law as contradistinguished from those which come before the court

Supreme Court developed a firm principle of uniformity in federal equity cases. In equity cases brought in federal courts, a uniform body of nonstate, judge-made principles would apply.

a. Procedure in Equity. By 1819 at the latest, any doubts regarding the source of procedural rules to be followed in federal equity cases were settled. In *United States v. Howland*,[98] Chief Justice Marshall made clear that federal courts would apply a uniform body of equity procedures, regardless of whether the forum state courts had equity power, and regardless of whether the forum state courts' equity procedures differed from equity procedures available in federal court.[99] In *Howland*, the United States brought an action in equity to enforce a judgment against a firm for "duties on imports and tonnage" owed. The United States sought an accounting of "goods, effects, money and credit" in the hands of one of the firm's other creditors and an injunction to restrain the creditor firm from disposing of the assets.[100] The enforcement action was brought in federal court in Massachusetts, a state that had no court of equity and had endowed its law courts with only limited equity power.[101] One of those limited grants of equity power was an attachment and joinder provision, enacted in 1794, that allowed "a creditor to sue the debtor of his debtor."[102]

Defendants urged that the federal court lacked power to hear the case in equity because the Massachusetts statute provided an adequate and complete remedy under Massachusetts law. Hence,

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sitting as a court of equity or admiralty." United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694).

98. United States v. Howland, 17 U.S. (4 Wheat.) 108 (1819).

99. *Id.* at 115.

100. *Id.* at 109.

101. The earliest Massachusetts courts lacked equity powers altogether, but over the course of the late eighteenth and early nineteenth centuries, the state legislature gradually expanded the state courts' equity powers. When *Howland* was decided, Massachusetts state courts had particular equity powers in cases of foreclosure and redemption of mortgages, Act of Nov. 4, 1785, ch. 22, 1785 Mass. Acts 474, and in cases involving estates and specific performance of contracts, Act of Feb. 10, 1818, ch. 87, 1818 Mass. Acts 486. State statutes empowered courts of law to use procedures or provide remedies that traditionally would have been available only in equity, including the particular provision at issue in *Howland*, which allowed courts of law to attach the property of a debtors' debtor. *See* Act of Feb. 28, 1795, ch. 41, 1794 Mass. Acts 120; *see also* Act of Feb. 18, 1819, ch. 98, 1819 Mass. Acts 148, 148 (providing for the addition of parties in suits for the redemption of lands or tenements when such addition is "necessary to the attainment of justice").

102. *Howland*, 17 U.S. (4 Wheat.) at 115.

under Section 16 of the Judiciary Act of 1789, the case did not qualify for federal equity jurisdiction and state law must apply. The United States Attorney General argued that the Massachusetts attachment and joinder statute was irrelevant, not because it did not apply by its own terms, but because "[t]he power 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."[103] The Court agreed, finding that federal equity's more generous joinder procedure would apply:

> [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; and as the Courts of the Union have a Chancery jurisdiction in every state, and the judiciary act *confers the same Chancery powers on all, and gives the same rule of decision*, its jurisdiction in Massachusetts must be the same as in other States.[104]

In 1822, three years after *Howland*, the quest for uniform equity procedure was aided by the promulgation of the first federal rules of equity. Likely drafted by Justice Story, the rules codified certain uniform equity procedures to be used in the lower federal courts.[105] Over the course of the nineteenth century, the Supreme Court issued equity rules on one other occasion, in 1842.[106] Both sets of Federal Equity Rules covered various aspects of equity practice, aiding in the pursuit of uniformity in federal equity cases. But the scope of the early-nineteenth-century equity rules was limited, and in recognition

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103. *Id.* at 112.

104. *Id.* at 115 (emphasis added). Several cases followed the *Howland* principle. *See* Union Bank v. Stafford, 53 U.S. (12 How.) 327, 340 (1851) (rejecting application of a Texas statute of limitations on the basis that "these sections can have no application to a bill in equity"); Russell v. Southard, 53 U.S. (12 How.) 139, 147 (1851) ("This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any State statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles."); 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."); Harding v. Handy, 24 U.S. (11 Wheat.) 103, 132 (1826) (rejecting the applicability of a Rhode Island law allowing suits by heirs to set aside a conveyance to proceed without making all heirs parties, noting that the state law's "influence on a suit in equity is not so certain").

105. *See* Rules of Practice for the Courts of Equity of the U.S., 20 U.S. (7 Wheat.), at v, v–xiii (1822).

106. *See* Rules of Practice for the Courts of Equity of the U.S., 42 U.S. (3 How.), at xli, xli–lxx (1842).

of their limited scope, both sets of equity rules endowed the circuit courts with the authority to "make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion."[107]

What procedural rule applied in the absence of a federal equity rule or a local federal rule? One could imagine a world in which the Supreme Court would direct federal judges to default to forum state equity procedures, especially in states that recognized equity as part of their legal systems. Indeed, such a course was strongly urged.[108] But consistent with then-established Supreme Court precedent, including *Howland*, the Federal Equity Rules of both 1822 and 1842 pointed federal judges to the "practice of the High Court of Chancery in England"[109] to fill any gaps left after consulting the equity rules and any local rules promulgated by the circuit courts.

The fact that the Federal Equity Rules defaulted to English chancery practice may appear a fairly minor, arcane point of early-nineteenth-century procedural law. But upon reflection, it is quite striking that the first procedural rules promulgated by the Supreme Court directed lower federal court judges to default to English equity principles. In the absence of an applicable federal equity rule, for example, a federal court sitting in Georgia was to look to English chancery practice to determine what procedures to follow, rather than to the practices of Georgia state courts.[110] Today, this approach is striking because the application of foreign law in federal courts has become a lightning-rod issue. But it was equally striking to some early-nineteenth-century critics of federal equity, who complained bitterly about the application of "alien" law in federal equity cases.[111]

b. Equitable Remedies. By the late 1810s, it was similarly well established that a uniform corpus of remedies applied in actions

107. Rules of Practice for the Courts of Equity in the U.S., 20 U.S. (7 Wheat.), at xiii, r. 32; *see also* Rules of Practice for the Courts of Equity in the U.S., 42 U.S. (3 How.), at lxix, r. 89 ("The Circuit Courts . . . may make any other and further rules and regulations for the practice, proceedings and process . . . not inconsistent with the rules hereby prescribed . . . .").

108. *See infra* Part II.B–C.

109. Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.), at xiii, r. 33; *see also* Rules of Practice for the Courts of Equity in the United States, 42 U.S. (3 How.), at lxix, r. 90 (requiring that, absent an applicable rule, federal courts "be regulated by the present practice of the High Court of Chancery in England").

110. *See, e.g.*, Neves v. Scott, 50 U.S. (9 How.) 196, 208–09 (1850) (citing English chancery cases in an opinion regarding an action filed on the equity side of the Circuit Court of the United States for the District of Georgia); *see also* text accompanying *infra* notes 162–65.

111. 4 REG. DEB. 364 (1828) (statement of Sen. Rowan). *See generally infra* Part II.B–C.

brought in federal equity cases, remedies that were derived from federal and English sources rather than state law or state equity principles.[112] This was the case even—and especially—when state law or equity would dictate a different result than that mandated by equity principles applicable in federal court. Indeed, it was precisely in cases in which the law (state or federal) failed to give a complete or adequate remedy that federal equity jurisdiction attached under Section 16 of the Judiciary Act of 1789, hence triggering the application of uniform nonstate equity principles.[113]

In 1818, the Supreme Court decided *Robinson v. Campbell*,[114] which quickly became the leading case in this area. *Robinson* presented a tricky choice-of-law question, but one that was not entirely unusual in the early 1800s. Both parties claimed ownership of four hundred acres of property located in a region that had once been part of Virginia but that had become part of Tennessee pursuant to an 1802 compact.[115] A question arose as to whether the defendant in the action could assert an equitable title as a defense in an ejectment action—an action at law—as was allowed in Tennessee courts pursuant to a state statute governing priority in land titles.[116] Even while conceding that the doctrine of *lex loci* and Section 34 dictated that Tennessee law governed,[117] Justice Todd rejected the suggestion that the Court was required by Section 34 to follow a Tennessee statute with respect to the equitable remedies available.[118]

In certain respects, *Robinson* is an odd case to have become a leading authority establishing the federal uniform equity doctrine. *Robinson* involved an action brought in law. According to the defendant's attorney, the core issue was whether, in an action brought

112. This has been called the "equitable remedial rights doctrine." *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4513 (2d ed. 1996) (recognizing that, historically, "in some circumstances federal equity courts could grant equitable relief that was not available in the courts of the forum state"). The existence of this doctrine was discussed and questioned in the years following *Guaranty Trust Co. v. York*, presumably because that opinion seemed to disclaim the existence of a federal decisional law of equitable remedies. *See, e.g.*, Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513, 518–19 (1958); Note, *The Equitable Remedial Doctrine: Past and Present*, 67 HARV. L. REV. 836, 843–45 (1954). *Guaranty Trust*'s disclaimer of a history of judge-made law in federal equity cases is discussed in Part III, *infra*.

113. Judiciary Act of 1789, ch. 20, §16, 1 Stat. 73, 82.

114. Robinson v. Campbell, 16 U.S. (3 Wheat.) 212 (1818).

115. *Id.* at 214.

116. *Id.* at 220–21.

117. *Id.* at 219–21.

118. *Id.* at 222–23.

at law, the defendant could assert an equitable title in real property because a Tennessee court would have allowed him to do so.[119] But Justice Todd posed the question differently. To him, the issue was whether, Section 34 notwithstanding, Congress had intended to "confine the courts of the United States in their mode of administering relief to the same remedies, and those only, . . . which existed in the courts of the respective states."[120] In other words, were lower federal courts required to follow state remedial schemes, in which "remedial" was used rather liberally to describe assertion of an equitable title? Justice Todd's answer to this question was negative: he explained that the remedies in federal court "are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles"[121]—England.

Although Justice Todd's references to remedies "at *common law* or in equity" may seem strange, their context suggests that he sought to protect the uniformity of federal equitable remedies against the radical disuniformity of state equity practice. Todd was particularly concerned about the significant variation in the application of equity in state courts:

> In some states in the union, no court of chancery exists to administer equitable relief. In some of those states, courts of law recognise and enforce in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in others, all relief is denied and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in a[ll] its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction [in federal court].[122]

Hence, equitable remedies in federal court would conform to a national standard and default to English chancery practice, regardless of the remedies available in the forum state courts, in law or equity.

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119. *Id.* at 215 (argument of counsel) ("By the law, as settled in Tennessee, the prior settlement right of the defendant, though an equitable title, might be set up as a sufficient title in an action at law.").

120. *Id.* at 222 (opinion of the Court). In other words, Todd explained, the question was "whether it was [Congress's] intention to give the party relief *at law*, where the practice of the state courts would give it, and relief *in equity* only, when according to such [state] practice, a plain, adequate, and complete remedy could not be had at law." *Id.*

121. *Id.* at 222–23.

122. *Id.* at 222.

This would be so even when those state remedies were defined in a statute, and even when those remedies would result in a different outcome.[123] Over the following decades, *Robinson* came to stand for this basic principle, which was reconfirmed by the Court with great vehemence throughout the period[124] and (generally) followed with great diligence in the circuit courts. Judge Betts of the Southern District of New York, sitting in his capacity as circuit court judge, made the point exceedingly clear: "The state laws furnish the rule of decision in the courts of the United States in cases at common law. But the equity jurisdiction of those courts is one and the same in every state, and is in no respect dependent upon the local law."[125]

Careful consideration of just two of these many cases highlights the significance of the *Robinson* holding. In *Mayer v. Foulkrod*,[126] a circuit court opinion involving a dispute over the administration of an estate, Justice Washington rejected an attempt to defeat the circuit court's equity power to order discovery and an accounting. Counsel for the defendant argued that under a Pennsylvania statute, an action at law could be maintained for recovery of a legacy, including a process that would allow the plaintiff to seek an accounting, and hence the federal court lacked equity jurisdiction.[127] Pennsylvania had never established equity courts, but its courts of law had adapted some equitable principles and practices, and the state legislature had enacted several statutes that provided the law courts with a limited range of equitable powers.[128] But Justice Washington was adamant that neither the state statute respecting legacies nor Pennsylvania's

123. *Id.* at 222–23.

124. *See*, *e.g.*, Livingston v. Story, 34 U.S. (9 Pet.) 632, 660 (1835) (reversing the lower federal court in Louisiana for failing to apply federal equity rules of discovery and refusing to make federal equitable relief available); Boyle v. Zacharie (*Boyle II*), 31 U.S. (6 Pet.) 648, 658 (1832) ("[T]he remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law."); *see also infra* Part II.B–C.

125. Lamson v. Mix, 14 F. Cas. 1055, 1056 (C.C.S.D.N.Y. 1837) (No. 8034) (citing Robinson v. Campbell, 16 U.S. (3 Wheat.) 212 (1818)). For other circuit court opinions following the *Robinson* rule, see Mayer v. Foulkrod, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (No. 9341), and Bean v. Smith, 2 F. Cas. 1143, 1150 (C.C.D.R.I. 1821) (No. 1174). As discussed in Part II.C, *infra*, not all lower federal court judges were inclined to apply uniform equity principles.

126. Mayer v. Foulkrod, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (No. 9341).

127. *Id.* at 1234; *see also* Act of Mar. 21, 1772, ch. 654, 1772 Pa. Laws 195, 195 (declaring it lawful for a person "to commence, sue and prosecute an action" to recover a legacy).

128. *See* John G. Buchanan, *Sources of the Development of Pennsylvania Equity*, 8 U. PITT. L. REV. 1, 5–9 (1941) (discussing the limited application of equity in the Pennsylvania state courts before 1836).

limited acceptance of equity practice was of any consequence as to what equity principles would apply in federal court. He took the opportunity to explain the stark difference between law and equity in the federal courts:

> [S]tate laws, respecting rights, are to be considered by the courts of the United States as rules of decision . . . . But as to suits in equity, state laws, in respect to remedies, . . . could have no effect whatever on the jurisdiction of the court, the [Permanent Process Act of 1792] having prescribed a rule, by which the line of partition between the law and the equity jurisdiction of those courts is distinctly marked.[129]

Washington spoke of equity jurisdiction, but that should not lead one to think that he meant subject matter jurisdiction, which was governed by Section 11 of the Judiciary Act of 1789.[130] Rather, he used the term in a general sense to mean the power of the federal court to apply traditional equitable remedies in a case in which legal remedies were unavailable or inadequate. And in these cases, uniform equitable remedies would apply in federal equity cases regardless of the availability or unavailability of equity in the state courts.

The Supreme Court made this point clear in the 1832 case of *Boyle v. Zacharie*.[131] In *Boyle*, Louisiana merchants James Zacharie and Samuel Turner sued Baltimore merchant Hugh Boyle in federal court in Maryland for monies owed. In 1821, the circuit court had entered a judgment against Boyle for approximately $3,000.00.[132] But

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129. *Mayer*, 16 F. Cas. at 1234–35. One reason to focus on the *Mayer* case is that Fletcher relies on it to support his contention that Section 34 applied to actions brought in equity. Fletcher argues that, in *Mayer*, "Washington . . . interpreted [*Robinson v.*] *Campbell* to mean that questions of rights, both at law and in equity, would be determined according to local state law, whereas questions of remedies, both at law and in equity, would be determined according to federal court practice." Fletcher, *supra* note 8, at 1529 n.72. Certainly language in *Mayer* could be read to mean that federal courts followed state substantive law in equity. However, as discussed below, that practice was limited in scope: in certain cases federal courts sitting in equity looked to state law to determine the substantive rights of the parties, while in cases where equitable rights were at issue, the federal courts turned to uniform nonstate substantive equity principles. *See infra* Part I.B.2.c. Moreover, it is clear that Justice Washington did not understand Section 34, even as it applied in cases brought in law, to require conformity with respect to all "questions of rights," as he explained that "[t]he thirty-fourth section of the judiciary law of 1789 is very correctly stated . . . to apply only to the rights of persons and of property." *Mayer*, 15 F. Cas. at 1234.

130. Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, 78.

131. Boyle v. Zacharie (*Boyle I*), 31 U.S. (6 Pet.) 635 (1832); Boyle v. Zacharie (*Boyle II*), 31 U.S. (6 Pet.) 648 (1832).

132. *Boyle II*, 31 U.S. (6 Pet.) at 649.

Boyle was insolvent, and Zacharie and Turner would have to wait to collect. Several years later, when Boyle's fortunes had changed, the Louisiana merchants sued again to execute the original judgment through attachment of a ship owned by Boyle, the *General Smith*.[133] Boyle filed a bill in equity in federal circuit court, seeking an injunction on the grounds that a Maryland insolvency statute barred execution of the 1821 judgment.[134] The federal circuit court in Maryland temporarily granted Boyle's request for an injunction staying execution of the judgment but then promptly allowed the execution to go forward.[135]

On appeal, the Supreme Court affirmed, reciting the standard refrain that "[t]he chancery jurisdiction given by the constitution and laws of the United States is the same in all states of the union," and explaining that "the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law."[136] With this in mind, the Court insisted that "the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the state of Maryland."[137] As in *Mayer*, the fact that a state *statute* would have dictated a very different result was of no moment.[138]

It is worth pausing to consider just how different this doctrinal world was in contrast to the modern *Erie* doctrine. Today, in federal diversity cases, absent a specific, codified federal procedural rule or statute on point, a state rule applies under basic vertical choice-of-law

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133. *Boyle I*, 31 U.S. (6 Pet.) at 642.

134. *Id.* at 638; *Boyle II*, 31 U.S. (6 Pet.) at 654–55. Boyle also filed a motion to quash the *venditioni exponas*, a writ of execution directed at the sheriff or marshal to order the sale of property in satisfaction of a judgment. *Boyle II*, 31 U.S. (6 Pet.) at 654–55.

135. *Boyle I*, 31 U.S. (6 Pet.) at 643.

136. *Boyle II*, 31 U.S. (6 Pet.) at 658 (citing United States v. Howland, 17 U.S. (4 Wheat.) 108, 115 (1819); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 220 (1818)).

137. *Id.*

138. In fact, Boyle relied on two state statutes to support his case: the insolvent act of Maryland, which the Court held not to apply in a federal equity case, *Boyle I*, 31 U.S. (6 Pet.) at 642–43, and a Maryland statute governing the effect of injunctions on executions of judgments, *Boyle II*, 31 U.S. (6 Pet.) at 657–58. The circuit court granted Boyle's request for a temporary stay of the execution and apparently had not vacated that stay in equity before issuing or reissuing the writ of execution. *Boyle II*, 31 U.S. (6 Pet.) at 655. Boyle claimed that, in so doing, the circuit court violated a Maryland statute governing equity practice. *Id.* at 657–58. The Supreme Court made clear that such state statues had neither force nor effect in federal court. *Id.* at 658–59.

doctrine if application of that state rule is outcome determinative.[139] But in the early nineteenth century, a contrary vision of federal equity power prevailed. According to this vision, it was commonsensical that a federal court sitting in equity would supply a remedy even when a state court would not. A central purpose of equity was to remedy the deficiencies of the common law, and equity traditionally did so by providing a remedy only when no such remedy was available in law or when the available legal remedy was incomplete or inadequate. Thus, equitable remedies were by their very nature "outcome determinative" relative to legal remedies.[140] And in the early nineteenth century this truism was incorporated into the federal system, resulting in a vertical choice-of-law doctrine that required application of uniform nonstate equity principles when state law or equity failed to provide adequate relief.

c. Equitable Rights. By today's jurisprudential standards, the most complex and controversial aspect of the uniformity principle in federal equity cases was its application to what early-nineteenth-century jurists labeled "equitable rights." This was not just the provision of an equitable remedy when legal liability had been demonstrated but could not be remedied at law. It was the provision of a substantive right or liability rule.

Equity jurisprudence was (and is) often described as a system of remedies and procedures. Thus, one function of equity courts was to provide remedies for the violation of rights that, although recognized in courts of law, could not be adequately remedied in those courts.[141] But as Justice Story explained in his monumental treatise on equity jurisprudence, courts of equity could also "administer remedies for rights, which rights Courts of Common Law do not recognise at all; or, if they do recognise them, they leave them wholly to the conscience and good-will of the parties."[142] Thus, for example, over

139. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (applying the "outcome-determination" test of *Guaranty Trust* in light of the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws"); Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) (interpreting *Erie* to require that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court").

140. *See infra* Part III.

141. 1 STORY, *supra* note 70, at 28.

142. *Id.* As examples of equitable rights, Story listed trusts and certain kinds of mistake, accident, and fraud claims, as well as penalties, oppressive proceedings, undue advantages, betrayals of confidence, and unconscionable bargains, "in all of which Courts of Equity will

time the Chancery Court developed expertise and authority over particular fields, including trusts, fraud, mortgages, and guardianships. Although some equitable rights originated in the Chancery Court's substantial remedial authority, by the early nineteenth century equity also provided a well-developed body of substantive jurisprudence that governed the primary rights and liabilities of individuals in a range of matters.[143] And in federal court in the early nineteenth century, federal or English equity provided those principles.

Schooled as we are in legal realism, the application of nonstate, judge-made equitable rules to determine the substantive rights of the parties should not offend our modern sensibilities any more or less than the provision of an equitable remedy when a state court would have supplied none. In both cases the outcome of the litigation—the final entry of judgment by the court and the execution of that judgment through court-ordered processes—turned on a nonstate, judge-made rule.[144] And for this reason, discriminating between equitable remedies and equitable rights in certain cases is difficult, if not impossible. But because the application of judge-made substantive law in federal courts threatens a vital fault line in modern theories of federal judicial power, twentieth-century analyses of nineteenth-century federal equity have tended to focus on whether federal courts had authority to apply substantive judge-made equitable principles distinct from the legal or equity principles applicable in the forum state courts.

These analyses have resulted in conflicting accounts. Immediately following *Erie*'s condemnation of the application of general common law in federal court, the question arose as to whether—and to what extent—*Erie*'s holding applied in federal equity cases. *Guaranty Trust v. York* provided the definitive answer, resolving that the *Erie* principle applied to all aspects of a case in

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interfere and grant redress; but which the Common Law takes no notice of, or silently disregards." *Id.* at 28–29.

143. As Christopher Langdell would explain in the late nineteenth century, equity was not "simply a different system of remedies from those administered in courts of law; for there are many extensive doctrines in equity, and some whole branches of law, which are unknown to the common-law courts." C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING, at xxv (Cambridge, Charles W. Sever 1877).

144. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.").

which equitable remedies were sought.[145] But Frankfurter did little to distinguish the Court's early-nineteenth-century equity cases, proclaiming instead that "[i]n giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law."[146]

Some contemporary commentators agreed with Justice Frankfurter's assessment, arguing that application of nonstate equity principles in federal court had, in fact, never extended to questions of substantive law.[147] In more recent commentary, in the context of Section 34 jurisprudence, William Fletcher essentially concurs with that assessment, concluding that, "as a routine matter, the federal courts sitting in equity followed local state law," and that "questions of rights, both at law and equity, [were] determined according to local state law."[148]

Others have taken a very different position on this issue.[149] Examining the federal right to a jury trial in the early nineteenth century, Professors Ann Woolhandler and Michael Collins observe that "the substantive law that applied in federal equity proceedings was frequently either federal or general law rather than state law."[150]

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145. *See* Guar. Trust Co. v. York, 326 U.S. 99, 112 (1945) (declaring that state law "ought to govern" in federal court "whether the remedies be sought at law or may be had in equity"); *see also* discussion *infra* note 391.

146. *Id.* at 105. For further discussion of Justice Frankfurter's treatment of the historical record in *Guaranty Trust Co. v. York*, see *infra* Part III.

147. *See, e.g.*, Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1027–28 (1953) ("[A]nalysis of the pre-*Erie* cases shows that almost invariably the uniformity of decision in federal equity was understood to be a uniformity only in matters of practice and remedy.").

148. Fletcher, *supra* note 8, at 1529, 1529–30 n.72.

149. In addition to the sources discussed herein, see John T. Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 174 (1999), Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 469 (2003), and Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 29 (1985). An earlier generation of legal scholars also discussed the existence of a more robust tradition of federal judge-made law in equity. *See, e.g.*, CROSSKEY, *supra* note 17, at 877–902 (arguing that, when sitting in equity, early-nineteenth-century federal courts often disregarded state equity and common-law principles); Howard Newcomb Morse, *The Substantive Equity Historically Applied by the U.S. Courts*, 54 DICK. L. REV. 10, 13 (1949) ("The equity jurisdiction of the United States courts in the several states has repeatedly been held to be uniform . . . ."); Seymour D. Thompson, *Federal Jurisdiction in Equity*, 12 GREEN BAG 119, 119 (1900) (showing examples of federal courts in equity recognizing substantive rights that did not exist under the laws of the states).

150. Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 619 (2001); *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled*

In the context of an analysis of the scope and operation of federal subject matter jurisdiction, Professor Laura Fitzgerald similarly argues that the Judiciary Act of 1789 "authorized the federal judiciary to develop for itself a uniquely federal law of equity," observing that "[a]lthough Congress required federal courts to follow state rules of decision in common law cases, absent controlling federal constitutional or statutory authority, they were not so confined when deciding cases in equity."[151] And in the course of examining the origins of federal common law review of the actions of federal and state officials, Professor John Duffy describes nineteenth-century federal equity as "a domain of federal judge-made law."[152]

A closer look at early federal equity jurisprudence helps explain why modern jurists and scholars disagree about the choice-of-law rule governing substantive law in early-nineteenth-century equity cases, as there appears to have been some truth in both positions. Section 34, by its own terms, applied only to actions at common law—a fact that led early-nineteenth-century treatise writer Thomas Sergeant to declare that the provision was irrelevant to suits filed in equity.[153] But others had a different view. For example, William Rawle, the United States Attorney for Pennsylvania under President Washington and a successful Supreme Court advocate in the 1810s, contended in an 1825 treatise that Section 34's apparent mandate that federal courts apply state law was "so convenient and appropriate" to "appl[y] to cases in equity, that we may consider it likely to be adopted," though he conceded that "[i]t does not appear that this point has yet been directly decided."[154]

This conundrum was gradually, and imperfectly, resolved through a rather complicated doctrinal scheme. As a general matter,

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Remedies, 107 YALE L.J. 77, 104–05 (1997) ("In equity, where Congress had not directed the use of state procedures, the federal courts provided effective relief for federal rights claimants with even less attention to the strictures of state law than in actions at law.").

151. Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1263 (2001).

152. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 126 (1998).

153. *See* THOMAS SERGEANT, CONSTITUTIONAL LAW 148 (Phila., P.H. Nicklin & T. Johnson 2d ed. 1830) (1822) ("[The 34th] section is confined to civil proceedings . . . . A case in equity must be governed by those rules and principles which prevail in equity.").

154. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 249 (Phila., H.C. Carey & I. Lea 1825). In support of his contention that "the federal courts sitting in equity followed local state law," Fletcher observes that "Rawle considered the *lex loci* principle to apply to suits in equity," Fletcher, *supra* note 8, at 1529–30. Fletcher, however, does not reference Rawle's caveat that, as of 1825 when Rawle's treatise was published, the matter had not yet been directly decided, RAWLE, *supra*, at 249.

the question of what source of law would provide the substantive law in a federal equity case turned on whether the right or claim being asserted was traditionally understood as legal or equitable. If the underlying right derived from a legal source—for example, the common law or a statute providing a legal right or obligation—then Section 34 generally governed, requiring judges to engage in the rather confusing process of determining whether the case before them was one in which state law "applied."[155] But if the right or claim was traditionally defined in equity, then federal judges generally applied federal or English equity principles rather than state equity or law.

Riding circuit in Massachusetts, Justice Story applied this principle in *Powell v. Monson & Brimfield Manufacturing Co.*,[156] a case in which a widow sought assignment of her dower.[157] Defendants urged that Mrs. Powell had released her dower rights pursuant to a Massachusetts statute, despite apparent irregularities in that release.[158] Story explained that, in this scenario, the court was obliged to look to the language of the Massachusetts statute to determine whether Mrs. Powell's release in fact complied with the statute.[159] He concluded that it had not, rejecting the defendants' contention that in "a case in equity, . . . the court will grant great indulgences to the imperfect acts of parties to sustain their intentions; and that it will not lend its aid to enforce any inequitable claim."[160] Story explained,

> *The parties stand upon their legal rights*, and what is not a bar of dower at law ought not, under the circumstances of the case, to be held a bar in equity. Here, no fraud or imposition is set up. The case stands upon its naked rights; and the relief asked, is not rebutted by any counter equity . . . .[161]

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155. *See supra* Part I.A. Even when a federal court turned to state law to determine the primary right or liability, that federal court might still provide a federal equitable remedy when such a remedy would not be available under state law. *See* discussion and sources *supra* note 31.

156. Powell v. Monson & Brimfield Mfg. Co., 19 F. Cas. 1218 (C.C.D. Mass. 1824) (No. 11,356).

157. *Id.* at 1219.

158. *Id.* at 1219–20.

159. *Id.* at 1220.

160. *Id.* at 1222.

161. *Id.* (emphasis added). Examples abound of federal courts applying state law to determine the substantive rights and liabilities of the parties in equity cases. *See* Walker v. Parker, 38 U.S. (13 Pet.) 166, 174 (1839) (applying Maryland law to interpret the will to resolve the claims of a decedent's widow and infant son in an action at equity); McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192, 201 (1825) (dismissing a bill in equity on the ground that the will allegedly conveying the real property had not been "duly proved" according to the laws of the

In such a case, the federal court would follow the state statute. As Justice Story intimated, however, if the right in question derived from equity—if it had evolved from jurisprudence developed by the Chancery Court, such as the law of "fraud or imposition"—then equity principles would apply. And when equitable rights were at stake in federal court, uniform nonstate equity principles would generally apply.

The 1850 Supreme Court case *Neves v. Scott*[162] provides a good example of this phenomenon. The *Neves* case concerned the enforceability of what was then known as a marriage settlement,[163] a type of trust traditionally administered in equity. The question before the Court in *Neves* was whether a federal court in Georgia would enforce a bilateral marriage settlement against third parties, notwithstanding the fact that under Georgia's own equity principles such a settlement was enforceable only against parties to the agreement and consanguineous relations.[164] Thus, the Justices were forced to choose between the broader federal equity rule and the explicitly narrower rule required under the forum states' equity jurisprudence. By choosing the former, the Justices indicated that they understood that federal equity provided a distinct rule of decision with respect to the underlying rights and liabilities of the parties:

> 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, and to apply such of them, to each particular case, as they may find justly applicable thereto. . . . [I]n all the States, the equity law, recognized by the Constitution and by acts of Congress, and

state in which the property lay); Talbot v. Simpson, 23 F. Cas. 644, 646 (C.C.D. Pa. 1815) (No. 13,730) (finding that a husband's conveyance of his wife's property to a third party conformed with the statutory requirements of privy examination of the wife by a magistrate, and rejecting the argument that principles of equity mandated a different result).

162. Neves v. Scott (*Neves I*), 50 U.S. (9 How.) 196 (1850).

163. *Id.* at 197; *see also* Neves v. Scott (*Neves II*), 54 U.S. (13 How.) 268 (1851) (rehearing and approving of *Neves I*).

164. *Neves II*, 54 U.S. (13 How.) at 271; *see also* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 89–90, 112–15 (1986) (discussing the evolution of the enforcement of bilateral or "simple" marriage settlements).

> modified by the latter, is administered by the courts of the United States, and upon appeal by this court.[165]

In both the language and tenor of *Neves*, the Court registered its insistence that the lower federal courts apply uniform equity principles, even when doing so required the court to disregard state equity principles.

This basic principle applied even when no state law or equity provision provided an analogous right or liability. Perhaps the most dramatic example of this phenomenon is *Pennsylvania v. Wheeling & Belmont Bridge Co*.[166] In *Wheeling Bridge*, Pennsylvania sued the Wheeling and Belmont Bridge Company, seeking to enjoin the construction of a bridge across the Ohio River. Because of its height, the bridge would have obstructed steamboat traffic to key trading outlets on the Ohio River, including those in Pennsylvania.[167] One of the significant obstacles for Pennsylvania in *Wheeling Bridge* was the absence of a statutory or common law basis for its assertion that the bridge constituted a nuisance warranting an injunction. Plans for the bridge had been approved by the Virginia legislature and acquiesced to by Congress. Hence, counsel for the defendants urged that the bridge could "in no sense be considered a nuisance."[168] Conceding that "the federal courts have no jurisdiction of common-law offences," and that in law such offenses were defined by state common law or a federal or state statute, the Court turned to its chancery power, citing *Robinson* for a well-settled principle:

> In exercising this jurisdiction, the 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.[169]

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165. *Neves II*, 54 U.S. (13 How.) at 272. Although the Court was insistent that federal equity principles governed in federal equity cases, it was not entirely insensitive to the status of the Georgia Supreme Court. It took pains to examine relevant Georgia precedent and expressed great "respect . . . for that learned and able court." *Id.*

166. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851).

167. *Id.* at 557.

168. *Id.* at 563.

169. *Id.* (citing Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222 (1818)).

Pursuant to its broad chancery powers, the Court found that the bridge caused "private and . . . irreparable injury," which "makes the obstruction a private nuisance to the injured party" that could be remedied in equity.[170]

Wheeling Bridge was heard by the Supreme Court pursuant to its original jurisdiction, but the same principles applied in cases brought in lower federal courts, even when the state courts did not recognize or enforce the particular right in question in law or equity. For example, in *Fletcher v. Morey*,[171] a London merchant sought to enforce an equitable lien against a bankrupt Boston firm to which it had extended credit pursuant to a written agreement.[172] The plaintiff claimed that the lien was created by the agreement, but the defendant urged that such a lien could not be recognized or enforced by the federal court because Massachusetts courts would not recognize such a lien.[173] Relying on English and federal case law, Justice Story, riding circuit, found that the agreement indeed created an equitable lien,[174] and he rejected the notion that such a lien could not be created by a contract executed in Massachusetts:

> It has been long since settled in the courts of the United States, that the equity jurisdiction and equity jurisprudence administered in the courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state, where the court sits.[175]

Several years earlier, Justice Story had also made clear that rights defined and created in English chancery court would be enforced in federal court, even when they conflicted with a state statute or the state supreme court's interpretation of that statute.

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170. *Id.* at 564. Although the Court used the language of "relief," *id.*, the Court in *Wheeling Bridge* was not simply determining whether the infringement of a right could be remedied, but also was ascertaining the rights of Pennsylvania to be free of the alleged nuisance that would be caused by the bridge. This point is underscored and illuminated by Chief Justice Roger Taney's dissent, in which he questioned "by what law, or under what authority, this court can adjudge it to be a public nuisance and proceed to abate it, either upon a proceeding in chancery or by a process at law." *Id.* at 580–81 (Taney, C.J., dissenting).

171. Fletcher v. Morey, 9 F. Cas. 266 (C.C.D. Mass. 1843) (No. 4864).

172. *Id.* at 267.

173. *Id.* at 269.

174. *Id.* at 270.

175. *Id.* at 271 (citing United States v. Howland, 17 U.S. (4 Wheat.) 108, 115 (1819); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 220 (1818)).

Flagg v. Mann[176]—a case that, because of allegations of fraud, fell within the Massachusetts federal court's equity jurisdiction[177]—demonstrates just how far the uniformity principle extended to ensure the application of nonstate equity instead of state law or equity. In *Flagg*, Henry Flagg filed a bill in equity to set aside certain conveyances of property by Samuel Mann as fraudulent. A central question in the case was whether Flagg and Mann were tenants in common or were otherwise in a fiduciary relationship at the time of the conveyance—a precondition for Flagg's fraud claim.[178] As of the late 1830s, when Flagg filed suit in federal circuit court in Massachusetts, the state courts had been given limited equity powers by the state legislature, including the power to "determine in equity, all disputes between co-partners, joint tenants and tenants in common."[179] Hence, the issue was whether the federal court was bound by such state legislation, and state court interpretation of such legislation, when exercising its equity power.

In *Flagg* that issue was particularly salient because, in a prior action involving the same parties and facts, Massachusetts's highest court had held that, under the relevant state statute, Flagg and Mann were not tenants in common, "and that therefore the bill was not maintainable."[180] Flagg refiled in federal court, and Justice Story, sitting as Circuit Justice, expressed his "distress" regarding the Massachusetts court's determination of Flagg and Mann's status. Story purportedly objected not to the Massachusetts court's interpretation of its "local law," but rather to its views "upon general principles of interpretation applicable to courts of equity," which "are not, and cannot from their nature be, conclusive upon this court, in a suit in equity addressed to its general jurisdiction."[181] In a lengthy opinion that relied on "ancient and modern authority, . . . the positive rule of the Roman law, . . . [the law of] continental Europe, and the actual jurisprudence of England and America,"[182] Story found that Flagg and Mann were "in a court of equity at least, . . . tenants in

176. Flagg v. Mann, 9 F. Cas. 202 (C.C.D. Mass. 1837) (No. 4847).
177. *Id.* at 231.
178. *Id.* at 215.
179. Act of Feb. 21, 1824, ch. 140, § 2, 1824 Mass. Acts 399, 399.
180. *Flagg*, 9 F. Cas. at 223.
181. *Id.*
182. *Id.* at 216.

common,"[183] and that the defendant "was guilty of a wrong and constructive fraud upon the rights and equity of the said Flagg."[184]

In sum, the vertical choice-of-law regime that determined the substantive legal and equitable principles applicable in federal equity cases was exceedingly complex. In a case like *Powell*, the plaintiffs rested their claim to an equitable remedy—assignment of dower—on a legal right to dower and on a Massachusetts statute. In such cases, the federal courts would first determine, pursuant to Section 34, whether to apply local law or general common law to resolve the underlying legal issue,[185] and then apply federal equity principles to determine whether a violation was remediable in equity. By contrast, *Neves*, *Wheeling Bridge*, *Fletcher*, and *Flagg* were all cases in which a party asserted claims based on rights as defined in equity. In those cases, nonstate uniform equity principles were used to resolve those claims.

These general principles were not always followed perfectly, especially because the line between an equitable right and an equitable remedy was so imperfectly discernible.[186] And in the 1850s, the application of nonstate equity principles to determine the rights of the parties found a critic in Chief Justice Taney, even as he endorsed federal uniformity in equitable remedies and procedures.[187] But

183. *Id.* at 223.

184. *Id.* at 231.

185. *See supra* Part I.A.

186. In addition, by the 1840s the Court seems to have developed two exceptions to the general practice that equitable rights would be defined by a uniform corpus of nonstate equity principles. First, in the case of land titles, the Court made clear that "when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, . . . so as to give effect to state legislation and state policy." Clark v. Smith, 38 U.S. (13 Pet.) 195, 204 (1839). The Court, however, was also careful to note that, when sitting in equity, it would not "depart[] . . . from what legitimately belongs to the practice of a Court of Chancery." *Id.* Second, after struggling to determine the force and effect of English equity principles governing charitable trusts in *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 17 U.S. (4 Wheat.) 1 (1819), the Court in *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844), found that a challenge to a charitable trust established for the benefit of Philadelphia failed under "the law of charities in Pennsylvania," *id.* at 196.

187. Although Chief Justice Taney generally endorsed the proposition that federal courts sitting in equity followed uniform federal principles, sitting as a Circuit Justice in *Meade v. Beale*, 16 F. Cas. 1283 (C.C.D. Md. 1850) (No. 9371), Taney suggested a different view of the use of federal principles in determining "equitable rights." Although Taney recognized that "the jurisprudence of England is to be observed in [federal courts] in administering the remedy for an existing right," that rule "applies to the remedy and not the right." *Id.* at 1291. "[T]he right must be given by the law of the state, or of the United States." *Id.* For discussion of Taney's dissent in *Wheeling Bridge*, see *supra* note 170.

despite such criticism, and although Section 34 and general principles of comity sometimes led federal courts to apply local law in equity cases, federal courts generally applied federal equity principles, with a default to English chancery practice.

* * *

It is tempting to understand the uniform nonstate equity principles applied in federal court as a direct analogue to the general common law—a general body of principles that were employed by both state and federal judges.[188] Nineteenth-century jurists sometimes referred to the equity principles that applied in federal courts as general or universal. But it is important to recognize the significant differences between the general common law and the uniform equity principles applied by federal courts. Although some state courts surely drew on the same equity principles, it was routinely acknowledged that the equity principles applicable in federal courts were not available in many state courts. Indeed, Section 16 of the Judiciary Act of 1789 required federal judges to evaluate the adequacy of state law against traditional equity principles.[189] When state law (or equity) failed to provide an adequate or complete remedy—as measured by federal judges against traditional equity principles—a uniform corpus of federal and English equity principles would apply in their stead. In this regard, the equity principles applied in federal court were, in the United States context, federal rather than general in character.

The equity principles applied in federal court were not, however, considered supreme federal law that state courts were required to apply, and in that regard they were unlike today's federal common law.[190] Indeed, it was not even intimated that state courts would or should apply federal equity principles, as was sometimes suggested of the general common law principles provided in federal opinions.[191] Rather, the uniform equity doctrine was understood only to require

188. *See supra* note 61 and accompanying text.

189. *See* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 ("[S]uits in equity shall not be sustained . . . in any case where plain, adequate and complete remedy may be had at law.").

190. *See* Henry Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (observing that post-*Erie* federal common law "is truly uniform because, under the supremacy clause, it is binding in every forum").

191. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) (noting that the *Swift* doctrine had failed to lead the state courts to conform with general common law as provided in federal court decisions).

application of a single body of equity principles throughout the federal judicial system.

Finally, as the foregoing analysis of early-nineteenth-century federal case law demonstrates, the equity principles applied in federal court were federal in the sense that federal judges frequently distinguished them from state law that generally applied on the law side of the docket. Discursively, the equity side of the federal docket was a recognized site of judge-made decisional rules that, in many states, were available in federal courts only.

II. FOREIGN LAW IN THE FEDERAL COURTS

Shifting attention to federal equity power provides a fresh perspective on the history of judge-made law in the federal courts and also prompts consideration of a different set of issues: Why did the federal uniform equity doctrine evolve as it did? What does it reveal about early-nineteenth-century understandings of the role of the federal courts vis-à-vis the states and Congress? If there was vocal resistance to the application of nonstate equity in federal courts—as there was—why didn't Congress rein in federal equity power? After all, for much of this period, Congress was dominated by legislators who tended to resist, or purported to resist, efforts to nationalize government functions.

A focus on the history of federal equity illuminates underexamined sources that help answer these questions. The uniform federal equity doctrine prompted substantial debate, a fact that makes federal equity a particularly fruitful subject for analysis.[192] National legislators quarreled over whether federal courts sitting in equity should be required to apply state law and equity. State officials petitioned Congress, challenging the availability of federal equitable remedies in cases in which state law or equity provided none. And in at least in one state, lower federal court judges simply refused to apply federal and English equity principles, openly resisting repeated Supreme Court mandates. Thus, analyzing the history of judge-made law in the federal courts through the lens of equity prompts examination of a host of sources generated by players from different corners of the early-nineteenth-century legal community. Considering

192. By contrast, the *Swift* opinion was unanimous; it was readily followed by lower federal judges; it received very little attention in legal periodicals and reviews; and it did not give rise to cries for congressional intervention. FREYER, HARMONY AND DISSONANCE, *supra* note 13, at 2–3.

these perspectives provides a much fuller account of contemporary views regarding nonstate, judge-made law in federal courts than could be provided by focusing on judicial opinions alone.

Analysis of two episodes in which federal judges' application of nonstate equity principles precipitated significant contests helps explain why the federal uniform equity doctrine prevailed. The first episode occurred in the aftermath of the Panic of 1819 and concerned the particular response of Kentucky state and federal courts to the wave of lawsuits that followed as debtors were unable to fulfill their contractual obligations. The second is the *cause célèbre* of Myra Clark Gaines, a fraud case that originated in New Orleans and captured the attention of both the nation and the Supreme Court.

Upon first impression, these two contests concerning federal equity power may seem to have concerned outlier cases in the Supreme Court—literally, cases that involved federal courts on the territorial fringes of the republic—and hence would not have reflected concerns central to the operation of the federal courts more generally. But I argue that it was precisely because these two contests were geographically remote from the metropolitan centers of the East Coast that they raised an issue of substantial importance: institutional uniformity and the capacity of the federal judicial system.

A primary concern during this period was the failure of the federal courts to keep pace with westward expansion. New states—states incorporated into the Union after 1789—often received inadequate federal judicial resources and were entirely left out of important federal judicial legislation. Such systemic inadequacies were a constant source of complaint, debate, and calls for judicial reform. And they also occasioned and created—in the Supreme Court and in Congress—a felt need for system-wide uniformity in the federal courts. Although social needs do not necessarily translate into law,[193] in this situation the institutional conditions and realities of the early-nineteenth-century federal court system helped shape the federal uniform equity doctrine and prompted Congress's repeated acquiescence to it. In the face of concerns over the federal judiciary's failure to provide uniform judicial services, and significant disparity in the states' embrace of equity, the Supreme Court used uniform equity

193. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 101 (1984) ("If a society's law can't be understood as an objective response to objective historical processes, neither can it be understood as a neutral technology adapted to the needs of that particular society.").

as one way to secure a modicum of horizontal consistency throughout the federal judicial system. And it did so in the context of a complex institutional relationship with a Congress that was unable or unwilling to engage in substantial, and much-needed, judicial reform.

A. New States, Orphan States, and Quasi-Circuit Courts

In many accounts, the Supreme Court in the early national period is portrayed as a Leviathan-like adjudicative body. Federal-court-empowering opinions of the 1810s and 1820s are explained as a consequence of institutional aggrandizement by Chief Justice Marshall and other federalist-minded Justices on the Court.[194] Extending this characterization of the Court into the tenure of Chief Justice Taney, scholars have argued that even as President Andrew Jackson's appointees gained presence and power on the Court in the 1830s and 1840s, it continued to exhibit nationalizing tendencies.[195] With little effort, one can see how the uniform equity doctrine would seem to fit into this narrative. Through this doctrine, the Court empowered itself and the lower federal courts to largely disregard state law and equity when sitting in equity, thereby strengthening federal judicial authority and concomitantly weakening the authority of state courts and legislatures.

There is, however, another perspective on the Supreme Court's institutional status in the early nineteenth century, one that draws attention to the Court's role as the head of a rather loosely organized system of lower federal courts and its complex relationship with Congress. In this period, the federal judiciary was still a system in the making, and the lower courts frequently labored with woefully inadequate institutional resources, especially in the farther reaches of the republic. Undoubtedly, concerns about the Court's nationalizing

194. As G. Edward White has noted, historians regularly use "four talismanic labels" to describe the Marshall Court: "[I]t was a 'nationalistic,' 'Federalist,' 'property-conscious,' and 'Chief Justice-dominated' Court." G. Edward White, *The Art of Revising History: Revisiting the Marshall Court*, 16 SUFFOLK U. L. REV. 659, 671 (1982).

195. *See* David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864*, 1983 DUKE L.J. 695, 742 ("A summary of the achievements of the Court over which Taney presided would include a rather generous interpretation of congressional and presidential power . . . [and] a striking expansion of federal judicial authority beyond the boundaries set by the Marshall Court . . . ."). Some scholars emphasize the Court's ideological transformation under Presidents Andrew Jackson and Martin Van Buren. *See* FORREST MCDONALD, STATES' RIGHTS AND THE UNION: *IMPERIUM IN IMPERIO*, *1776–1876*, at 118–19 (2000); Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 145–46 (2009).

tendencies gave rise to episodic efforts to restrict the authority of the federal courts.[196] But concerns about the lower federal courts' institutional inadequacies gave rise to constant complaints and myriad legislative proposals to reform and expand the federal judicial system. A brief sketch of the organization and operation of the federal judicial system during this period is essential to understanding contemporary fears of institutional incapacity, and how the felt need for institutional judicial reform helped shape the Court's equity doctrine.

Although contemporaries referred to it as a system, the lower federal courts of the early nineteenth century hardly resembled today's well-organized and well-staffed federal judiciary. First, the judiciary was quite small during this period. In 1789, there were thirteen district court judges;[197] by 1840, there were twenty-nine.[198] District courts exercised original jurisdiction over certain cases involving crimes, admiralty law, and land law.[199] The circuit courts functioned both as intermediate courts of appeals and as courts of original jurisdiction in several significant classes of cases, including diversity cases, certain criminal cases, and certain cases in which the United States was a plaintiff.[200] Until the late nineteenth century, the circuit courts were composed of two judges: the itinerant Circuit Justice assigned to the particular judicial circuit and the local district

196. The most famous of these efforts was the proposal to repeal Section 25 of the Judiciary Act of 1789, which empowered the Supreme Court to review state-court judgments in which the constitutionality of a federal law was "drawn in[to] question," or where the constitutionality of a state law was upheld. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86. For deeper background on Section 25, see Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act [Part One]*, 47 AM. L. REV. 1 (1913); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act [Part Two]*, 47 AM. L. REV. 161 (1913).

197. Judiciary Act of 1789 § 2, 1 Stat. at 73.

198. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 394 (2d ed. 2002) ("As new states were admitted to the Union, each was organized as a single judicial district with a single judge without regard to the size of the district."). Although there were only twenty-six states in 1840, in three of the original thirteen states Congress had created two districts. *See* Act of Apr. 29, 1812, 2 Stat. 719 (New York); Act of Apr. 20, 1818, ch. 108, § 3, 3 Stat. 462 (Pennsylvania); Act of Feb. 4, 1819, ch. 12, § 1, 3 Stat. 478 (Virginia); *see also* RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 13 (2d ed. 1994).

199. Judiciary Act of 1789 § 9, 1 Stat. at 76–77.

200. *Id.* §§ 11, 22, 1 Stat. at 78–79, 84–85.

judge.[201] Consequently, district court judges wore two hats: They sat as district court judges and as circuit court judges alongside a Supreme Court Justice acting as Circuit Justice.[202]

The lower federal courts' operational resources were quite limited. Those courts had no courthouses and often held court in state or local public buildings, in private homes, or in the public rooms of taverns.[203] Due to significant delays in the reporting of Supreme Court decisions, district judges were likely to learn about opinions of the Court by reading reports of the opinions in newspapers[204] or from a Supreme Court Justice sitting as a Circuit Justice. By statute, the district court judges were required to reside in their appointed district, generally hundreds of miles from their closest colleague in the federal judiciary.[205]

The circuit-riding system was the glue that was to hold this system together, connecting the center to the periphery and binding these far-flung outposts of federal justice into a system. But circuit riding was poorly suited for the vast, ever-expanding territory of the United States. The Justices' complaints about circuit riding and the toll it took on their physical constitutions almost register as quaint today,[206] but the original circuit system had significant limitations that

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201. Originally, each circuit court was constituted by *two* Supreme Court Justices and the district court judge. *Id.* § 4, 1 Stat. at 74–75. But owing to the difficulty of ensuring that two Justices attend circuit, the requirement was reduced in 1793 to one Supreme Court Justice. Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333, 333.

202. *See* Judiciary Act of 1789 §§ 3–4, 1 Stat. at 73–75.

203. SURRENCY, *supra* note 198, at 81.

204. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1310 (1985) ("Delay . . . in the reporting of the decisions of the nation's highest court necessarily diminished, in many instances almost to the vanishing point, the immediate impact that the Court's actions might otherwise have been expected to have on the bar and the public at large. For the newspapers of the period, the only other significant means of disseminating information concerning the jurisprudence of the Court, routinely reported even its most major doctrinal pronouncements in almost summary fashion.").

205. *See* Judiciary Act of 1789 § 3, 1 Stat. at 73.

206. *See, e.g.*, Letter from the Justices of the Supreme Court to George Washington (Aug. 9, 1792), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT, 1790–1794, at 288 (Maeva Marcus ed., 1988) ("We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms."); Letter from the Justices of the Supreme Court to John Adams (Aug. 15, 1797), *in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT, 1795–1800, at 220–21 (Maeva Marcus ed., 1990) (opposing a change in the scheduling of the circuit court for Delaware because it would be inconvenient for the assigned judge to travel immediately from Virginia to Delaware); John McKinley, Praying an Alteration in the Judicial Circuits of the United States, S. DOC. NO. 27-99, at 1–2 (2d Sess. 1842) (noting that the "business of the [ninth] circuit [was] greatly beyond the

exemplified a larger set of institutional deficiencies of the federal courts, especially with respect to the states that became part of the Union after 1789. Eleven of the fifteen states added between 1789 and 1842 were "orphan states"—they were not included in a federal judicial circuit and, hence, lacked a Circuit Justice—for anywhere between one and forty-two years.[207] A host of other states had what were dubbed "quasi Circuit Courts" during this period because, although nominally part of a circuit, they were rarely, if ever, graced with the presence of their assigned Circuit Justice.[208]

New states were marginalized from the federal judicial system in other ways, too. Neither the Temporary Process Act nor the Permanent Process Act technically applied in the new states. Thus, until the situation was corrected by the Process Act of 1828, no statute formally guided the procedure or the execution of judgments in federal cases brought in law or equity in federal courts located in the new states.[209] This statutory omission not only created problems in the lower federal courts but also signaled the more general failure of

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physical capacity of any one man," and observing that he was required to travel 10,000 miles to attend to his circuit duties).

207. A federal district court was created for each state when it gained statehood, but there was substantial delay in integrating these district courts into a federal judicial circuit. Hence, Kentucky, Tennessee, and Ohio became states, with district courts, in 1791, 1797, and 1803, respectively, but those states were not made part of a judicial circuit until 1807. *See* Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (recognizing Kentucky statehood); Act of Jan. 31, 1797, ch. 2, § 2, 1 Stat. 496, 496 (recognizing Tennessee statehood); Act of Feb. 19, 1803, ch. 7, § 2, 2 Stat. 201, 201–02 (recognizing Ohio statehood); Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420, 420 (creating the Seventh Circuit to comprise the district of Kentucky, Tennessee, and Ohio). In 1837, a portion of the district of Louisiana, created by Act of Apr. 8, 1812, ch. 50, § 3, 2 Stat. 701, 703, the district of Indiana, created by Act of Mar. 3, 1817, ch. 100, § 2, 3 Stat. 390, 390, the district of Mississippi, created by Act of Apr. 3, 1818, ch. 29, § 2, 3 Stat. 413, 413, the district of Illinois, created by Act of Mar. 3, 1819, ch. 70, § 2, 3 Stat. 502, 502–03, the district of Alabama, created by Act of Apr. 21, 1820, ch. 47, § 2, 3 Stat. 564. 564, the district of Missouri, created by Act of Mar. 16, 1822, ch. 12, § 2, 3 Stat. 653, 653, the district of Arkansas, created by Act of June 15, 1836, ch. 100, § 4, 5 Stat. 50, 51, and the district of Michigan, created by Act of July 1, 1836, ch. 234, § 2, 5 Stat. 61, 62, were integrated into circuits, *see* Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176–77.

208. S. REP. NO. 20-50, at 5 (2d Sess. 1829); *see also* 2 REG. DEB. 510 (1826) (statement of Sen. White) (noting that, due to the failure of an ailing Circuit Justice to ride circuit, Tennessee, Kentucky, and Ohio were "no better provided with an opportunity of obtaining a due administration of justice in their Federal Courts, than the other six Western States" that were not included in a circuit at all); 31 ANNALS OF CONG. 419 (1817) (statement of Rep. Claiborne) (noting that "unless some remedy [is] provided" for the Justice assigned to the Seventh Circuit, Tennessee would continue to be denied "justice as to the laws of the United States").

209. *See infra* notes 241–42 and accompanying text.

Congress to implement needed judicial reform as the country expanded westward.

These institutional deficiencies had significant consequences for litigants, prompting calls for judicial reform and preoccupying the early-nineteenth-century Senate and House Judiciary Committees.[210] Starting with Edmund Randolph's Attorney General Report of 1790,[211] proposals to reform and expand the federal judicial system were standard fare for national legislators. They included various and sundry proposals to abandon or curtail circuit riding, to create an independently staffed intermediate federal court of appeals, and to remedy the significant lacunae in judicial legislation for the new states.[212] Regardless of the specific reform proposal, by the 1820s, two discursive refrains characterized advocacy for judicial reform: uniformity and equality. There was a general understanding that litigants in all regions should have equal access to the federal courts (including the circuit courts) and that the federal judiciary should operate uniformly in all regions.

Thus, although historians have tended to focus on contemporary fears of the Court's consolidationist tendencies in the 1820s[213] that informed proposals to *limit* federal judicial power, during the same period concerns about the federal judiciary's incapacity regularly animated debates concerning how best to *expand* the federal judicial system. Calls for expansion of the lower federal judicial infrastructure often came from what, at first appearance, may seem to have been unexpected quarters. In 1826, Senator John Eaton of Tennessee—a

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210. One of the most common complaints of orphan states and quasi-circuit states was that, absent a Circuit Justice, the resident circuit judge sat alone on appeal and hence was the sole judge to review his own decision as a district judge. Because of the practical and jurisdictional limits of appeal to the Supreme Court, this meant that there was no means of effective appellate review in the vast majority of cases heard in federal court in states which, de jure or de facto, lacked a Circuit Justice. *See* J.E. DAVIS, MEMORIAL OF THE BAR ASSOCIATION OF THE STATE OF MISSISSIPPI, H.R. REP. NO. 18-94, at 5 (2d Sess. 1825) ("At present, in the absence of the Circuit Court System, the decision of the District Judge, in all cases where the amount in controversy does not exceed $2,000, is final and conclusive."); Geo[rge] M. Bibb et al., Petition to the Congress of the United States, 2–3 (Frankfurt, KY Jan. 10, 1824) (on file with the *Duke Law Journal*) (observing that in the "[s]ix states that are without the benefit of the circuit system . . . the opinion of the single District Judge is final and without appeal in all causes of less value than two thousand dollars").

211. *See* EDMUND RANDOLPH, JUDICIARY SYSTEM, H.R. REP. NO. 1-17, at 21 (3d Sess. 1790).

212. *See* FRANKFURTER & LANDIS, *supra* note 19, at 14–55 (describing pre-Civil War legislative proposals to reform the federal judiciary); *see also* sources cited *infra* notes 215–24.

213. *See* source cited *supra* note 194 and accompanying text.

close personal ally of President Jackson—delivered a lengthy address in Congress that was typical of dozens of similar complaints articulated by national legislators of the western states. "We are one people living under a Government common to us all," Eaton emphasized, "and each State has a right to expect from the Federal Government, that a like provision will be made for her citizens, with that made for the citizens of the other States. This has not been done [with respect to the judiciary]."[214]

Such concerns were voiced in petitions submitted to Congress by state legislatures, bar associations, and other concerned groups. For example, in 1836, the Alabama legislature petitioned Congress for an extension of the circuit system to that state to secure "equal blessings and equal benefits upon the citizens of every portion of the republic."[215] In his address to Congress in 1829, President Jackson decried the inequality of the federal courts in different states and regions, observing that a "uniform operation of the Federal Government in the different States is certainly desirable; and, existing as they do in the Union, on the basis of perfect equality, each State has a right to expect that the benefits conferred on the citizens of others should be extended to hers."[216] Jackson repeated this message in substance in 1831, 1832, 1834, and 1835.[217]

Such calls for judicial reform and expansion of the lower federal court system did not necessarily signal the embrace of a consolidationist vision of federal judicial power—the strengthening of

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214. 2 REG. DEB. 511 (1826) (statement of Sen. Eaton). For similar complaints by other Jacksonian senators, see *id.* at 1061–62 (statement of Rep. Hemphill); 1 REG. DEB. 587–88 (1825) (statement of Sen. Van Buren); 1 REG. DEB. 527–28 (1825) (statement of Sen. Johnson). Party affiliations of legislators are taken from KENNETH C. MARTIS, THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS 1789–1989, at 88 (1989).

215. S. REP. NO. 24-130, at 1 (1st Sess. 1836). For similar statements regarding the unequal and defective organization of the federal judiciary, especially in the western states, see G.W. CAMPBELL, MEMORIAL OF THE MEMBERS OF THE BAR OF NASHVILLE IN THE STATE OF TENNESSEE, H.R. REP. NO. 18-29, at 3 (2d Sess. 1825); DAVIS, *supra* note 210, at 4–5; JOHN HENDERSON, MEMORIAL OF JOHN HENDERSON, SUBMITTING A PLAN FOR THE REORGANIZATION OF THE JUDICIAL SYSTEM OF THE UNITED STATES, S. MISC. DOC. NO. 31-4, at 1 (1st Sess. 1849); Bibb et al., *supra* note 210, at 1.

216. ANDREW JACKSON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 21-1, at 18 (1st Sess. 1829).

217. *See* Andrew Jackson, Third Annual Message (Dec. 6, 1831), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 544, 558 (James D. Richardson ed., 1897) [hereinafter CMPP]; Andrew Jackson, Fourth Annual Message (Dec. 4, 1832), *in* 2 CMPP, *supra*, at 591, 605; Andrew Jackson, Sixth Annual Message (Dec. 1, 1834), *in* 3 CMPP, *supra*, at 97, 117; Andrew Jackson, Seventh Annual Message (Dec. 7, 1835), *in* 3 CMPP, *supra*, at 147, 177.

the federal government at the expense of the states. Legislators with significantly different views on other federalism-sensitive issues agreed that the lower federal court system created by the 1789 Act needed to be modified and expanded to ensure uniform federal judicial services throughout the country.

Despite that broad consensus, judicial reform was exceedingly difficult for Congress. An 1823 House Judiciary Committee report responding to a memorial submitted by the State of Indiana reported its efforts to determine "'whether any . . . alterations are necessary to be made in the organization of the Courts of the United States, so as more equally to extend their advantages to the several states.'"[218] The Committee recognized that the new states ought "to be placed upon a footing of equality with the old [states], in respect to their judicial establishments,"[219] but it dodged the issue by presenting several reform options "in hopes that the subject may attract the attention of the country generally," explicitly leaving the issue of reform to "the next Congress."[220] An 1829 Senate Judiciary Committee report revisited the issue of inequality in the administration of justice in the federal courts, denominating as "*quasi* Circuit Courts" those states in which a "District Judge alone" undertook the responsibilities of circuit judge due to the absence of the assigned Circuit Justice.[221] But substantial reform was not forthcoming.

At least in part, significant judicial reform was unsuccessful during this period because reform proposals did not readily map onto existing partisan alignments and thus were unable to attract a cross-partisan coalition. Some legislators who opposed centralization nevertheless generally supported expansion of the federal judiciary through, for example, the creation of additional circuits.[222] But other

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218. H.R. REP. NO. 17-105, at 1 (2d Sess. 1823).

219. *Id.* at 2.

220. *Id.* at 3.

221. S. REP. NO. 20-50, at 5 (2d Sess. 1829). For additional committee reports considering various judicial-reform measures, see H.R. REP. NO. 23-429, at 1 (1st Sess. 1834); H.R. REP. NO. 19-95, at 1 (1st Sess. 1826); S. REP. NO. 19-89, at 1 (1st Sess. 1826); H.R. REP. NO. 17-105, at 2–3; S. DOC. NO. 15-12, at 1 (2d Sess. 1818); S. DOC. NO. 15-80, at 1 (1st Sess. 1818); and see also Courts of the United States, 6 Op. Att'y Gen. 271, 271 (1854).

222. *See, e.g.*, sources cited *supra* note 208. Some legislators urged that creating a permanent intermediate court of appeals and abolishing circuit riding would maximize the presence of local judges who would be sensitive to local law. Hence, expansion of the institutional capacity of the lower federal courts through the creation of circuit judgeships would be consistent with a robust understanding of state sovereignty in the context of a federal system. *See, e.g.*, 2 REG. DEB. 520 (1826) (statement of Sen. White) (advocating expansion of the Supreme Court to ensure that all

legislators sensitive to states' rights associated expansion of federal judicial resources with increased federal judicial power generally[223]—a painful hangover from the infamous 1801 Judiciary Act.[224] At the same time, some legislators who generally embraced broad national power nevertheless objected to certain judicial reforms that would have involved the addition of Justices or judges, likely because the creation of new judgeships would have given significant appointment power to an opposing-party administration.[225] Although unlikely factions can sometimes build coalitions, in this instance disagreement over how to address the very obvious problems facing the judiciary led to legislative paralysis. In their famous study of the administration of the federal courts, Felix Frankfurter and James Landis noted that legislative activity on judicial reform during this period largely "spent itself in talk."[226]

Amid calls for judicial reform—and the failure of Congress to implement substantial judicial reform legislation—the Supreme Court's insistence on federal uniform equity principles takes on a different light. Although uniformity of institutional infrastructure was by no means synonymous with uniformity of the equitable principles to be applied in federal court—or vice versa—the two concepts were tightly linked in the legislative and judicial debates over federal equity power. Viewed in this context—and as stories from one-time orphan states Kentucky and Louisiana show—the federal uniform equity doctrine serves less as evidence of the Supreme Court's

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states have a Circuit Justice who will bring "an intimate knowledge of the municipal laws of the respective States" to the high Court).

223. *See, e.g.*, 2 REG. DEB. 537 (1826) (statement of Sen. Berrien) (objecting to an increase in the number of Supreme Court Justices to supply the need for Circuit Justices in part on the ground that "[t]he federal government is already too strong for the States").

224. On the eve of Jefferson's presidential inauguration in 1801, the Federalist-dominated Seventh Congress enacted a judicial-reform statute, abolishing circuit riding for Supreme Court Justices, creating a federal intermediate court of appeals, redrawing the boundaries of the federal judicial districts, and endowing the federal courts with federal question jurisdiction. Act of Feb. 13, 1801, ch. 4, §§ 1–7, 2 Stat. 89, 89–90. It was immediately and famously repealed by the Republicans in 1802. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132. For a probing discussion of the 1801 Act, see generally Alison L. LaCroix, *The New Wheel in the Federal Machine*: *From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 381–93 (2008).

225. *See* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 133 (1922).

226. FRANKFURTER & LANDIS, *supra* note 19, at 44. In 1837, Congress finally enacted legislation that brought Alabama, Arkansas, Illinois, Indiana, the eastern district of Louisiana, Michigan, Mississippi, and Missouri into the circuit system—a move that required the creation of two new Associate Justice seats on the Supreme Court. Act of Mar. 3, 1837, ch. 34, §§ 1–3, 5 Stat. 176, 176–77.

unilateral effort to consolidate federal judicial authority at the expense of state sovereignty and more as evidence of an effort to ensure litigant equality and uniform administration of justice throughout the federal judicial system.

B. Kentucky: Panic, Process, and Alien Law

In February 1822, Abraham Venable executed a deed conveying over three hundred acres of real property, as well as slaves and personal property, to George M'Donald, Venable's brother-in-law.[227] As consideration, M'Donald promised that he would support Venable's stepchildren.[228] The timing of the conveyance was telling. In 1821, the Bank of the United States had filed suit in federal court against Venable and several others as endorsers of a promissory note for $4700 that had changed hands several times and was eventually purchased by the bank at a discount.[229] As the Supreme Court explained, "Here then is the case of a person upon the eve of a decree being rendered against him for a large sum of money, which it is admitted would go far to his ruin, making conveyances of his whole property real and personal to his brother-in-law . . . ."[230] Such last-ditch efforts to stave off complete financial ruin were not unusual in Kentucky in the wake of the Panic of 1819, which brought destitution to many in that state and gave rise to a state constitutional crisis concerning judicial power.[231]

Perhaps with more zeal than other states caught in the grip of the Panic, Kentucky moved swiftly to enact legislation that would bring some measure of relief and protection to debtors. Starting in 1819, the Kentucky legislature enacted a series of relief measures, including stay laws, debt exemption provisions, minimum pricing for execution of judgments on real property, laws that eased or abolished imprisonment for debt, and relief-driven monetary policies.[232] These

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227. Venable v. United States, 27 U.S. (1 Pet.) 107, 107 (1829).

228. *Id.* at 111.

229. *Id.* at 110.

230. *Id.* at 112.

231. For discussions of the Panic of 1819 in Kentucky and the state legislature's response, see 2 WILLIAM ELSEY CONNELLEY & E.M. COULTER, HISTORY OF KENTUCKY 599–600 (Charles Kerr ed., 1922); 2 WARREN, *supra* note 225, at 93–111; Theodore W. Ruger, *"A Question Which Convulses the Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826, 835–55 (2004).

232. 2 CONNELLEY & COULTER, *supra* note 231, at 608, 613–14; 2 WARREN, *supra* note 225, at 104.

relief laws occasioned political mayhem, a state constitutional crisis, and the complete upheaval of the Kentucky state courts. In 1824, as a direct response to the invalidation of a stay law by Kentucky's highest court, the state legislature abolished the existing Court of Appeals (the Old Court) and created a new court staffed with prorelief judges (the New Court).[233] The members of the Old Court refused to acknowledge their removal from office, paralyzing the Kentucky judicial system for well over a year.[234]

As others have chronicled, the Old Court–New Court controversy led to substantial debates over, and a referendum concerning, the power of judicial review in Kentucky state courts.[235] But the Panic of 1819 also occasioned significant controversy over the power of the federal courts, including their equity powers. Given the state of affairs in Kentucky in the 1820s, creditors were understandably concerned about the prospect of collecting on contracts in the state courts. For creditors—including the Bank of the United States—who could satisfy subject matter jurisdiction requirements, the federal court in Kentucky became the only hope. Indeed, at certain junctures, it was the only functional adjudicative body available in that state.

In a series of cases, including most famously *Wayman v. Southard*,[236] the Supreme Court affirmed the Kentucky circuit court's refusal to apply state relief laws, including laws that directed courts to stay the execution of judgments.[237] Similarly, in *Venable v. United States*,[238] a case brought in equity, the Court affirmed the Kentucky

233. 2 CONNELLEY & COULTER, *supra* note 231, at 629–31. The constitutional crisis concerning judicial and legislative authority became a central feature of the conflict between the relief and antirelief factions, so much so that "New-Court" and "Old-Court" came to stand for their respective platforms. *Id.* at 636–40.

234. *Id.* at 636–37.

235. These debates that have been examined in great detail by Theodore Ruger. *See* Ruger, *supra* note 231.

236. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

237. 2 WARREN, *supra* note 225, at 104. Although the Kentucky stay laws varied in their details, they all stayed execution of judgments issued by any court in the state for a designated time period unless the creditor agreed to accept notes issued by the Bank of the Commonwealth, in which case the stay of execution was of a shorter duration. Unlike most contemporary paper currency, notes issued by the Bank of the Commonwealth were not redeemable for specie. Thus, when the state legislature approved massive printing of notes in 1824 (secured, in theory, on certain assets in the state's treasury), the notes plummeted in value. Consequently, under the stay laws, a creditor could wait one year to be paid in a near-worthless currency, or wait two years to be paid in specie or U.S. notes. Warren, *supra* note 38, at 437–38.

238. Venable v. United States, 27 U.S. (1 Pet.) 107 (1829).

circuit court's 1822 determination that Venable's conveyance to M'Donald was, in fact, fraudulent, and that Venable's property could be sold at a marshal's sale in satisfaction of a promissory note.[239] Such rulings by the Supreme Court and the lower federal courts triggered significant debate in Congress over the scope of federal judge-made law and, of particular concern here, federal equity power.[240]

The Kentucky episode also illuminated an embarrassing lacuna in existing federal legislation. As *Wayman* made clear, federal courts in the new states were not covered by the Permanent Process Act, as that statute applied only to the states that were part of the Union in 1789.[241] This revelation was another piece of evidence that the new states were orphaned from the federal judicial system.[242]

For some, then, the Kentucky situation revealed the lack of uniformity and institutional incapacity of the federal judicial system.[243] For others, however, the Kentucky cases betrayed a different kind of defect in the federal judicial system—the discretion allowed to federal judges sitting in law and, to a much greater extent, in equity to usurp

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239. *See id.* at 120.

240. The *Wayman* decision and the resulting legislative debates concerning the Process Act of 1828 have received significant attention from federal-courts scholars. *See, e.g.*, Warren, *supra* note 38, at 435–50 (summarizing the legislative debates over the Process Act); Woolhandler, *supra* note 150, at 103 (discussing *Wayman v. Southard* and noting that in that opinion "Chief Justice Marshall indicated . . . that the process acts had been designed specifically to allow federal courts to avoid using state debtor relief legislation."). But to my knowledge, little, if any, attention has been given to the fallout over federal equity power that was also part of the debates leading up to the Process Act of 1828.

241. *Wayman*, 23 U.S. (1 Wheat.) at 32 (observing that the Permanent Process Act "adopts the State law as it . . . stood [in 1789], not as it might afterwards be made"); 2 REG. DEB. 11 (1825) (statement of Sen. Kane) (noting that in *Wayman* the Court determined that "benefits" of the Process Act of 1789 applied "to the citizens of those States only which had existence when the act was passed. It was for the purpose of placing the citizens of other States upon the same footing, that he ventured to introduce this resolution"); *see also* Warren, *supra* note 38, at 436 ("[U]nder the Act of 1792, only State [practice] laws existing in 1789 in the original thirteen States were automatically applicable to the Federal Courts . . . .").

242. The fact that the Permanent Process Act did not apply in the new states was not news to those who had been alert to legislative debates concerning judicial policy. Efforts to remedy the omission of new states from the process acts began as early as 1809. *See* Warren, *supra* note 38, at 436–37.

243. For example, the day after Senator Kane proposed that the Senate Judiciary Committee consider the failure of the existing judicial process acts to reach the new states, *see supra* note 241, Senator John Eaton expressed enthusiasm for the proposal because he sought resolution of an allied problem: the failure of the circuit system to reach the new states in the west, 2 REG. DEB. 13 (1825) (statement of Sen. Eaton).

the function of the state legislature and, in turn, to undermine important state-level prodebtor legislation.[244]

1. *Senator Rowan Versus Senator Webster, and the Process Act of 1828.* Senator John Rowan—a former Kentucky Court of Appeals judge who was elected to the United States Senate in 1825 as a member of the New Court faction—was of the latter opinion. Federal courts, he believed, possessed too much discretion and lawmaking authority, especially in equity.[245] Impatient with judicial power—especially federal judicial power—and a proponent of legislative supremacy—especially state legislative supremacy—Rowan thought that putting such discretion in the hands of federal judges defeated basic principles of republican government.[246] In January 1827, amid ongoing debates regarding judicial reform and the new-state problem illuminated by *Wayman*, Rowan seized upon the issue in an effort to end the tyranny of lawmaking by federal judges, particularly when sitting in equity. Notably, however, Rowan was unable to turn his colleagues, the majority of whom were Jacksonians, against federal equity. Even among those lawmakers who tended to be suspicious of policies that would strengthen federal power, there was no consensus that the federal uniform equity doctrine represented an encroachment on state sovereignty or a violation of separation of powers.

Senator Rowan threw his energies behind a judicial-reform bill that was intended to bring the new states into the federal judicial system by clarifying the processes that would apply in federal courts both in law and equity.[247] The bill, which had been proposed by the

244. *See, e.g.*, 2 REG. DEB. 12 (1825) (Statement of Sen. Johnson) (expressing support for the resolution to evaluate the operation of the process acts in the new states out of concern that "irresponsible judicial officers [may have] assumed the right, and exercised . . . the power, of making laws for a sovereign and independent State"); *see also infra* text accompanying notes 245–70.

245. Senator Rowan was a veteran of judiciary politics, as he had been a member of the second Kentucky state constitutional convention in 1799, where debates and power struggles focused on the proper institutional design of Kentucky's judiciary. *See* 2 CONNELLEY & COULTER, *supra* note 231, at 626–47.

246. *See* Stephen W. Fackler, *John Rowan and the Demise of Jeffersonian Republicanism in Kentucky, 1819–1831*, 78 REG. KY. HIST. SOC'Y 1, 11–13 (1980).

247. S. 81, 19th Cong. (2d Sess. Feb. 2, 1827). This bill was virtually identical to a bill that had been reported out of the Senate Judiciary Committee several months earlier, S. 158, 19th Cong. (1st Sess. May 11, 1826). Both S. 81 and S. 158 would have required that, in the new states only, the "forms of writs of execution and other process, except their style, and the forms and modes of proceeding in suits in the Courts of the United States . . . in proceedings in equity,

Senate Judiciary Committee, would have significantly altered the scope and nature of federal equity power by requiring conformity with state equity in federal courts sitting in the new states.[248] In this way, the bill departed from well-established uniformity in federal equity cases. Rowan seized the opportunity, proposing an amendment that would have required conformity with state equity in *all* lower federal courts[249]—not only in the new states. In addition, his amendment would have stripped federal judges of any discretionary rulemaking power in law or equity, thus departing even further from existing practice.[250] But Rowan's aggressive tactics backfired. By calling attention to the changes to federal equity practice that the Committee's bill would have effected, and by proposing amendments that would rein in federal equity power even further, Rowan prompted a response from Senator Daniel Webster that ultimately doomed his efforts to require conformity with state equity practices and principles.

Although Justice Story later described it as "a most masterly speech,"[251] Webster's address to the Senate on the pending judicial process bill has not survived. The brief reference to Webster's speech in the legislative record indicates that he "addressed the Senate at great length," arguing that modification of the process acts, and particularly any disruption of the way "equity process was to be regulated," would be "disastrous."[252] Newspapers reported that Webster delivered a "most powerful speech on the Bill regulating the process in the Courts of the United States" to a Senate chamber packed with "[a]ll our most distinguished lawyers . . ." and most of the

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[shall be] according to the principles, rules, and usages, which belong to Courts of Equity of the said States, respectively." S. 81; *accord* S. 158. It is not apparent that the Chair of the Committee, Senator Martin Van Buren, appreciated the full significance of the bill, as he later remarked that, prior to Webster's intervention, the process bill "was allowed to progress merely through an oversight of the Senate." 4 REG. DEB. 343 (1828).

248. *See* S. 81, 19th Cong. (2d Sess. Feb. 2, 1827).

249. *See* S. 11, 20th Cong. § 1 (1st Sess. Jan. 30, 1828) (requiring conformity with state laws governing process and execution of judgments, in cases brought in law and equity, "held in any of the States composing this Union").

250. *See id.* § 2 ("That so much of any act of Congress as authorizes the Courts of the United States, or the Supreme Court thereof, at their discretion, to add to, or modify, any of the rules, forms, modes, and usages aforesaid, or the forms of writs of execution, and other process, except their style, shall be, and the same is hereby, repealed.").

251. Letter from Joseph Story to George Ticknor (Mar. 6, 1828), *in* 1 LIFE AND LETTERS OF JOSEPH STORY 536 (William W. Story ed., London, John Chapman 1851).

252. 4 REG. DEB. 342–43 (1828) (statement of Sen. Webster).

members of the House.[253] In his address, Webster "replied in detail to arguments urged by Messrs Tazewell and Rowan," specifically addressing the significance of the term "civil laws" in the Temporary Process Act.[254] Webster urged that "if the process bill passed in its present shape, it would destroy all Equity process in many of the old states."[255] Faced with a bill that threatened to minimize, or even eliminate, the federal courts' distinctive equity powers, Webster delivered an encomium for equity that, according to one report, "seemed to flash on every mind instant conviction that the subject had not before been fully understood; and [that] placed one or two lawyers of that body . . . in a situation in which no high minded man, no man of genius or ambition, could desire to be."[256] Rowan was one of those men.

Whatever the precise nature of Webster's remarks, they were enough to incite Senator Rowan to make a forceful and complete defense of state legislative supremacy and the concomitant need for complete federal conformity with state law in both common law and equity cases. Rowan reserved his most scathing remarks for federal equity. The requirement of uniform equity principles Webster embraced offended every tenet of government that Rowan held dear, beginning with rudimentary principles of separation of powers. "Legislative power," admonished Rowan, "is never to be exercised but under strict responsibility to the people, whose will gives obligatory force to the law."[257] According to Rowan, federal judges—"in office for life" and removable by impeachment only—"were commissioned to judge, not to legislate—to expound, not to make laws."[258]

In making his defense, Senator Rowan was not solely, or even largely, concerned with protecting congressional power from encroachment by federal judges; he was concerned with encroachment upon the sovereign rights of states and state legislatures. The fact that some state courts lacked equity powers was no justification for federal courts to employ uniform equity principles in the federal courts, as defenders of federal equity suggested.

253. *From the Massachusetts Journal*, PORTSMOUTH J. & ROCKINGHAM GAZETTE, Mar. 1, 1828, at 2.

254. *In the Senate*, PROVIDENCE PATRIOT & COLUMBIAN PHOENIX, Feb. 27, 1828, at 2.

255. *Id.*

256. *From the Massachusetts Journal*, *supra* note 253, at 2.

257. 4 REG. DEB. 349 (1828) (statement of Sen. Rowan).

258. *Id.*

Instead, it was precisely because of the variation in state equity principles that the federal courts should be required to conform to state equity practice, or the lack thereof. "[W]hat ought to be conclusive," Rowan argued, "is, that those States have not chosen to administer justice through Chancery forms."[259]

> If [equity] does not exist in each State, it must be owing to the want of power, or of wisdom, in the State which has it not. It cannot be want of power, for all the States are sovereign and equipollent—*quoad hoc*. . . . [Will any Senator] say that the rights and interests of the citizens of his State shall be decided, whenever drawn into question in the Federal Court, . . . not by those principles and rules of equity, which have been ordained by the wisdom, and consecrated by the usage of that State, but by a code imparted by the [federal] Judges, and unknown to the State?[260]

If Senator Rowan's ideological sensibilities were thoroughly offended by the thought of a federal judge, "unknown to the State," usurping the role of the state legislator and deciding the "rights and interests of the citizens of his State," Webster's insistence that "civil law regulates proceedings in equity" was the final insult.[261] Taking apparent joy in trying to school the schoolmaster, Rowan started with first principles. "Now, . . . by the civil law, every lawyer understands that the municipal law of the Roman empire is meant. That law, [Webster] tells us, regulated proceedings in equity in England, and performs the same office in our country. *Mr. President, can the gentleman be serious*?"[262] Taunting Webster, Rowan continued, "the gentleman will have it from England; we must get the rules of equity, says he, from England, through learned judges and lawyers, who have made it (the civil law) their study. . . ."[263] But according to Rowan, resort to judges and lawyers as the "medium of [equity's] intromission" was itself a usurpation.[264] "[T]he Judges have given that State law enough . . . . [Kentucky] will acknowledge nothing as law, which has not . . . had legislative sanction. She will insist . . . that the Judges shall neither make nor import law."[265]

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259. *Id.* at 362.
260. *Id.* at 362–63.
261. *Id.* at 363–64.
262. *Id.* at 364 (emphasis added).
263. *Id.* at 365.
264. *Id.*
265. *Id.*

Finally, the notion that federal judges were to import a "foreign or alien code"[266] of equity offended Senator Rowan's republican vision of law as organic to the people, and as a core dimension of state sovereignty. A state's "mode or form of administering justice . . . is essential to its sovereignty," he explained.[267] "Free states appropriate, by legislative sanction, those universal rules and principles of equity and justice, and use them as their own. Vassal states are regulated by laws enacted or adopted for them by others."[268]

Senator Rowan's understanding of federal courts' obligation to follow state law and equity—and his corresponding critique of judicial "legislation"—was coherent and passionate. And it was animated by criticisms of federal judge-made law that are sometimes purported to represent the prevailing understanding of the limits of federal judicial power in the early nineteenth century.[269] If it was indeed generally understood that application of judge-made law in federal courts made "[f]ree states" into "vassal states,"[270] however, one might expect that Rowan's proposed amendment to the judicial-reform bill would have passed without controversy. Yet Rowan's vision of the federal courts as functionaries of the state legislatures ultimately failed to capture a majority of his fellow senators' support. Not only was his specific amendment requiring absolute federal conformity with state equity principles rejected, but upon Webster's motion, the entire bill was sent back to committee for reconsideration.[271]

The resulting legislation, the Process Act of 1828, finally remedied the glaring omission of the existing process acts by stipulating the sources of procedural and remedial law applicable in federal courts in the new states.[272] But notwithstanding Rowan's best efforts, and after sustained debate in Congress, with one significant exception[273] the Act did nothing to limit the application of a uniform corpus of nonstate equity principles in federal equity cases.

2. *Judicial Reform and Federal Equity in Kentucky.* How does the legislative fallout over, and the final response to, the state and

266. *Id.* at 364.
267. *Id.* at 366.
268. *Id.* at 368.
269. *See* sources cited *supra* note 10 and *infra* notes 385–86.
270. 4 REG. DEB. 368 (1828) (statement of Sen. Rowan).
271. *Id.* at 371–72.
272. Process Act of 1828, ch. 68, §§ 1, 3, 4 Stat. 278, 278–81.
273. *See infra* text accompanying notes 295–96.

federal courts' conduct in the wake of the Panic of 1819 help explain the vitality of the federal uniform equity doctrine during the early nineteenth century? As an initial matter, in light of congressional acquiescence to the uniform equity doctrine in the Process Act of 1828, it would be misleading to characterize that doctrine as a product of the Supreme Court's particular institutional tendency to unilaterally aggrandize federal judicial power. As discussed previously, when viewed through the lens of Section 34 and the *Swift* case, the history of judge-made law in the federal courts in this period is sometimes told as a story about the federal courts' particular tendency to overreach, repudiating Congress's statutory pronouncements.[274]

However accurate that characterization may be with respect to Section 34,[275] events in Congress following the Panic of 1819 suggest that the Supreme Court's uniform equity doctrine cannot be so easily reduced. It cannot be gainsaid that Congress was well aware of the federal courts' equity powers after the Rowan-Webster debate. Despite that awareness, Congress was unwilling or unable to enact legislation requiring the federal courts to conform to state law in federal equity cases. Instead, in 1828 national legislators extended the geographical reach of existing legislation that, although not particularly clear, had been interpreted by the Court for a decade to require uniformity in federal equity cases. The uniform equity doctrine was not a product of a unilateral power grab by the Supreme Court but rather was the product of a complex, institutional dynamic between the Court and Congress.[276]

Second, debates over the Process Act of 1828 suggest that uniform equity was not predominantly understood as a doctrine that violated prevailing federalism and separation-of-powers principles. Some legislators—like Senator Rowan—described federal equity in such terms. But for many legislators, including many Jacksonians in Congress, such concerns were either nonexistent or were outweighed by other factors. Defenders of state sovereignty—such as Senator Martin Van Buren of New York,[277] Senator Elias Kane of Illinois,[278]

274. *See supra* note 18 and accompanying text.

275. As discussed earlier, William Fletcher's important contribution on this point called that characterization of Section 34 into question. *See* Fletcher, *supra* note 8.

276. *See infra* Part II.D.

277. *See* 4 REG. DEB. 203–04 (1828) (statement of Sen. Van Buren) ("It appears to me that it was the duty of the State legislature to have adopted rules; and if they did not establish them, it was their own fault. The Courts, in the performance of their duties, finding none, were forced

and several other Jacksonians in Congress—opposed Rowan's efforts to secure absolute conformity with state law and equity.[279] The point here is not that these senators were sympathetic to Webster's nationalist views on federal judicial policy in general. Rather, it is that even among legislators whose ideological inclinations tended toward the limitation of federal power, there was a range of views about the proper scope of federal judicial power, and the uniform equity doctrine did not generally offend a shared understanding of the constitutional limits of federal judicial power.

Recognizing that debates over federal uniform equity were part of a larger conversation concerning the institutional capacity of the federal judicial system helps explain why Rowan's anti-federal equity campaign failed. In judicial-reform debates, uniformity in equity was seen by many as a jurisprudential device that would help standardize the administration of justice in the judicial system—an issue that appealed across partisan lines. The process bills, triggered in significant part by the Kentucky crisis, would not remedy all of the federal courts' institutional problems, such as those stemming from the circuit-riding system and chronically understaffed circuit courts. But they were designed to remedy the related problem of the

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to make rules to govern their process."); *id.* at 93 (statement of Sen. Van Buren) ("It was impossible to give up all the power of the Federal Courts without involving the country in confusion.").

278. *Id.* at 94–95 (statement of Sen. Kane) (observing that the Process Act of 1792 struck a wise path by "g[iving] the Circuit Courts power to alter and amend the laws of process, passed by the State Legislatures; and to the Supreme Court of the United States, power to supervise and overrule them"); *id.* at 371 (statement of Sen. Kane) (making the same argument); *see also id.* at 372 (statement of Sen. Berrien) ("[T]he power to prescribe rules for their own courts had been hitherto given to the Federal Judges, under certain limitations; and it could not be confined . . . without doing serious injury.").

279. For example, seven Jackson-supporting senators voted against the Rowan amendment that would have required strict conformity with state law and equity. *See id.* at 327–28 (recording the nay votes of Jackson-supporting Senators Chandler, Dickerson, Kane, McLane, Smith of Maryland, Van Buren, and Williams). Determining the political allegiances of national legislators in this period is fraught with difficulty because "the mass political party did not become established as an institution of public authority until at least the 1830s." GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS 9 (2002). But the Rowan-Webster showdown occurred at a moment during which there was an unusual degree of clarity concerning nascent party affiliation among national legislators. In the congressional elections of 1826 and 1827, support for President John Quincy Adams or challenger Andrew Jackson was a crucial factor, and—although the Jacksonians were a heterogeneous group—support for the latter generally signaled a rejection of Adams's nationalist program and stronger support of states' rights. *See* MARTIS, *supra* note 214, at 30 (noting that Jackson's support came in part from the fact that the American people perceived him as a "champion of states' rights").

omission of the new states from the original process acts.[280] For legislators bent on bringing some measure of consistency to the federal court system, Senator Rowan's demand for total conformity with state equity and zero discretion in rulemaking was out of step with the larger goals of judicial reform—uniformity and equality throughout the federal system.

In theory, institutional uniformity of the sort sought by western legislators and others did not require the application of uniform equity principles in federal court.[281] When deciding cases in law, federal judges typically applied the forum state's procedure, remedies, and—with important exceptions—substantive law.[282] Rowan's proposed amendment would have required even stricter conformity with state equity practice in old states and new.[283] But conformity of this sort was unworkable on the equity side of the docket. Variety in state equity systems, including a near-total absence of equity in some states, meant that conformity with state equity would result in radical disuniformity in the administration of justice in federal courts.[284] From a modern perspective, this may seem like a trivial concern. But even defenders of state sovereignty understood that the purpose of the federal judiciary was to bring some measure of uniformity to the national administration of justice. For example, an 1824 petition by Mississippi's bar association authored by Joseph Davis, Jefferson Davis's older brother, explained that precisely because of the diversity of laws, "the system of national tribunals, ordained to enforce them, should be uniform in every part of the Union, in order that the spirit of system and uniformity prevailing in the one, might counteract the tendency to anarchy and confusion in the other."[285] Although one might conclude that Davis's enthusiasm for uniformity in the federal courts was of limited scope, Davis went on to laud the "Napoleon Code" and to suggest that "if there was no other motive for the extension of the Judicial System of 1789 to the

280. *See* sources cited *supra* note 241 and accompanying text.

281. An 1824 petition by a group of Kentucky lawyers proposed a plan that would have remedied the institutional defects of the federal courts in the west and also would have required greater deference to state law through limitation of diversity jurisdiction. *See* Bibb et al., *supra* note 210, at 1, 10. But the sometimes subtle distinction between uniform administration of justice and uniform law was by no means evident. *See infra* note 296 and accompanying text.

282. *See supra* Part I.A.

283. *See supra* notes 249–50 and accompanying text.

284. *See supra* notes 76–83 and accompanying text.

285. DAVIS, *supra* note 210, at 4.

new States, but that the system should be uniform and universal, that alone would be sufficient to induce Congress so to extend it."[286]

In the immediate context in which the debates over federal equity power took place in the 1820s, Davis's concerns about "anarchy" and, at the very least, "confusion,"[287] seemed plausible, making federal uniform equity appear particularly important to both national legislators and members of the Court. Uniformity in federal equity cases functioned as a quasi-constitutional bulwark against the fragmentation of the Union and localist excess. Thus, within the limits of their jurisdictional grant, lower federal courts sitting in equity were to provide a national floor of remedies and, sometimes, rights for those litigating in federal court.[288] In light of the Kentucky crisis, strict judicial conformity with state law and equity would arguably involve the federal courts in similar turmoil. It would require them to conform with state law even when state judges would not—a problem that even Martin Van Buren could appreciate.[289] If that was the kind of conformity required under Senator Rowan's amendments, then perhaps this was taking too far the concept of federal judicial conformity with state law and equity. Rowan's insistence that federal courts conform to state equity thus ran contrary to the general desire for some level of uniformity in the federal judicial system.

Finally, any analysis of federal judge-made law in the early nineteenth century would be incomplete without considering the possibility that economic interests motivated the development and perpetuation of the federal uniform equity doctrine. Professors Morton Horwitz and Tony Freyer have both demonstrated how the perceived need for a uniform body of commercial law generated significant support for general common law and uniform equity principles, especially among the commercial classes.[290] Another

286. *Id.* at 5.

287. *Id.* at 4.

288. In this regard, application of uniform federal equity principles in private-law litigation is consistent with the application of federal equitable remedies in constitutional cases filed in federal court during the same period. As Woolhandler has demonstrated, diversity jurisdiction was an important means of bringing federal constitutional litigation into federal court well before statutory recognition of federal question jurisdiction in 1875. *See* Woolhandler, *supra* note 150, at 84–85. Her observation that there was a "settled consensus that the federal courts should administer a federalized set of rights and remedies for federal constitutional rights," *id.* at 81, applies in parallel fashion to the private rights asserted in federal equity cases.

289. *See* sources cited *supra* note 247.

290. FREYER, HARMONY AND DISSONANCE, *supra* note 13, at 40 (explaining how *Swift* made it possible for federal judges to create a "federal commercial law" which "served the

important possibility, then, is that Congress failed to rein in the Court's uniform equity doctrine because it was generally sympathetic to the Court's apparent efforts to create a national uniform commercial law, one that tended to favor out-of-state creditors.

At first blush, such an interpretation seems directly applicable to the Process Act of 1828. After all, in cases like *Wayman*, the Supreme Court ratified federal procedural rules that aided the collection of debt and thwarted the operation of state debtor-relief laws, thus helping to create and enforce national norms concerning creditors' rights.[291] And in the 1820s, as in 1789, congressional debates concerning judicial process and equity were bound up in contests over debtors' and creditors' respective rights.[292] In debates following the Kentucky crisis, strong defenders of debtors' rights—such as Senator Rowan—advocated that federal courts apply state law and equity, in no small part because state legislatures had enacted laws tending to favor debtors. Given this important context, it is inviting to understand the Process Act of 1828 as evidence of a general procreditor bias in national judicial policy. Under this theory, national legislators ratified federal uniform equity by refusing to rein in federal equity power when the opportunity arose, thereby further entrenching the power of a national commercial elite.

As tempting as such an interpretation is, the final version of the Process Act of 1828 demonstrates that, in this instance, creditor-debtor tensions played a rather nuanced role in shaping federal judicial policy. Given the immediate context of cases like *Wayman* that gave rise to debates regarding judicial reform and federal equity in the 1820s, national legislators could not have failed to recognize the significance of judicial policy to the relative rights of creditors and debtors.[293] But national legislators also perceived the need for institutional uniformity in the federal judicial system.

The final form of the Process Act of 1828 reflects a compromise struck between these two competing concerns. Like the earlier

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interests of merchants involved in interstate trade"); HORWITZ, *supra* note 13, at 250 ("[T]he much heralded quest for legal uniformity . . . can also be seen more concretely as an attempt to impose a procommercial national legal order on unwilling state courts.").

291. *See* Warren, *supra* note 38, at 437–39 (describing Kentucky's debtor-relief laws and the Supreme Court cases that made the laws ineffective in federal courts).

292. *See* Holt, *supra* note 86, at 1478–1503 (describing the debate and history surrounding the passage of The Judiciary Act of 1789 as a struggle between procreditor and prodebtor legislators).

293. *See supra* notes 232–40 and accompanying text.

process acts, the Process Act of 1828 provided that in "proceedings in equity," federal cases would be conducted "according to the principles, rules, and usages, which belong to courts of equity."[294] By 1828, this phrasing was understood to refer to federal and English equity principles. But the 1828 Act also contained an important exception. The third section of the Act required federal conformity, in law and equity, with respect to "writs of execution" and final process.[295] This third section of the 1828 Act was a triumph, albeit a limited one, for Senator Rowan and other supporters of debtors' rights, for it generally required federal courts to apply debtor-friendly stay-of-execution statutes like Kentucky's.

Thus, while the Process Act of 1828 by and large perpetuated and expanded the federal uniform equity doctrine geographically, it slightly narrowed the scope of that doctrine by directing federal judges to apply the execution provisions that had been enacted by state legislators—many of which were debtor friendly—in equity. Given this particular exception to federal uniform equity, it would be a misstatement to suggest that the Act's perpetuation and extension of the uniform federal equity doctrine can be attributed to procommercial interests in Congress. Out-of-state creditors who frequently litigated in federal courts to collect debts surely lost important ground in the final version of the Act. Other concerns were also at work in the debates leading to the Process Act of 1828, including the felt need for institutional coherence and uniformity in the federal judicial system.[296]

In sum, by reading the debates leading up to the enactment of the Process Act of 1828 for what they were—judicial reform debates—one sees that it is impossible to understand the vitality of federal uniform equity without also understanding contemporary

294. Act of May 19, 1828 (Process Act of 1828), ch. 68, § 1, 4 Stat. 278, 280.

295. *Id.* § 3, 4 Stat. at 281.

296. It is worth noting, moreover, that although commercial cases were certainly an important part of the federal equity docket, equity jurisdiction also extended to a whole host of subjects unlikely to involve typical commercial interests. The federal courts applied, and insisted on the application of, a uniform body of equity principles in cases involving all manner of subjects—from disputes over dower, Powell v. Monson & Brimfield Mfg. Co., 19 F. Cas. 1218 (C.C.D. Mass. 1824) (No. 11,356), to marriage settlements, Neves v. Scott, 50 U.S. (9 How.) 196 (1850), to wills, Gaines v. Chew, 43 U.S. (2 How.) 619 (1844). *See infra* Part II.C.1. Thus, to use modern terminology, the uniform equity doctrine was transsubstantive, at least within the federal equity docket. This does not mean that the perceived need for a national, uniform commercial law did not animate the push for uniformity in federal equity jurisprudence. But it does suggest that other factors were also at work.

concerns about institutional uniformity. Amid cries from orphan states for uniformity, equality, and expansion of the institutional infrastructure in the federal court system, uniform equity in the 1820s was not generally understood as a violation of federalism or separation-of-powers principles. Nor was it identified exclusively, or even largely, with an overreaching, nationalizing, and creditor-friendly Supreme Court. In important ways, it appealed to a desire for uniformity and equality in the federal judicial system, especially on the fringes of the republic.

In so concluding, one need not naïvely dismiss the significance of partisan disagreement and economic interests in shaping the behavior of federal judges and legislators. Surely some proponents of federal uniform equity sought expansion of federal judicial power based on a consolidationist understanding of government, while others sought to protect the interests of out-of-state creditors. But it would also be a mistake to suggest that uniformity always and only functioned as a code word for consolidation at the expense of state sovereignty, or for protection of particular interests. Institutional considerations—broad agreement that there was a minimum requirement for institutional uniformity in a federal judicial system—created an additional, distinctive set of conditions that provided a fertile and necessary context for the development and vitality of the federal uniform equity doctrine.

C. Louisiana: "Foreign Law" in the Federal Courts

The dynamic created by the Supreme Court's use of federal equity power to secure institutional uniformity in the federal courts, and Congress's acquiescence to that power, played out dramatically in the case of Louisiana. In the 1812 statute granting Louisiana statehood, Congress also created a federal judicial district, the "Louisiana district," staffed with a district judge "who shall reside therein."[297] But the socio-legal culture of Louisiana remained distinctive, presenting the Supreme Court and national legislators with a dilemma: defer to the particular legal culture of the state and

297. Act of Apr. 8, 1812, ch. 50, § 3, 2 Stat. 701, 703. As was the case in all territories, Congress established federal courts in Louisiana prior to statehood. James Pfander demonstrates that one of the pre-statehood federal courts in Louisiana was, in fact, an Article III district court. *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 618, 712 (2004) ("In the legislation that implemented the Louisiana Purchase . . . Congress created both a territorial court and an Article III district court.").

risk complete loss of a distinctive federal judicial authority, or insist upon uniformity and risk trammeling Louisiana law. Measures had been taken to ensure, to a certain degree, the application of Louisiana civil law in federal court.[298] In part because of the value placed on institutional uniformity in federal courts, however, the Supreme Court insisted upon the application of uniform equity principles in the federal courts in Louisiana. Once again, Congress demurred.

It is difficult to imagine a state that was more on the national fringes geographically, legally, culturally, linguistically, and politically than Louisiana in the early nineteenth century. Louisiana state law was generally based on the civil law system that governed in most continental European countries rather than on the English common law system that governed in other states.[299] In Louisiana state courts, judicial proceedings were conducted in French rather than English.[300] And with respect to its federal courts, Louisiana was truly an orphan state for much of the period. Until 1837, Louisiana was not part of any federal judicial circuit, and no Justice had been appointed to serve as its Circuit Justice.[301]

Because of Louisiana's distinctive legal system and culture, however, the application of uniform equity in Louisiana federal court encountered significant resistance in that state. But resistance to federal equity in Louisiana differed from that in Kentucky in an important respect. In Louisiana it was not only certain legislators who viewed federal equity as a usurpation of state sovereignty; the federal district judges likewise resisted federal equity. Thus, debates concerning federal equity in Louisiana illuminate a different dimension of the call for institutional uniformity in the federal courts. Given the limits of the circuit-riding system—especially in states like Louisiana—it was important that the lower federal court judges

298. *See infra* text accompanying note 305.

299. *See* MARK F. FERNANDEZ, FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM 1712–1862, at 31 (2001) (describing how Louisiana's private law was based on the Roman, French, and Spanish civil-law traditions).

300. Although the Louisiana State Constitution of 1812 required that all laws be promulgated in English, French prevailed as the legal *lingua franca* in state legislative debates, judicial proceedings, and legal arrangements between private parties. Alain A. Levasseur & Roger K. Ward, *300 Years and Counting: The French Influence on the Louisiana Legal System*, 46 LA. B.J. 300, 304 (1998).

301. In 1837, Congress created the Ninth Circuit and included the Eastern District of Louisiana within that circuit. Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176–77. The entirety Louisiana was incorporated into the circuit system in 1842. *See* Act of Aug. 16, 1842, ch. 180, 5 Stat. 507.

complied with Supreme Court precedent and mandates. The creation of a lower federal judiciary would have been of little use if the jurists appointed did not identify, at some level, as federal judges willing to follow Supreme Court precedent.[302] But in a state like Louisiana, ensuring that federal courts conformed with and followed Supreme Court precedent was no mean feat.

In the early nineteenth century, the judges appointed to the federal district court in Louisiana were drawn from the local bar.[303] In Louisiana, that meant the appointment of judges trained in civil law—judges who, as it turned out, earnestly defended Louisiana's legal system as the authentic civil law system over the bastardized version that was English chancery practice.[304] In this institutional context, mandates that Louisiana federal courts apply uniform equity principles were contested and defined in a series of federal cases brought from the 1830s through the 1850s. It was in part because of the Louisiana federal judges' fierce resistance to federal equity—a resistance that led nearly to the impeachment of one federal judge—that the Supreme Court insisted upon the use of uniform equity principles with such vehemence.

1. *Equity in Louisiana Federal Courts.* Responding to proposals by Louisiana legislators, Congress enacted a special process act in 1824 to regulate adjudication in federal courts in Louisiana. The 1824 Act stipulated that "the mode of proceeding in civil causes in the courts of the United States . . . established in the state of Louisiana, shall be conformable" to the mode of practice in the state courts.[305] But like most judiciary acts of the period, the 1824 Act was vague

302. One might imagine a unitary judicial system in which lower-court judges were not obliged, explicitly or implicitly, to follow clear precedent established by superior courts. Acceptance of such a practice, however, would have constituted a significant departure from well-accepted norms in Anglo-American judicial practice. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (noting that in American courts, "long-standing doctrine dictates that a court is always bound to follow a precedent established by a court 'superior' to it").

303. *See* Act of Apr. 8, 1812, ch. 50, § 3, 2 Stat. 701, 703.

304. Although some commentators claimed the civil law as one of the important sources of English equity principles—thus tying Anglo-American equity to a glorious history of European civil law—the connections between civil law and English Chancery (and, hence, federal equity) remain unclear. *See* Charles Donahue, Jr., *The Civil Law in England*, 84 YALE L.J. 167, 170 (1974) (book review) (describing connections between areas of law and courts, but noting that finding a connection for the "civil law element in the law applied in Chancery . . . is more problematic").

305. Act of May 26, 1824, ch. 181, § 1, 4 Stat. 62, 62–63.

with respect to the source of procedures, remedies, and substantive principles to be applied in actions brought in equity. In fact, the 1824 Act made no reference to equity at all.

The Supreme Court first addressed that issue in 1835, in an opinion authored by Jackson-appointee Justice Smith Thompson. In *Livingston v. Story*,[306] Thompson explained that because Louisiana courts did not recognize "equitable claims or rights" as traditionally understood in the Anglo-American tradition, the 1824 Act simply did not apply to equity cases brought in Louisiana federal court.[307] Citing *Robinson v. Campbell*, he reasoned that equity principles applied in Louisiana federal courts as they applied in all federal courts.[308] Although not the only possible interpretation of the 1824 Act, it was the interpretation that would both preserve uniformity across the federal judicial system and ensure that Article III's reference to equity was honored and enforced. Three years later, the basic holding of *Livingston* was affirmed by Chief Justice Taney in *Poultney v. The City of La Fayette*.[309]

Both before and after *Livingston* was decided, the federal judges in Louisiana balked at the suggestion that uniform nonstate equity principles would apply in Louisiana federal court. Judge Samuel Harper, appointed in 1829 by President Jackson after personally assuring the president of his states' rights views, was the first to joust with the Supreme Court over equity power.[310] It was his ruling that the Supreme Court reversed in *Livingston*. And, more generally, it was his rules of court that prohibited the application of equity in the circuit court in Louisiana even after the *Livingston* Court held otherwise.[311]

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306. Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835).

307. *Id.* at 660.

308. *Id.* at 655–56. This is particularly significant because the Process Act of 1828 explicitly exempted Louisiana federal courts, Act of May 19, 1828 (Process Act of 1828), ch. 68, § 4, 4 Stat. 278, 282, and—as per the Supreme Court's interpretation—the 1824 Act did not apply to equity cases, *Livingston*, 34 U.S. (9 Pet.) at 632. Hence, the Supreme Court had no statutory foundation for its rulings concerning the applicability of federal uniform equity in the Louisiana circuit court.

309. Poultney v. City of La Fayette, 37 U.S. (12 Pet.) 472 (1838).

310. *See* KERMIT L. HALL, THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829–61, at 6–7 (1979) (discussing Harper's pre-appointment visit with Jackson, during which he stressed his states' rights beliefs).

311. *See* Opinion of the Court, Whitney v. Relf (No. 3823) (Mar. 9, 1837) (Harper, J.), at 28, 32, *reprinted in* Certificate of Division from the U.S. Circuit Court for E. La., Gaines v. Chew, 40 U.S. 9 (1841), at 385, 386 [hereinafter Certificate of Division].

Judge Harper's rules were in place in 1835 when Myra Whitney (later, Myra Gaines) filed suit in federal circuit court in Louisiana claiming fraud against the executors of her alleged father's estate.[312] The *Gaines* case, as it came to be known, demonstrates just how valuable federal equity could be for out-of-state litigants who often sought out a federal judicial forum. In addition, it shows just how far the Supreme Court would go to ensure that the lower federal courts applied uniform equity principles. Myra's lawsuit was made for the tabloids.[313] On the eve of her marriage to William Whitney, Myra learned from her father—or the man she had believed to be her father—that she had in fact been adopted. She was actually the biological child of the then-deceased Daniel Clark, an extraordinarily wealthy man whom Myra had known only as a close family friend.[314] Myra also learned of evidence suggesting that the executors of Clark's estate defrauded her out of an enormous inheritance by suppressing a will that named her as his legitimate daughter and primary beneficiary.[315]

In 1834, Myra and William began investigations and sought the assistance of the Louisiana state probate court in securing documents relevant to their case. But their investigations generated little more than the ire of the executors, a libel suit against William, and William's imprisonment when he was unable to pay the related bond.[316] Once William was out of prison, the couple decided to try their luck in federal court. They filed a bill in equity in federal court, charging that Clark's last will and testament of 1813 had been fraudulently suppressed, and asking initially for discovery in the form of documents and deposition testimony.[317]

But Myra and William fared only slightly better in federal court. Ruling on the defendants' motion in 1837, Judge Harper ignored the recently decided *Livingston* opinion and held that the equity

312. *See* Petition for a Rehearing at 33, 34, Gaines v. Relf (June 1, 1839), *reprinted in* Certificate of Division, *supra* note 311, at 387, 387.

313. For fuller accounts of the *Gaines* case, see generally ELIZABETH URBAN ALEXANDER, NOTORIOUS WOMAN: THE CELEBRATED CASE OF MYRA CLARK GAINES (2001); Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1830–37 (2005).

314. ALEXANDER, *supra* note 313, at 13–14; Collins, *supra* note 313, at 1830–32.

315. Collins, *supra* note 313, at 1830–32.

316. ALEXANDER, *supra* note 313, at 54–56.

317. *See* Order of Court, Whitney v. Relf (No. 3823) (Mar. 9, 1837) (Harper, J.), at 28, 28, *reprinted in* Certificate of Division, *supra* note 311, at 384, 384.

principles available in all other federal courts were inapplicable in Louisiana.[318] Instead, he required that the proceedings be regulated by Louisiana practice rules, ordered that no discovery would be allowed under those rules, and mandated that all papers filed in the action be drafted in French.[319]

Judge Harper's opinion employs much of the same anti-federal-equity reasoning that one finds in Senator Rowan's speeches in Congress. But Harper's opinion was specifically tailored to Louisiana's unusual situation. Harper insisted that Louisiana's civil-law tradition was closer to the original source of equity jurisprudence than England's borrowed and partial version of equity. "It was from the civil law that England derived her system of chancery courts; but while she borrowed only that *part* of the civil law, we recognize the *whole* code."[320] In other words, Louisiana courts were not bound by equity as defined in common law countries, but instead by a truer version of equity. If "want of the name [equity] is a fatal objection" to the application of Louisiana's civil law in equity cases filed in Louisiana federal court, Harper complained, "it might as well be said that a house is not a house, because it is called *maison* in French."[321]

Notably, Harper also responded directly to the prevalent argument that application of federal and English equity principles was necessary to provide uniformity in the federal judicial system: "When equity, in the true sense of the word, can be administered in this court under the present practice in every case, why should a foreign system be introduced, merely to preserve, as it is said, a *uniformity* of practice throughout the Union?"[322] Pointing to the Act of 1824 and other statutes, Harper reasoned,

> [N]o foreign system of practice can be imposed on this State; and until these acts of the national legislature shall be declared unconstitutional by the competent authority, it is insisted that this State is exempted from the onerous, and (to us,) odious rules of procedure with which we are threatened.[323]

318. *Id.* at 28–29.
319. *See id.* at 32–33.
320. *Id.* at 29.
321. *Id.* at 32–33.
322. *Id.* at 31.
323. *Id.* at 31–32.

In response to Myra's first appeal, *Ex Parte Whitney*,[324] the Supreme Court made quick work of Judge Harper's impassioned opinion. "That it is the duty of the Circuit Court to proceed in this suit according to the rules prescribed by the Supreme Court for proceedings in equity causes at the February term thereof, A. D. 1822, can admit of no doubt."[325] But by the time the opinion in *Ex Parte Whitney* was issued in 1839, Judge Harper had died. So when Myra returned to the circuit court in Louisiana—by this point widowed and remarried to General Edmund Gaines—she encountered Harper's successor, Judge Philip Lawrence.

One might have thought that Judge Lawrence would have been more amenable to federal equity than was his predecessor, given that he was the judicial candidate of a more moderate faction of the Democratic Party in Louisiana.[326] But Lawrence would have nothing of federal equity in his court. For two years Myra's case foundered in the circuit court. In 1841 she appealed to the Supreme Court again, complaining of the circuit court's continued refusal to apply equity and unwillingness to require the defendants to answer the bill.[327] In another opinion by Justice Thompson, the Supreme Court declared it to be a "matter of extreme regret, that it appears to be the settled determination of the District Judge, not to suffer chancery practice to prevail in the circuit court in Louisiana, in equity causes; in total disregard of the repeated decisions of this Court."[328]

On appeal before the Supreme Court yet again in 1844, counsel for the executors raised the well-rehearsed objections to the use of equity in Louisiana federal courts.[329] At this juncture, Myra had attempted to rescind the executors' transfer of estate property using

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324. *Ex parte* Whitney, 38 U.S. (13 Pet.) 404 (1839).

325. *Id.* at 408.

326. Judge Lawrence was a New York native and had worked as an editor for a newspaper that began as a pro-Van Buren newspaper, hence giving him a direct connection to President Van Buren. Although not a native of Louisiana, Lawrence lived in Louisiana and worked in the political and legal community, serving as the U.S. District Attorney. His appointment as the district judge enjoyed considerable support from the local Democratic Party. *See* HALL, *supra* note 310, at 30–31 ("Divisions in the Louisiana Democracy provided Van Buren with some discretion in choosing a new judge, but ultimately he responded to the recommendations of party moderates.").

327. Gaines v. Relf, 40 U.S. (15 Pet.) 9, 12 (1841) ("The counsel for the plaintiffs contended that the single question in the case was, whether the Circuit Court of Louisiana has chancery jurisdiction.").

328. *Id.* at 17.

329. Gaines v. Chew, 43 U.S. (2 How.) 619, 628–31 (1844).

an implied trust.[330] Explaining that trusts had been abolished by the Louisiana Code of 1808, and again by the Code of 1825, counsel for the defendants queried, "[How can] this court fasten upon the people of Louisiana all the doctrine of uses and trusts, against their positive law? . . . The English cases are not applicable."[331] "Our system has been called a mongrel system," counsel explained, "but it is good enough for us."[332]

Countering the argument that uniform equity equalized the treatment of litigants throughout the federal judicial system, defense counsel observed the inequality created by the imposition of equity principles: "How can a citizen of another state claim more rights than a citizen of the state itself[?] The Constitution requires all to be placed upon an equal footing, but nothing more."[333]

The Supreme Court did not relent. At the pen of Justice John McLean—a dissenter in *Robinson*—the Court once again insisted on the application of uniform equity, declaring that "the Circuit Court of the United States, exercising jurisdiction in Louisiana, as in every other state, preserves [as] distinct the common law and chancery powers."[334] McLean then dismissed the notion that "the federal government has imposed a foreign law upon Louisiana," denying that "[t]he courts of the United States have involved [a] new or foreign principle in Louisiana."[335] Either unaware of or unconcerned about the tension within his reasoning, McLean declared that "local law governs" disputes in federal court in Louisiana "the same as in every other state," but that equity applies, "produc[ing] uniformity in the federal courts, throughout the Union."[336]

That such "uniformity" in the federal courts came at the cost of conformity with Louisiana's civil law was of no moment. So, too, was the fact that the application of equity principles almost necessarily altered the outcome of a lawsuit, which would lead to inequality in the administration of justice among litigants depending on whether the suit was brought in federal or state court. "No right is jeoparded by" the application of uniform equity principles in the federal court,

330. *See id.* at 649–50 (discussing the availability of the equitable remedy of the implied trust in federal court).

331. *Id.* at 639.

332. *Id.* at 637.

333. *Id.* at 639.

334. *Id.* at 650.

335. *Id.*

336. *Id.* at 650–51.

McLean explained.[337] Rather, "to say the least, wrongs are as well redressed, and rights as well protected, by the forms of chancery as by the forms of the civil law."[338]

On Myra's next appeal to the Court in 1848, the Justices effectively took over the case. Rather than remanding to the Louisiana federal judge, they reviewed all of the evidence *de novo* and resolved the ultimate question of Myra's legitimacy. In an opinion by Justice Wayne—a Jackson appointee and former Georgia state court judge—the Court applied federal and English equity principles and practices,[339]declared that Myra was legitimate, and found that the executors had committed fraud.[340] Although Myra's legal battles did not end there, the Court's insistence on the application of uniform equity principles in Louisiana federal court did not wane.[341]

2. *Institutional Stalemate.* The struggle over federal equity power in Louisiana recorded in *Livingston*, *Poultney*, and, most vividly, the *Gaines* case, was part of the larger debate concerning the institutional authority and operation of the federal courts throughout the nation. That debate was taking place in Congress, the state legislature, and local bar associations.[342] As in the case of Kentucky, the struggle over federal equity in Louisiana correlated with a breakdown in the administration of justice. But in this case it was a breakdown of the operation of the federal courts, rather than of the forum state courts.

Judge Lawrence's stalwart refusal to apply federal uniform equity principles is notable, not only because it was the subject of Myra's appeals to the Supreme Court, but also because it figured in two legal actions initiated by the Clerk of the United States Court for the Eastern District of Louisiana, Duncan Hennen. By filing a

337. *Id.* at 651.

338. *Id.*

339. *See* Patterson v. Gaines, 47 U.S. (6 How.) 550, 584 (1848) (observing that "[t]he practice of granting issues" is "not a matter of right" in either "American courts of equity" or "[i]n the English chancery, except in the case of an heir at law or of a rector or vicar").

340. *See id.* at 602 (finding that Myra "is the lawful and only child of [the] marriage" between Daniel Clark and Zuline Carriere and that the property in question had been "illegally sold by those who had no right or authority to make a sale of it"); Collins, *supra* note 313, at 1835–36 (summarizing the Court's analysis of the evidence regarding Myra's legitimacy).

341. Myra and her heirs appeared before the Supreme Court at least thirteen more times before the saga was concluded. *See* Collins, *supra* note 313, at 1816 n.196 (listing the Supreme Court opinions issued in the *Gaines* case).

342. *See supra* Part II.A.

mandamus action in the Supreme Court and an impeachment petition in Congress, Hennen alerted both bodies to the breakdown of the Louisiana federal court caused by Judge Lawrence's refusal to apply federal equity principles.[343]

Hennen had been appointed clerk by Judge Harper in 1834.[344] Shortly after Judge Lawrence took his oath of office, he terminated Hennen's appointment. The termination was not for cause, as Lawrence himself declared that Hennen had performed his duties "*methodically, promptly, skillfully,* and *uprightfully*."[345] Instead, Lawrence fired Hennen to replace him with a personal friend. Hennen refused to relinquish his office, and, more materially from the perspective of litigants with pending cases, "refused to deliver the records of the said court to" the new clerk of court.[346]

Hennen's complaints against Judge Lawrence were many. In addition to wrongful discharge and unlawful patronage, Hennen charged Lawrence with absenteeism from the state in dereliction of his duties and statutory mandates, ethical violations of various sorts, "*notorious[]* and *inveterate[]* addict[ion] to the intemperate use of ardent spirits," and refusal "to allow . . . petitioner . . . to keep any chancery docket, to keep any order-book, to issue any subpoena in chancery, or to perform any of the duties of his said office connected with the mode of proceeding in chancery."[347] In particular, Hennen noted that "in the case of Whitney *vs.* Relf et al."—Myra's "bill in chancery" against the executors of Clark's estate,

> Judge Lawrence . . . refused to allow the solicitor of the complainants to have an attachment to compel the defendant to answer the bill, on the ground that such proceeding was not warranted by the State practice of Louisiana; and on said solicitor requesting that said application and refusal, as it occurred, should be stated on the records of the court, that it might be brought to the supervision of the Supreme Court of the United States, the said Judge Lawrence refused, and commanded your petitioner not to make any entry on the records of said application and refusal, nor

343. *See In re* Hennen, 38 U.S. (13 Pet.) 230 (1839); H.R. REP. NO. 25-272, at 2 (3d Sess. 1839); H.R. DOC. NO. 25-63, at 5 (3d Sess. 1839).

344. H.R. DOC. NO. 25-63, at 1.

345. H.R. REP. NO. 25-272, at 2.

346. *Id.* at 2–3.

347. *Id.* at 6, 7.

> any mention thereon of said proceeding, which took place in open court at said November session, 1837.[348]

The result, Hennen explained, was a complete breakdown of the federal court in Louisiana. "[T]he consequences of the said acts of Judge Lawrence have been to suspend the administration of justice for the period of one judicial year."[349] Although a mandamus petition in the Supreme Court yielded no relief for Hennen,[350] a House select committee appointed to review Hennen's allegations recommended that the House impeach Lawrence "for high misdemeanors in office."[351]

Lawrence died before his impeachment was finally decided. But the dispute over equity in Louisiana federal court did not die with him. In 1841, while Myra's second appeal was pending before the Supreme Court, the Louisiana legislature petitioned Congress, "[a]sking the act of 1824 to be so amended as . . . to adopt the proceedings in civil cases for equity causes, and prevent the chancery law of Great Britain from being introduced in such causes."[352] The legislators complained about "repeated decisions of the Supreme Court of the United States" which have determined that "complicated and artificial modes of proceeding called the Chancery Practice, consisting of the rules prescribed by the Supreme Court . . . and the rules of proceedings of the Court of Chancery in England" apply in equity cases brought in Louisiana federal court.[353] The gravamen of their petition was that application of equity in Louisiana federal court made Louisiana citizens foreigners in their own federal courts: "[T]he whole of the chancery law of Great Britain is introduced among us, and established upon us contrary to the desires and interests of the State."[354] However forceful, the 1841 petition went nowhere. In 1844, the Louisiana legislature submitted a nearly identical petition.[355] This petition likewise fell on deaf ears.

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348. *Id.* at 6.

349. *Id.* at 7.

350. *In re* Hennen, 38 U.S. (13 Pet.) 230, 262 (1839) (denying the relief requested by Hennen).

351. H.R. REP. NO. 25-272, at 1.

352. H.R. DOC. NO. 27-14, at 1 (1st Sess. 1841) (emphasis omitted); *see also* S. DOC. NO. 27-14 (2d Sess. 1841) (presenting the same resolution to the Senate).

353. H.R. DOC. NO. 27-14, at 1.

354. *Id.* (emphasis omitted).

355. *See* H.R. DOC. NO. 28-207 (1st Sess. 1844).

Within a couple years, and at the height of the contest concerning the application of equity in the *Gaines* case, two other groups filed petitions in Congress objecting to federal equity power. In 1848, "judges and members of the bar of New Orleans"[356] filed a particularly bold petition in the Senate. They argued that by applying equity, the Court had "introduce[d] a new and extensive system of jurisprudence, unconnected, if not incompatible with the system of laws which prevail in this State."[357] If the Supreme Court continued on its path, explained the judges, "our State w[ould] present the singular spectacle of a country in which two distinct tribunals, *exercising a concurrent jurisdiction*, are governed by principles and forms essentially different."[358] This, they continued, would lead to what we now call forum shopping. Where equity is available in the federal courts but not the state courts, they observed that a "different measure of justice may frequently prevail" in the two forums, and "foreigners or citizens of other States have the privilege of selecting that court which is most favorable to themselves."[359]

In addition to creating a strategic advantage enjoyed by the out-of-state litigant, this arrangement had overtones of the worst aspects of colonial rule. The judges predicted that the federal courts would be looked at "as a foreign tribunal sitting in their midst, trampling on their laws, overruling the decisions of their courts, and unsettling the titles to their property."[360] Such an "intrusion" would be considered "worse than that of a country subjugated by war, whose conquerors rarely interfere with the laws affecting merely the pecuniary interests and civil relations of society."[361]

A ten-page report of the Committee of the Louisiana Bar submitted as part of the same 1848 petition took this line of criticism even further, arguing cogently and passionately that the application of uniform equity in Louisiana federal courts was simply unconstitutional. This report echoed the concern that the application of equity in Louisiana federal court would lead to the gradual extinction of Louisiana's distinctive—and superior—legal system: "[T]hat under the guise of mere forms of practice, a system of law

356. S. MISC. DOC. NO. 30-144, at 1 (1st Sess. 1848).
357. *Id.* at 2.
358. *Id.* at 3.
359. *Id.*
360. *Id.*
361. *Id.*

wholly foreign to our habits and usages may supersede our own as far as it can be done by the authority of the federal courts . . . and the State laws [would] be abrogated without the authority or sanction of our legislature."[362] The report further argued that as long as equity principles were applied in Louisiana federal court, and,

> as long as the rules enacted by ourselves for the equitable interpretation and enforcement of our own laws are cramped, controlled, and set at naught by others originally adopted some hundred years ago to govern the anti-jury tribunals, and enforce the feudal laws of a distant monarchy, so long will our rights be impaired, our property perilled, our very liberties rendered precarious, our territorial legislation converted into a solemn farce, and our system of jurisprudence itself be eventually jostled out of existence.[363]

In 1849, a resolution was referred to the Senate Committee on the Judiciary in response to these petitions,[364] and the following year the committee introduced a bill that would have required federal judges to conform to Louisiana state law and judicial practice.[365] But the 1850 bill went nowhere and it seems to have generated little interest or debate. An 1851 report of the House Committee on the Judiciary that provided a negative recommendation on a similar bill sheds a little light on the lack of support for the Louisiana petitions. The House Committee's report is short and defers entirely to the Supreme Court: "[T]he court in the last resort having repeatedly decided that the distinction between law and equity, and to be exercised by the federal judiciary, is a constitutional one: the question is therefore settled against the proposed reform."[366]

The report's characterization of the Court's insistence on uniform exercise of federal equity power as a constitutional decision, and therefore insulated from legislative reform, seems overstated given that Congress already regulated the federal courts' equity powers in various ways. But the Committee's report intimated that its members understood there to be constitutional limits on the extent to

362. *Id.* at 13.

363. *Id.* at 15.

364. *See* S. JOURNAL, 30th Cong., 2d Sess. 179 (1849).

365. S. 112, 31st Cong. (1st Sess. 1850). The bill passed to a second reading, S. JOURNAL, 31st Cong., 1st Sess. 156 (1850), but then disappeared.

366. H. COMM. ON THE JUDICIARY, PRACTICE OF STATE COURTS, H.R. REP. NO. 31-67, at 1 (2d Sess. 1851).

which Congress could regulate the federal courts' equity powers because of Article III's extension of the judicial power to cases brought in equity.

Whatever the force of the theory that Article III restricted Congress's authority to restrict federal equity power, the suggestion of such limits at the very least indicates that there was no general sense that constitutional principles—such as federalism or separation of powers—*prevented* federal courts from applying uniform equity principles, even when those principles departed from state law or equity, as they often did.

3. *Federal Equity and Institutional Uniformity in Louisiana.* Careful reconstruction of debates regarding equity in Louisiana federal courts illustrates the underappreciated relevance of judicial-reform debates to early-nineteenth-century attitudes toward the application of nonstate, judge-made law in federal equity cases. It also helps to explain why Louisianans' objections to the application of uniform equity principles had little influence in the early nineteenth century.

Federal equity's critics decried the Supreme Court's uniform equity doctrine as colonial in its aspirations. But the historical sources reveal that such criticism reflected an extreme states'-rights understanding of the limits of federal judicial power. Given the prevalent concern about disuniformity in, and the incapacity of, the federal judicial system, critics' complaints about federal equity's ill effects were unlikely to resonate with many national legislators or with members of the Supreme Court. With the *Gaines* case in the newspapers and a recent petition to impeach one of Louisiana's federal judges in part because of his rejection of federal equity, Congress's refusal in the 1840s and 1850s to take any further measures to protect Louisiana's legal system from alleged federal judicial overreaching is unsurprising. The temporary breakdown of the administration of justice in the Louisiana federal court over the issue of federal equity underscored the profound need for uniformity in the federal courts, helping to explain why the Supreme Court insisted upon, and Congress acquiesced to, application of uniform equity principles.

Considered in conjunction with Congressional debates concerning the Process Act of 1828, disagreement over the application of equity in Louisiana federal court also calls into question the relevance of an explanation frequently offered to

account for the development of general common law. Early-nineteenth-century judges, the argument holds, simply did not understand themselves as engaged in lawmaking at all. Rather, when employing a common law rule of decision, they were declaring law, not making law. In such accounts, the *Swift* case is explained as the product of a radically different, prepositivist jurisprudential moment, and hence cannot be understood to have ratified judicial lawmaking as that concept is understood today.[367]

One could easily formulate a parallel account tailored to equity jurisprudence—a field of adjudication in which judges purportedly understood themselves to be applying a common reservoir of equitable procedures and remedies, not adjudicating substantive liabilities or making law. One finds such language in some early-nineteenth-century equity cases.[368] Under this theory, federal judges applying uniform equity principles were not making law at all. Hence, contemporaries would not have seen the federalism and separation-of-powers problems posed by the federal uniform equity doctrine.

But one of the most interesting aspects of the early-nineteenth-century debates over federal equity is their modern-sounding—even positivist—resonance. Critics of federal equity were under no illusion that federal courts sitting in equity were merely declaring the law, prescribing remedies, or drawing on general equitable principles that

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367. In *Swift*, Justice Story proclaimed that the decisions of courts "are, at most, only evidence of what the laws are; and are not of themselves laws." Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). Some modern commentators contend that this alternative jurisprudential understanding of the common law helps to explain why, during the *Swift* era, the general federal common law did not offend contemporary sensibilities about federalism and separation of powers. *See, e.g.*, Clark, *supra* note 10, at 1284–85 (explaining that, at the time it was decided, *Swift* offended neither federalism nor separation of powers principles, in part because the *Swift* Court "ascertain[ed] the applicable rule of decision," and did not make law or policy). That theory of judicial role has been called into question by Morton Horwitz and William Nelson, both of whom contend that in the early nineteenth century, judges abandoned the declaratory understanding of the common law in favor of an "instrumentalist" or policy-oriented understanding. *See* HORWITZ, *supra* note 13, at 22; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 172 (Univ. of Ga. Press 1994) (1975).

368. Chief Justice Taney drew this distinction when sitting as a Circuit Justice. *See* Meade v. Beale, 16 F. Cas. 1283, 1291 (C.C.D. Md. 1850) (No. 9371) (recognizing that equitable remedies in federal court would be supplied by English chancery practice, but insisting that "the right must be given by the law of the state, or of the United States"). Justice McClean also drew this distinction in the *Gaines* case. *See* Gaines v. Chew, 43 U.S. (2 How.) 619, 650–651 (1844) ("In deciding controversies in [Louisiana] the local law governs, the same as in every other state. . . . [The application of equity is] only a change of mode, which produces uniformity in the federal courts, throughout the Union.").

were universally applicable. Instead, they were quick to observe that the federal courts were imposing new laws associated with other sovereigns on the people of Kentucky and Louisiana, thereby treading on the powers of state legislators and the rights of the people. Senator Rowan cogently urged that federal judges were improperly legislating from the bench: "We have been contending at the boundary line which separates the legislative from the judicial power . . . ."[369] The 1848 memorial from the judges and members of the New Orleans Bar made the same point. The application of uniform equity principles in Louisiana federal court would mean that "those courts may decide, not according to local law, but according to a system of laws foreign to our own laws and usages. . . . *[I]t would make them legislators*."[370]

In short, despite competing jurisprudential views concerning what, exactly, judges did when deciding cases in equity, this was not a situation in which contemporaries were unable to comprehend the potential separation-of-powers and federalism problems posed by federal equity power because they were schooled in a radically different jurisprudential philosophy. Yet, even though litigants and lawmakers very clearly articulated those concerns, such views garnered little support on the Supreme Court or in Congress. By reading the debates over federal equity in Louisiana as judicial-reform debates, one can see that such arguments found little general support at least in part because conformity with Louisiana law in federal equity cases would have compromised the fragile institutional integrity of a fledgling federal judicial system.

D. Instituting the Federal Courts and Courting the Nation

No single factor can explain a complex phenomenon like the development of the federal uniform equity doctrine in the early nineteenth century. And this Article makes no attempt to dismiss entirely the explanations frequently offered for the parallel phenomenon of the general common law, such as the need for a uniform commercial law or alternative jurisprudential theories of the judicial function. But careful attention to debates concerning federal equity power reveals other forces that shaped the uniform equity

369. 4 REG. DEB. 368 (1828) (statement of Sen. Rowan); *see also id.* at 363 ("Does the Chief Justice, do all the Judges together, possess legislative power?"); *id.* ("The Judges possess no legislative power.").

370. S. MISC. DOC. NO. 30-144, at 10 (1st Sess. 1848) (emphasis added).

doctrine, including institutional concerns and pressures. In this respect, the story of federal equity power can enrich and complicate modern scholars' and jurists' understanding of how ideological beliefs regarding federal and state power were informed and mediated by historically contingent institutional limitations and pressures.

Analyses of early-nineteenth-century federal judicial power account for particular institutional dynamics of the Supreme Court, largely by referring to its consolidationist ambitions at that time.[371] But as recent work by political scientists urges, and as the historical sources discussed in this Article confirm, students of the federal courts would do well to broaden and refine their conception of the institutional constraints and pressures that shaped and characterized judicial and legislative behavior in the early nineteenth century.[372]

First, laws are the result not only of societal interests or the ideological predisposition of government officials; they are also shaped by particular institutions.[373] As Professor Keith Whittington and others have argued, institutions constitute preferences in part by generating particular interests, incentives, and habits of mind in the people operating within those institutions. Thus, "justices are likely to think about and act on public problems differently as a consequence of their experiences and expectations on the Court."[374] Second, institutions also largely determine the range of actions available to officials seeking to achieve a particular policy goal.[375]

We can see both of these institutional dynamics at play in the Supreme Court's insistence on uniformity in federal equity cases.

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371. *See* White, *supra* note 194, at 673–77 (summarizing several authors' analyses of the Marshall Court); *cf.* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction* 6 (Univ. of Chi. Law Sch., Pub. Law & Legal Theory Working Paper No. 297, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558612 ("The Marshall Court's jurisdictional decisions emerged from a complex array of causes that cannot be attributed simply to an overarching nationalist project.").

372. For example, Professor Paul Frymer cautions against conflating institutions with "a more porous and less analytically rigorous 'political context.'" Paul Frymer, *Law and American Political Development*, 33 LAW & SOC. INQUIRY 779, 781 (2008) (book review).

373. *See* Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 608 (2000) (book review) (explaining the theory of "New Institutionalism," which claims that judges do not decide cases based solely on their "personal policy preferences"; rather, "[b]oth the internal procedures and norms of the Court and the external relationship between the Court and its larger political environment affect judicial outcomes").

374. *Id.* at 615; *see also* Frymer, *supra* note 372, at 785 ("[I]nstitutions create and shape the interests of those who work within them . . . .").

375. *See* Whittington, *supra* note 373, at 614.

Concerns about the lack of uniformity in the federal judiciary were not abstract. The Supreme Court Justices' particular institutional position within the federal judiciary sensitized them to concerns about disuniformity in the federal courts. Through circuit riding in particular, Justices experienced the failures of the system first hand. Originally, circuit riding was the primary way that the federal judicial system would bring federal justice "to every Man's Door," while also ensuring that the Justices stayed in touch with the mores of the people.[376] But circuit riding of the scope originally mandated quickly became implausible. By the 1810s, reliance on the circuit-riding system left many states without a Circuit Justice at all.[377] The Justices, more than other federal officials, were thus intimately aware of, and sensitive to, the ways that existing institutional arrangements were failing to ensure uniform administration of justice in the lower federal courts.

Though the Justices were personally aware of the disuniformity in the lower federal courts, their particular institutional position limited the manner by which they could effect change in the system. Justices petitioned Congress personally for judicial reform on numerous occasions, spelling out the crisis in terms familiar to litigants and western legislators. But they achieved little significant effect.[378] Although the Justices were powerless to directly influence judicial-reform legislation, they could shape the Court's jurisprudence in ways that would diminish the reliance on circuit riding and ensure that federal courts served the rudimentary function of providing a forum that would administer justice uniformly throughout the nation.[379] In short, by insisting on the application of a uniform body of

376. John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), *in* 2 The DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT, 1790–1794, *supra* note 206, at 25, 27–28.

377. *See* sources cited *supra* notes 206–08.

378. *See* sources cited *supra* note 206. In addition to letters and petitions seeking to modify circuit-riding duties and the circuit system, the most overt effort by Supreme Court Justices to influence judicial legislation in the early nineteenth century was "The Judges' Bill," drafted by Justice Story in 1816 and endorsed by all of the sitting Justices. The bill would have granted the circuit courts the full scope of federal question jurisdiction allowed by Article III and raised judicial salaries. *See* 1 WARREN, *supra* note 225, at 442; 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 251, at 300 (quoting a manuscript in which Story discusses the reception of the bill by the other Justices).

379. Uniform federal equity was not the only doctrinal tool at the Justices' disposal. Insistent enforcement of Section 25 and recognition of federal question jurisdiction in certain, albeit limited, instances also evince the Court's effort to secure uniformity. For an insightful

equity principles in cases like the *Gaine*s case and myriad other mundane cases, the Justices crafted a doctrine that catered to a desire for uniformity in the federal courts.

Attentiveness to institutional dynamics—in particular the complex relationship between Congress and the federal courts—also helps explain Congress's role in the evolution and entrenchment of the uniform equity doctrine. On the one hand, one might expect that the objections to federal equity articulated by Senator Rowan and the Louisiana petitioners would have led Congress to restrict federal equity power as much as was constitutionally permissible. And at least hypothetically, national legislators would have had an interest in protecting the prerogative of federal and state legislators by constraining federal equity power. But Congress acquiesced to and even extended the geographic reach of the federal uniform equity doctrine in the aftermath of the Kentucky crisis, and despite substantial lobbying by Louisiana officials.

Once again, the shared concern about the need for federal judicial reform and the related concern about the uniform administration of justice provide an essential context for understanding Congress's failure to rein in the federal equity power. Congress knew that judicial reform was needed. But due to the legislative stalemate caused by fractious coalitions and the controversial nature of any federal judicial reform, significant legislative action was impossible.[380] For legislators who wanted to secure uniformity in the administration of the federal courts, but who were unable to do so directly through legislation, acquiescing to the uniform equity doctrine was one way to achieve a modicum of uniformity in the federal courts. Moreover, some national legislators may have been quite happy to turn judicial reform over to the courts to avoid any political consequences that might be associated with it.[381] Again, the Supreme Court's uniform equity doctrine was by no means

analysis of the Marshall Court's effort to secure uniformity of federal law through federal question jurisdiction, see LaCroix, *supra* note 371, at 43–52.

380. *See supra* notes 212–26 and accompanying text.

381. In this respect, my findings are consistent with Whittington's important analysis of the political operation of judicial review in the early national period and his observation that "structural characteristics of political systems such as the United States encourage cooperation between judges and political leaders to obtain common objectives." Keith E. Whittington, *"Interpose Your Friendly Hand": Political Support of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005). *See generally* Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005) (discussing new research in political science that explores the relationship between judicial review and elected officials).

an adequate substitute for substantial changes to the circuit-riding system or other necessary judicial reforms. But in a world of little legislative resolve and imperfect solutions, the crisis in the federal judiciary likely made acquiescence to, and even acceptance of, uniform equity a palatable alternative.

Constructing a federal judicial system that would simultaneously serve the country and respect state sovereignty was not a straightforward project. Individual actors undoubtedly brought partisanship and ideologically charged policy views regarding courts and commerce to the task. But they were also confronted with the practical governance problems that inevitably arose in a polity characterized by dual sovereignty, multiple states, concurrent jurisdiction, and vast geographic territory. These concerns shaped judicial-reform debates in Congress and animated the Court's response to the particularly acute disuniformity that would result if the federal courts attempted to conform to the various state equity systems. Seen in this light, the Court's effort to define and defend federal equity power appears as evidence less of its raw consolidationist ambitions than of the Court's institutional co-stewardship of the federal judicial system—a role it shared, albeit not always easily, with Congress.

III. "A CONSIDERABLE SURGICAL OPERATION" AND THE ERASURE OF FEDERAL EQUITY

For some students of federal courts, the most significant aspect of the early-nineteenth-century federal uniform equity doctrine is not why it thrived but rather the fact that it existed at all. One of the stock historical narratives that continues to shape modern understanding of federal judicial power is that the application of nonstate, judge-made law was generally disapproved of in the early period and was extremely limited in scope. In this account, Section 34's apparent requirement that federal courts apply state law in the absence of governing positive federal law is held up as the general rule, with *Swift* and other departures marking aberrations that must be explained away or repudiated. *Erie* thus stands as a triumphant return to the true principles of separation of powers and federalism.[382]

382. *See* Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 846 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000)).

Sosa v. Alvarez-Machain,[383] a case in which the majority of the Court recognized a narrow species of federal common law in the context of the Alien Tort Statute,[384] provides an example. Justice Scalia's dissenting proclamation reveals conflicting impulses to recognize the modernity of the *Erie* doctrine while also grounding it in founding-era principles: "Despite the avulsive change of *Erie*, the Framers who included reference to 'the Law of Nations' in . . . the Constitution would be . . . quite terrified by the 'discretion' endorsed by the Court."[385] Sounding a similar chord, Professor Martin Redish explains Section 34 as an attempt by the first Congress "to preserve the political values of federalism by curbing the one branch of the federal government most feared as a threat to state power."[386] The assumption underlying both of these statements is that during the founding era, there was a shared understanding of the profound limits on nonstate, judge-made law in the federal court—an understanding recognized and restored in *Erie*.

Telling the story of judge-made law in the federal courts through the lens of federal equity power calls that assumption into question. Regardless of whether *Swift* was consistent with contemporary practice,[387] any account that focuses exclusively on cases brought in law mistakes a part for the whole of federal adjudicative activity during the period. On the equity side of the docket, application of uniform, nonstate, judge-made law was the norm.[388] Viewed in light of the history of federal equity power, then, any analysis that attempts to draw an easy line connecting modern limitations on federal judge-made law and historical beliefs and practices deserves skeptical scrutiny.

This point is hardly noteworthy to legal historians, who have long lamented lawyers' and jurists' efforts to simplify the past for

383. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

384. *Id.* at 724.

385. *Id.* at 749 (Scalia, J., concurring in part and concurring in the judgment).

386. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 792 (1989).

387. *See supra* note 367 and accompanying text.

388. This is not to suggest that jurists were insensitive to the problems associated with judicial legislation. Concerns were raised in the context of federal equity power, even if they did not represent the dominant view in the early nineteenth century. *See supra* Part II.B–C. And the perils of federal criminal common law led to significant limitation of federal judicial lawmaking powers in criminal cases. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that federal courts do not possess an implied power to exercise common law jurisdiction in criminal cases).

expedient purposes.[389] Although it is well beyond the scope of this Article to examine the perils and possibilities of utilitarian invocations of the past in federal courts' jurisprudence generally,[390] it is germane to consider how the pull of conventional legal reasoning has shaped modern understanding of the history of equity power. Such an inquiry illustrates why the history of uniform federal equity power has been minimized in modern doctrinal and scholarly accounts and highlights some of the costs of its erasure.

In 1945, Justice Frankfurter was faced with a problem: Seven years after *Erie* announced the end of general common law on the law side of the federal docket, the question of *Erie*'s status in equity cases remained unresolved.[391] By this point in time, law and equity had been officially merged by virtue of the Federal Rules of Civil Procedure.[392] Yet even after the merger, the long-standing norm of uniformity on the equity side of the docket weighed strongly against the wholesale application of the *Erie* principle in equity cases. Indeed, it remained so powerful that in *York v. Guaranty Trust*,[393] the Second Circuit found that *Erie* did not mandate the application of a state statute of limitations in a case in which equitable remedies were sought. In reaching this conclusion, the Second Circuit cited, at the top of a very long list of cases, *Robinson v. Campbell*.[394]

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389. *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 167–90 (1996) (discussing the different practices of lawyers and historians and the differing ends to which they characteristically apply evidence).

390. Moreover, Edward Purcell and Susan Bandes have each provided elegant discussions of that subject with particular attention to *Erie*. *See* PURCELL, *supra* note 382, at 3 (observing that *Erie* has been "widely misunderstood, in large part because judges and legal scholars have too often divorced it from its full and vital historical context"); Bandes, *supra* note 382, at 830 (discussing how principles like federalism are often cast into abstract terms, ignoring historical and social realities).

391. Because the Rules of Decision Act did not apply in federal equity cases in any straightforward way, it was not clear whether or how *Erie* would apply in these cases. Immediately following *Erie*, the Court announced that the core *Erie* principle—that federal courts sitting in diversity must follow state substantive law—"applies though the construction arises not in an action at law, but in a suit in equity." Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205 (1938). Two years later, however, the Court expressly left unanswered the question of whether, in federal equity cases, the *Erie* principle required conformity with state remedies. *See* Russell v. Todd, 309 U.S. 280, 294 (1940) ("[W]e have no occasion to consider the extent to which federal courts . . . are bound to follow state statutes and decisions affecting those remedies."); *see also* WRIGHT ET AL., *supra* note 112, §§ 4504 n.6 & 4513.

392. *See* FED. R. CIV. P. 2 (1938) ("There shall be one form of action known as 'civil action.'").

393. York v. Guar. Trust Co., 143 F.2d 503 (2d Cir. 1944), *rev'd*, 326 U.S. 99 (1945).

394. *See id.* at 521–22 (citing Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222 (1818)). The *York* court urged that in equity cases, federal courts were under no obligation to follow

The Supreme Court opinion reversing the Second Circuit is now a staple component of the *Erie* doctrine. In *Guaranty Trust v. York*, the Court announced the "outcome determinative" test,[395] which in its modified form remains an essential principle in vertical choice-of-law analysis today.[396] But *Guaranty Trust* is important for another reason. In the first several pages of the opinion, Justice Frankfurter unequivocally extended the *Erie* principle to federal cases in which equitable remedies were sought.[397] *Guaranty Trust* finally eviscerated the federal uniform equity doctrine, largely ending equity's reign as a distinctive site of nonstate, judge-made law in federal diversity jurisdiction cases.[398]

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state statutes or state decisions "with respect to equitable 'remedial rights.'" *Id.* With respect to substantive law, the court provided a more equivocal description, contending on the one hand that "as to substantive rights, a federal court sitting in equity, in a suit where jurisdiction rests on diversity of citizenship, must apply state statutes and, usually, state decisions," *id.*, and on the other hand that, under *Swift*, "federal courts, in diversity cases, [were required to] follow state decisions except where there is no pertinent state statute and where a question of 'general law' is involved," *id.* at 522. As described previously, the application of substantive nonstate equity principles in federal court predated *Swift*—as the *Swift* Court acknowledged—but by 1944, that was irrelevant, as the Supreme Court in *Ruhlin* had made clear that, with respect to substantive law, the *Erie* principle applied in federal equity cases. *See Ruhlin*, 304 U.S. at 205; *supra* Part I.B.2.c.

395. *See* Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[T]he intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in State court.").

396. The centrality of *Guaranty Trust* to the *Erie* doctrine has been acknowledged for some time. *See* Philip B. Kurland, *The Federal Courts and the Federal System*, 67 HARV. L. REV. 906, 907 (1954) (book review) (suggesting the renaming of the *Erie* doctrine to reflect the importance of *Guaranty Trust*).

397. *Guar. Trust Co.*, 326 U.S. at 99–108.

398. The early-nineteenth-century federal equity cases are not completely without force, as they continue to animate modern interpretations of the Court's equity powers by defining the limits of the federal courts' remedial powers under FED. R. CIV. P. 64. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332–33 (1999) ("Because such a remedy was historically unavailable from a court in equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages."); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 234–35 (2003) (discussing the *Grupo Mexicano de Desarrollo*, 527 U.S. 308 (1999), opinion and how the Court relied on history in forming its decision). Others have shown how traditional equity doctrines remain a powerful source of remedial authority in the context of federal question cases, and particularly in the context of constitutional litigation. *See, e.g.*, John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 990 (2008) ("Anti-suit injunctions have been a staple of equity for centuries, so the injunction approved in [*Ex parte Young*, 209 U.S. 123 (1908),] did not rest on a novel cause of action derived from the Fourteenth Amendment.").

It is unfortunate that the first portion of the *Guaranty Trust* opinion is generally given so little attention in casebooks and legal scholarship, as it illustrates rather starkly the problems facing jurists who strive to provide a seamless historical account of federal judicial power even as they abandon past practices. Rather than concede that the opinion marked a significant—even seismic—change, Justice Frankfurter disavowed the existence of a long history of federal judicial "power [in equity] to deny substantive rights created by State law or to create substantive rights denied by State law."[399] Instead, he explained, "federal courts, in the long course of their history, have not differentiated in their regard for State law between actions at law and suits in equity."[400] Frankfurter's rather liberal treatment of the history of federal equity power enabled him to craft a story of continuity concerning the metes and bounds of nonstate, judge-made law in the federal courts. In his account, the application of *Erie* to equity cases was a natural extension of "the Framers'" vision of the role of the federal courts[401] and hence a natural extension of *Erie*'s return to timeless limitations on federal judge-made law.

But just as Justice Brandeis's turn to history in *Erie* has been called into doubt,[402] Justice Frankfurter's account of early federal equity power is similarly suspect.[403] It is practically impossible to ascertain what source of equity principles the Framers intended to be applied in federal court.[404] But in the early national period, federal courts routinely applied federal and English judge-made equity principles. This included, under certain circumstances, application of substantive principles in the form of equitable rights, and application of equitable remedies in ways that altered state-created rights. Archival evidence suggests that Frankfurter and at least one other

399. *Guar. Trust Co.*, 326 U.S. at 105.

400. *Id.* at 103; *see also id.* at 106–07 ("Whatever contradiction or confusion may be produced by a medley of judicial phrases severed from their environment, the body of adjudications concerning equitable relief in diversity cases leaves no doubt that federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing they were enforcing rights created by the States and not arising under any inherent or statutory federal law.").

401. *Id.* at 111.

402. *See* text accompanying notes 55–62.

403. Professors William Crosskey and Laura Fitzgerald have also observed Justice Frankfurter's liberal treatment of the history of federal equity power. *See* CROSSKEY, *supra* note 17, at 878; Fitzgerald, *supra* note 151, at 1270–72.

404. *See supra* Part I.B.1.

Justice were well aware that the *Guaranty Trust* opinion took significant liberties with the historical sources. In his personal file on the case, Frankfurter saved a memorandum in which he carefully recorded a telephone conversation with Chief Justice Stone. Stone commended Frankfurter's opinion, and particularly his "surgical" approach to the historical record:

> I have now read your opinion in the York case and I must say that you have performed a considerable surgical operation with great delicacy. I say considerable surgical operation because I think that there was a good deal more of historical material to clear away than the uninformed reader might realize—and you had to deal with it as delicately as you did if it was to be avoided in your decision.[405]

Chief Justice Stone's observation concerning Frankfurter's erasure of the history of federal equity power was an understatement. One can, however, understand why Justice Frankfurter, a member of the Court's Progressive wing, would seek to diminish federal equity's robust past.[406] Faced with the seismic changes of the New Deal period, Frankfurter felt compelled to help minimize the federal judiciary's power to block Progressive legislation.[407] Not only had the "switch in time" ended the Court's *Lochner*-era penchant for invalidating economic regulation, but as Professor Edward Purcell has explained in elegant detail, *Erie* required federal judges to abandon general common law—which often favored corporate interests—for state common law—which tended to favor Progressive interests such as expanded tort liability for industrial employers and minimum-wage laws.[408] Given that equitable injunctions, in particular, had become a means of suppressing labor strikes and generally controlling organized labor—a fact that Frankfurter had chronicled in depth during his years as a law professor[409]—*Guaranty Trust* gave him an opportunity to limit such uses of federal equity power by requiring federal courts to conform to state law in equity cases.[410]

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405. Memorandum of Felix Frankfurter (Mar. 17, 1945), Papers of Felix Frankfurter, Harvard Law Library, Series 7, Subseries G, Paige Box #12, No. 264 (on file with the *Duke Law Journal*).

406. *See* PURCELL, *supra* note 390, at 208–09.

407. *See id.*

408. *See id.* at 141–64.

409. *See* FELIX FRANKFURTER & NATHAN GREEN, THE LABOR INJUNCTION (1930); *see also* PURCELL, *supra* note 390, at 70–77.

410. Justice Frankfurter was by no means a solo actor in the effort to defeat federal equity power during the New Deal period. Other opponents of robust federal equity power were

In disclaiming the long history of federal uniform equity and the attendant authority to apply nonstate, judge-made decisional principles, Justice Frankfurter also made space for his particular vision of the federal courts. This vision was consistent with the modern institutional structure of the federal courts that Congress had finally anointed through important judicial-reform legislation. By 1945, the federal courts were no longer a fledgling system of far-flung federal emissaries and Supreme Court Justices navigating streams to bring justice to every man's door. In 1869 and 1891 Congress finally created several circuit judgeships to alleviate the circuit-riding burdens and improve access to federal circuit courts.[411] Importantly, in 1875, Congress made the existence of a federal question an independent basis for subject matter jurisdiction.[412] In 1934, Congress enacted the Rules Enabling Act, endowing the Supreme Court with broad procedural rulemaking authority and creating a process by which such rules would be drafted and then ratified by Congress.[413] And in 1938, the Supreme Court, empowered by Congress, approved the first Federal Rules of Civil Procedure.[414] When *Guaranty Trust* was decided, therefore, the federal courts were a highly organized and structured system of elite judges supported by significant staffs of lawyers and nonlawyers.[415]

Given this massive institutional transition from the early nineteenth century to the early twentieth century—a transition that Frankfurter and James Landis examined in great detail in *The*

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essential to the larger mission. For example, Woolhandler and Collins explain that Justice Hugo Black "campaigned relentlessly to reduce the role of federal equity in the area of economic regulation and elsewhere by developing abstention doctrines that required federal courts to dismiss suits that were clearly within their equitable jurisdiction." Woolhandler & Collins, *supra* note 150, at 681. Unsurprisingly, Justice Black joined Frankfurter's opinion in *Guaranty Trust.*

411. *See* Act of Apr. 10, 1869, ch. 22, 16 Stat. 44 (creating nine circuit judgeships). In 1891, Congress established permanent federal courts of appeals. *See* Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826 (1891).

412. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 474.

413. Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072–2074 (2006)). For a discussion of the Act's origins, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043–98 (1982).

414. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 970–73 (1987).

415. Professor Judith Resnik provides a searching examination of the growing organizational and lobbying capacity of the federal courts in the early twentieth century. *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 959 (2000) ("With the creation of the Conference of Senior Appellate Judges in 1922, the potential for the judiciary to speak as an institution emerged.").

Business of the Supreme Court[416]—there was no longer a pressing need to secure uniformity in the federal courts through uniform equity. Instead, every reason existed to push for federal equity's diminution. According to Frankfurter, diversity jurisdiction was becoming increasingly outmoded, especially when it allowed federal judges to meddle with matters that he considered to be reserved to state and federal legislatures. Well before *Erie* was decided, Frankfurter criticized *Swift* as "mischievous in its consequences, baffling in its application, untenable in theory, and . . . a perversion of the purposes of the framers of the First Judiciary Act."[417]

Seventeen years after writing those words, Justice Frankfurter was assigned to draft the opinion in *Guaranty Trust* and was thus given an opportunity to further erode the significance of diversity jurisdiction by fully extending the *Erie* principle in equity. Hence, in *Guaranty Trust*, Frankfurter dismissed a long line of precedent that suggested a different view of federal equity power and once again credited his vision of the limited role of federal courts to "the Framers."[418] Frankfurter's invocation of the Framers in *Guaranty Trust* is particularly notable given that two years earlier he had accused other Justices of "finding in [their] own personal views the purposes of the Founders."[419] But in *Guaranty Trust*, the Founders' purposes—as Frankfurter presented them—would help further minimize the significance of diversity jurisdiction and clear the way for the outcome determinative principle.[420]

Viewed in historical perspective, however, the outcome-determinative analysis represented a complete inversion of the principles that had governed federal equity power in the early national period. As per the traditional restrictions on courts of equity, equity jurisdiction did not attach unless no adequate or complete

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416. FRANKFURTER & LANDIS, *supra* note 19.

417. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 526 (1928); *see also* Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of the Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 700 (1999) (discussing "Frankfurter's well-known opposition to diversity and his powerful attacks on the doctrine of *Swift v. Tyson*").

418. Guar. Trust Co. v. York, 326 U.S. 99, 111–12 (1945) ("The Framers of the Constitution . . . entertained apprehensions lest distant suitors be subjected to local bias in State courts . . . . And so Congress afforded out-of-State litigants another tribunal, not another body of law." (citation omitted) (internal quotation marks omitted)).

419. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 666 (1943) (Frankfurter, J., dissenting).

420. Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

legal remedy was available.[421] And once the general principle was transposed into the federal system, equity was by its very nature outcome determinative vis-à-vis state law. Given this traditional function of federal equity power, Justice Frankfurter had a choice when explaining his new outcome determinative principle. He could either minimize the long history of uniform nonstate equity, or he could acknowledge *Guaranty Trust* as a dramatic break from precedent and past practice. The former was apparently the easier course of action.

The point to be made is not that *Guaranty Trust* was wrongly decided as a matter of modern judicial policy, or that Justice Frankfurter was disingenuous in drafting the opinion. Rather, the goal is to underscore the extent to which the intellectual and discursive conventions of legal practice push judges and lawyers to account for doctrinal development in ways that call on historical sources as authority, while simultaneously reconstituting those sources to reflect modern legal norms and policies.[422] The Framers, in this convention, often function not as a source of precedent, but as a source of "timeless elements out of a past that [are] assumed to be 'correct' or 'providential' . . . or 'clear,'" infusing a judicial opinion with the aura of inevitability and certitude.[423]

In the case of *Guaranty Trust*, as in judicial discourse generally, masking the transformative nature of certain judicial opinions has the salubrious effect of enhancing the appearance of law's stability and consistency.[424] *Erie* and *Guaranty Trust* announced a return to the Framers' wise design, and *Swift* and its progeny were a departure from that design that resulted from institutional- and economic-power distortions and misguided jurisprudential thought. Seen in this light, *Erie* may have marked an "avulsive change," but it was a change that inevitably amounted to no change at all. Instead, it returned the

421. *See supra* note 90 and accompanying text.

422. For an eloquent discussion of this general trend, coincidentally focusing on the judicial craftsmanship of Justice Frankfurter, see Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990), and see also Horwitz, *supra* note 23.

423. Ferguson, *supra* note 422, at 215.

424. *See* KALMAN, *supra* note 389, at 180 ("[A]uthors of lawyers' legal history value text, continuity, and prescription."); Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057, 1057 (1981) ("By and large, the dominant tradition in Anglo-American legal scholarship today is unhistorical. It attempts to find universal rationalizing principles.").

federal judiciary to the timeless institutional arrangements implemented by our prescient eighteenth-century ancestors.

By analyzing the history of judge-made law in the federal courts through the lens of equity, however, we see that the story is not one of stasis or return. Rather, it is a story of change. Given what Justice Frankfurter believed to be at stake in *Guaranty Trust*, it is little wonder that he sought to limit the precedential force of over a century of case law that could be used to support the exercise of nonstate equitable principles by federal judges. However, his description of the history of federal equity should not be understood as a declaration of an unalterable truth about federal judicial power. Nor should it be viewed as the restoration of the original meaning of Article III or the Rules of Decision Act through further repudiation of *Swift v. Tyson*. It should instead be understood as a product of significant shifts in the political and ideological alignment of the Supreme Court and of the changed institutional needs and capacities of the federal judicial system.