



**A CHALLENGE TO “EQUITABLE  
ORIGINALISM” – THE HISTORY OF  
INJUNCTIONS AS A PRINCIPLE-BASED  
ADAPTABLE JUDICIAL POWER**

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## INTRODUCTION

“Equitable originalism” is a judicial philosophy that asserts federal courts can only issue equitable remedies that were used in English chancery courts at the time of America’s founding. Accordingly, federal courts cannot issue newer types of injunctions, such as structural or nationwide injunctions, without congressional authorization. This historical analysis asks whether the original meaning, history or tradition of federal equitable remedies crystalized injunctive power as it was in England in the 1780s. The answer is no. Article III, federal legislation, rules of court, caselaw and treatises from the late 1700s through the early 1900s illustrate that the founders created federal courts’ equitable remedial power as a principle-based jurisdiction that was expected to adapt to changing circumstances.

The U.S. Supreme Court is ripe to weigh in on when, if ever, nationwide injunctions are allowable as the practice proliferates in politically-charged cases. Disallowing nationwide injunctions by looking backward at history and tradition could have significant consequences for federal equity jurisdiction and injunctive relief. As such, an accurate historical picture of the U.S. reception of equity and injunctive power is necessary. Nationwide injunctions have many faults, but the fact that they did not exist in English chancery courts in the 1780s is not one of them.

Part II tracks the equitable originalism approach to injunctive power from *Grupo Mexicano* in 1999 through the recent concurrences by Justices Thomas and Gorsuch. Part III traces remedial equity, particularly injunctions, from the 1300s in England to the U.S. colonies and subsequently through ratification of Article III of the U.S. Constitution and 1789 Judiciary Act. This section also analyzes the federal Process Acts of 1789, 1792 and 1828, and federal rules of court from 1791 through promulgation of the Federal Rules of Civil Procedure in 1938. These sources do not implicitly or explicitly characterize equity as limited to English chancery practice in the 1780s. Part IV analyzes caselaw and treatises from the late 1700s through the early 1900s to illustrate the reception of equity as a principle-based system, with a focus on the adequacy of legal remedies as the principle underlying injunctive power. Part V

analyzes these same sources to show that early U.S. conceptions of equity and injunctions anticipated that they would adapt to changing circumstances. This adaptation was necessary for equity to continue to serve an ameliorative function relative to the ever-changing common law.

Part VI questions the equitable originalism approach to injunctive power. Because the meaning, history, tradition and purpose of federal injunctive power was a principle-based jurisdiction that would adapt to changing circumstances, there is nothing originalist or based in history and tradition justifying a crystallized concept of injunctive power as it existed in England in the 1780s. The validity of “newer” injunctions, such as nationwide injunctions, should not be based on inaccurate historical conceptions of the U.S. reception of English equitable remedies.

#### I. INJUNCTIONS THROUGH THE EQUITABLE ORIGINALISM LENS

For decades, a contingent of U.S. supreme court justices have relied on “history and tradition” to reject a broad view of federal courts’ power to issue injunctions. According to this judicial philosophy, when the founders drafted and ratified Article III, extending “the judicial power” to “all cases, in Law and Equity” they meant equitable power as it existed in English chancery courts in the 1780s.<sup>1</sup> Therefore, new exercises of equitable power which did not exist at the time, such as structural injunctions and nationwide injunctions, are prohibited without an express grant of such power by congress.

Justice Thomas’ concurrence in *Missouri v. Jenkins* in 1995 was the first extensive exposition of the argument that one must look to English equity court practice at the time of founding to discern the modern scope of the courts’ injunctive power.<sup>2</sup> *Jenkins* involved a long-term structural injunction addressing school segregation. The district court issued an injunction that included a requirement that the defendant school district increase teachers’ salaries. In a 5-4 opinion, *Jenkins* found this aspect of the lower court’s injunction exceeded the court’s allowable exercise of remedial authority.

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<sup>1</sup> U.S. CONST. art. III, § 2 (emphasis added).

<sup>2</sup> *Missouri v. Jenkins*, 515 U.S. 70, 126-31 (1995).

Justice Thomas' concurrence relied on cases involving the contempt power to support the assertion that the Court should be "reluctant" to approve lower courts' use of "inherent judicial power" in an "aggressive or extravagant" manner.<sup>3</sup> Instead, he argued, "we should exercise it in a manner consistent with our history and traditions."<sup>4</sup> Justice Thomas cited to English historical sources, such as Blackstone and other treatises, and U.S. sources, such as the Federal Farmer, Justice Story's Commentaries on Equity Jurisprudence, and the Federalist No. 83, to conclude that equity was received by the founders as "controlled no less by rules and practices than was the common law."<sup>5</sup>

The first and so far only big win for the equitable originalism approach to injunctive power was Justice Scalia's 1999 majority opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*<sup>6</sup> In that case, an investment fund purchased unsecured notes from Grupo Mexicano, which subsequently defaulted. Concerned that Grupo Mexicano's assets would disappear, when the bond fund sued on the notes, it sought and obtained a preliminary injunction prohibiting Grupo Mexicano from transferring assets from the U.S. District Court for the Southern District of New York. The Second Circuit affirmed. One issue before the U.S. Supreme Court on appeal was whether the district court had power to issue a preliminary injunction prohibiting the transfer of assets in which no lien or equitable interest was asserted. The Court reasoned that its authority stemmed from the Judiciary Act, which conferred jurisdiction on federal courts over "all suits . . . in equity"<sup>7</sup> and Fed. R. Civ. P. 65,

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<sup>3</sup> *Id.* at 124.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 130.

<sup>6</sup> 527 U.S. 308 (1999). For additional discussions of *Grupo Mexicano*, see Caprice Roberts, *Remedies, Equity & Erie*, 52 AKRON L. REV. 493, 528 (2018); Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1326–27 (2023); Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 895–96 (2023); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 234 (2003); James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 730 (2020); Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451 (2014).

<sup>7</sup> An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73 (Sept. 24, 1789) [hereinafter Judiciary Act of 1789].

which governs preliminary injunctions and temporary restraining orders.<sup>8</sup>

Relying on a handful of cases and treatises, the majority held it could only issue relief “traditionally accorded by courts of equity” at the time of the U.S. founding.<sup>9</sup> The Court interpreted that to mean “[w]e must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.”<sup>10</sup> The Court then looked at historical sources, including equity treatises and cases from the 1800s and English legal sources, to conclude “[b]ecause such a remedy was historically unavailable from a court of 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 respondent’s contract claim for money damages.”<sup>11</sup>

The dissent characterized the majority’s approach as “an unjustifiably static concept of equity jurisdiction.”<sup>12</sup> The dissent reasoned “[f]rom the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England. . . . we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.”<sup>13</sup> The dissent suggested that English chancery courts may not have granted preliminary injunctions for unsecured creditors because “they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth.”<sup>14</sup> The dissent concluded that “it is one thing to recognize that equity courts typically did not provide this relief, quite another to conclude that, therefore, the remedy was beyond equity’s capacity.”<sup>15</sup>

In response to the dissent, Justice Scalia responded:

We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined

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<sup>8</sup> *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318.

<sup>9</sup> *Id.* at 319. For a discussion of *Grupo Mexicano*’s faulty characterization of several cases relied upon, see Keenan, *supra* note 6, at 895–97.

<sup>10</sup> *Grupo Mexicano*, 527 U.S. at 319 (Ginsburg, J., dissenting).

<sup>11</sup> *Id.* at 333.

<sup>12</sup> *Id.* at 336.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 338.

<sup>15</sup> *Id.*

within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a ‘default rule’ [ ] not of flexibility but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design an appropriate remedy.<sup>16</sup>

The next expansive discussion of the equitable originalism view of injunctive power came in Justice Thomas’ concurrence in *Trump v. Hawaii* in 2018.<sup>17</sup> Thomas began by discussing the negative aspects of nationwide injunctions, including that they prevent legal questions from percolating through the courts, encourage forum shopping, and “mak[e] every case a national emergency for the courts and for the Executive Branch.”<sup>18</sup> He expressed skepticism that “district courts have the authority” to enter such injunctions, which “did not emerge until a century and a half after the founding” and “appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.”<sup>19</sup> He cited to his concurrence in *Jenkins, Grupo Mexicano*, a number of historical sources discussed in Sections IV and V below (many of which he cited in *Jenkins*), and recent scholarship expressing concern about nationwide injunctions.<sup>20</sup> Additionally, Thomas noted that “American courts of equity did not provide relief beyond the parties to the case,” and any benefit to nonparties was “merely incidental.”<sup>21</sup>

In 2020, Justice Gorsuch wrote a concurrence in *Department of Homeland Security v. New York* staying a preliminary injunction enjoining immigration-related administrative rules, which Justice

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<sup>16</sup> *Id.* at 322. Justice Scalia raised similar concerns in his dissent, which Justice Thomas joined, in *Brown v. Plata*, 563 U.S. 493, 554-45 (2011), arguing that structural injunctions such as the prison population reduction order in that case “depart” from “historical practice” disfavoring injunctions beyond “a single simple act.”

<sup>17</sup> *Trump v. Hawaii*, 138 S.Ct. 2392, 2425-29 (2018).

<sup>18</sup> *Id.* at 2425.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2425-29.

<sup>21</sup> *Id.* at 2427.

Thomas joined.<sup>22</sup> Gorsuch wrote, “[u]niversal injunctions have little basis in traditional equitable practice” and observed “[i]t has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice.”<sup>23</sup>

In 2021, in *Whole Woman’s Health v. Jackson*, the Court considered plaintiffs’ request to enjoin the Texas Attorney General and additional unnamed private persons from enforcing the Texas Heartbeat Act, which allowed private civil actions against persons performing abortions outside a medical emergency.<sup>24</sup> Writing for the majority, Justice Gorsuch wrote “[t]he equitable powers of federal courts are limited by historical practice,” and noted Second Circuit precedent stating that “[a] court of equity is as much so limited as a court of law.”<sup>25</sup> While *Whole Woman’s Health* acknowledged “[c]onsistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions,” it cautioned “no court may ‘lawfully enjoin the world at large,’ [] or purport to enjoin challenged ‘laws themselves.’”<sup>26</sup>

Eight justices agreed that a plaintiff can seek a pre-enforcement injunction against state executive officials with authority to enforce a state law challenged on constitutional grounds. Departing from the other justices on which state officials had enforcement authority to enforce the Texas law, Justice Thomas wrote a partial concurrence. He cited to *Grupo Mexicano* and his concurrence in *Jenkins*, and stated “a federal court’s jurisdiction in equity extends no further than ‘the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.’”<sup>27</sup> This statement implies a

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<sup>22</sup> Dep’t of Homeland Sec. v. New York, 140 S.Ct. 599, 599 (2020). For a discussion of this decision, see James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1273 (2020).

<sup>23</sup> Dep’t of Homeland Sec., 140 S.Ct. at 600.

<sup>24</sup> *Whole Woman’s Health v. Jackson*, 142 S.Ct. 522 (2021).

<sup>25</sup> *Id.* at 535.

<sup>26</sup> *Id.* (citing *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 141 S.Ct. 2494, 2495 (2021)).

<sup>27</sup> *Id.* at 540 (citing *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund*, 527 U.S. 308, 318). In *Grupo Mexicano*, the court stated, “We have long held that ‘[t]he “jurisdiction” thus conferred ... is an authority to administer in equity suits the

categorical approach that is a more extreme version of the equitable originalism seen in *Grupo Mexicano*.<sup>28</sup>

These recent cases strongly suggest that nationwide injunctions will be the next test case for the equitable originalism philosophy of federal injunctive power.<sup>29</sup> Scholars have shown a recent interest in the history of nationwide injunctions, assuming that *Grupo Mexicano* requires proof that nationwide injunctions were utilized in the 1780s to justify their use today.<sup>30</sup> A decision limiting injunctive power based on the reasoning used in these recent concurrences would have

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principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Id.* However, *Grupo Mexicano* cited to *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939), which, as discussed below, in fact was referring to *principles* of English equity. *See id.* ("The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the *principles* of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.") (emphasis added).

<sup>28</sup> See Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1795 (2022) ("*Grupo Mexicano* itself recognizes that some development in equity is necessary, and this has long been the position of the Court.>").

<sup>29</sup> See Owen Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1218 (2023) ("[L]ike the Court's revival of equity in general, its reliance on history shows no sign of abating."); Fallon, *supra* note 6, at 1352 ("It seems likely that the Supreme Court will soon address the permissibility of so-called universal injunctions that confer protections on nonparties as well as parties."). One scholar notes that in addition to remedies, originalists are showing expanded interest in civil procedure, which she coins "procedural originalism." See Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 966-68 (2023) ("A heated debate has recently been raging concerning the legality and propriety of nationwide or 'universal' injunctions" . . . . A core plank of the legal case against these injunctions is that they are inconsistent with the original meaning of Article III . . . .").

<sup>30</sup> See, e.g., Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) (arguing that the universal injunction is not a recent invention); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1080-81 (2018) (arguing that "bills of peace" are a more circumscribed historical antecedent to nationwide injunctions). Frost argues that "the historical understanding of 'judicial Power' does not bar modern courts from issuing broad equitable relief affecting nonparties in response to sweeping executive orders and actions" and "historical antecedents such as the bill of peace illustrate that federal courts have long exercised such authority." *Id.* See also Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425 (2017) ("The equitable doctrines and remedies of the federal courts must find some warrant in the traditional practice of equity, especially as it existed in the Court of Chancery in 1789.").

far reaching implications for the contours of federal equity jurisdiction more broadly.<sup>31</sup>

## II. HISTORICAL OVERVIEW OF THE U.S. RECEPTION OF ENGLISH EQUITY AND INJUNCTIONS.

English equity courts began using injunctions in the 1300s as a mechanism for litigants for whom common law courts provided inadequate redress. Over time, a set of principles developed in English equity courts applicable to the chancellor's ability to issue injunctions. U.S. colonists utilized English equitable remedies and adapted them to the unique circumstances in the U.S. colonies. Article III of the U.S. Constitution, the 1789 Judiciary Act, the Process Acts of 1789, 1792 and 1828, the U.S. Supreme Court Rules of 1791, Equity Rules of 1822, 1866, 1912 and Fed. R. Civ. P. 65 recognized U.S. federal courts' equitable remedial power as a principle-based adaptable judicial power.

### A. The rise of English equity courts, equitable principles and injunctions.

After the Norman conquest of the Anglo-Saxons in the 11th century, the Normans set up a centralized administration of justice. The Norman kings utilized advisory councils, including a Select Council composed of various officers, and a Great Council, which met less frequently and was the precursor to English Parliament.<sup>32</sup> The Select Council served judicial functions for the first several hundred years of Norman rule largely through the Chancellor and

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<sup>31</sup> See Fallon, *supra* note 6, at 1353-54 (noting "[i]f traditional practice and especially practice in 1789 were taken as fixing the outer bounds of federal equity jurisdiction under Article III, broadly worded congressional authorizations of injunctions under a variety of modern statutes — and judicial practice in awarding them — could also be in constitutional jeopardy"); Pfander & Formo, *supra* note 6, at 729 ("Inflexibly linking equitable remedies to the past offers little hope for a supple remedial jurisprudence that can respond to current challenges . . ."); Haines, *supra* note 6, at 478-91 (discussing problems arising out of formalism and noting equitable originalism as seen in *Grupo Mexicano* guts equitable jurisdiction by requiring that the legislature, as opposed to federal courts exercising equity jurisdiction, is the only avenue to address injustices when legal remedies are inadequate); John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1920 (2022) ("The suggestion that the Constitution thereby adopts equity as it stood in 1788 cannot be sustained.").

<sup>32</sup> 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 328 (1846).

officials who resolved disputes in common law and other royal courts. Chancellors issued writs that entitled parties to proceed in common law courts.<sup>33</sup>

As the writ system atrophied and litigants became frustrated with limited remedial options available in common law courts, aggrieved parties petitioned the Crown directly for redress, which would refer such petitions to the Chancellor.<sup>34</sup> Both common law courts and equity courts were royal courts. Common law courts had jurisdiction based on royally-issued writs, and equity courts had jurisdiction based on the Crown delegating the function of responding to direct petitions to the Chancellor.<sup>35</sup> Orders in the name of the Crown by chancellors with the threat of contempt for noncompliance were available remedies as far back as the 1200s.<sup>36</sup>

Chancellors were usually bishops, who decided petitions not based on existing writs, but upon request to the Crown acting directly on the defendant's conscience.<sup>37</sup> In the first several centuries of equity jurisdiction, equity was God's law as exercised by an ecclesiastical official of the divine monarch and intervened only "when the law [was] directly in itself against *law of God*, or *law of*

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<sup>33</sup> David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 550 (1986) (noting that the Chancellor "issued the common law writs"); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915 (1987) ("The Chancellor's staff, the Chancery, sold writs, 'royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant.'") (citing S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 22 (1969)).

<sup>34</sup> SPENCE, *supra* note 32, at 346 (stating that in the 1300s, "[p]etitions for extraordinary remedies were still presented to the king, but they were usually referred by him to the Chancellor"). See also Gallogly, *supra* note 29, at 1237 ("[L]itigants began seeking relief directly from the king in his role as fountain of justice.").

<sup>35</sup> See SPENCE, *supra* note 32, at 338 ("[the Crown] conferred a general authority to give relief in all matters of what nature soever requiring the exercise of the Prerogative of Grace—differing from the authority on which the jurisdiction of the courts of common law was founded; for there the court held jurisdiction, in each particular case, by virtue of the delegation conferred by the particular writ, and which could only be issued in cases provided for by positive law.").

<sup>36</sup> SPENCE, *supra* note 32, at 369 (mentioning penalties for disobeying subpoena); DAVID EADY & A.T.H. SMITH, ARLIDGE, EADY AND SMITH ON CONTEMPT 1 (3d. ed. 2005) ("[c]ertainly from about 1250 onwards, the Rolls and Year Books contain references to contempt of court").

<sup>37</sup> See Anna Conley, *Comparing Essential Components of Transnational Jurisdiction: A Proposed Comparative Methodology*, 31 TUL. J. INT'L & COMPAR. L. 1, 12-13 (2023); Spence, *supra* note 32, at 334, 407-08; Subrin, *supra* note 33, at 918-19 ("The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's conscience.").

reason.”<sup>38</sup> “Conscience” as an early equitable principle was akin to the concept of the duty of good faith.<sup>39</sup>

“Equity” had natural law roots, with an emphasis on the Greek and Roman understanding of equity as an ameliorative supplement to generalized laws.<sup>40</sup> In short, “[t]he aim of the equity courts was to make the [defendant] *do* what was right.”<sup>41</sup> Although no longer linked to divinity or monarchical power, this concept is the seed of equity as a corrective function when general application of law created unjust results that still guides equity jurisdiction today.

Over time, “an orderly system of equitable principles, doctrines, and rules began to be developed out of the increasing mass of precedents, [and] this theory of a personal conscience was abandoned” and morphed into the idea of justice based on equity and fairness.<sup>42</sup> Developing precedent through reported cases allowed principles to develop, resulting in equity becoming “a system of positive jurisprudence, peculiar indeed, and differing from the common law, but founded upon and contained in the mass of cases already decided.”<sup>43</sup> Conscience and divine morality gave way

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<sup>38</sup> ST. GERMAIN, DOCTOR AND STUDENT (1523), translated and excerpted by SPENCE, *supra* note 32, at 409. *See also* SPENCE, *supra* note 32, at 411; Conley, *supra* note 37, at 12.

<sup>39</sup> SPENCE, *supra* note 32, at 411; S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 94 (2d. ed. 1981); ROSCOE POUND & THEODORE F.T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 210 (1927). *See also* Gallogly, *supra* note 29, at 1233 (discussing “conscience-based equity” from the 1300s to the 1500s).

<sup>40</sup> *See e.g.*, RICHARD WOODDESSON, LECTURES ON THE LAW OF ENGLAND, LECTURE VII GENERAL NATURE OF EQUITY 145 (1842) (discussing equity with reference to “[t]he Aristotelian definition . . . ‘The nature of equity is the correction of the law where it is defective by reason of its universality’”) (citations omitted); SPENCE, *supra* note 32, at 412.

<sup>41</sup> FREEMAN OLIVER HAYNES, OUTLINES OF EQUITY 22 (1858). *Accord* Earl of Oxford’s Case, (1615) 21 Eng. Rep. 485, 486 (Ch) (“The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.”).

<sup>42</sup> JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 58, 59 (1881); SPENCE, *supra* note 32, at 416. One scholar recently defined this development as moving from “conscience-based equity” to “precedent-based equity” *See* Gallogly, *supra* note 29, at 1245.

<sup>43</sup> POMEROY, *supra* note 42, at § 59; 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*434 (Wayne Morrison ed., 9th ed. 2001) (1973) (“[T]he systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law; but varied by different usages in the forms and modes of their proceedings: the one being originally derived

to doctrines of equity.<sup>44</sup> By the second half of the 1500s, “settled principles of equity had been formed, and precedents were established and commonly referred to as of authority.”<sup>45</sup> Equitable principles took two forms. First, “maxims of equity” such as clean hands, laches, and equity follows the law. Second, “heads of jurisdiction” represented the general categories of cases in which equity courts administered substantive and remedial equitable jurisdiction, such as trusts.<sup>46</sup>

### B. Injunctions in English Equity Courts

Early Norman sovereigns took prevention of injury to property seriously, likely because all property was owned by the Crown.<sup>47</sup> The idea of preventative justice involving land and waste surfaced early.<sup>48</sup> Preventative justice seeks to prevent injury prior to it occurring, as opposed to compensating for injury after it occurs. English common law courts were not designed to provide preventative justice.<sup>49</sup> As succinctly explained by Spence, “generally speaking the remedies afforded by the common law were partial and temporary [], or only to be obtained after the mischief was done.”<sup>50</sup> This created a need for a separate entity to provide preventative justice, which was filled by Chancellors issuing injunctions in the name of the Crown.<sup>51</sup> Chancellors could order remedies based on

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(though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.”).

<sup>44</sup> POMEROY, *supra* note 42, at § 59.

<sup>45</sup> SPENCE, *supra* note 32, at 394.

<sup>46</sup> *Id.* at 429–42. *See also* Bray & Miller, *supra* note 28, at 1764 (describing heads of equity as “recurring pattern of equitable intervention”).

<sup>47</sup> SPENCE, *supra* note 32, at 668.

<sup>48</sup> *Id.* at 668–69.

<sup>49</sup> *Id.* at 669 (“But preventive justice by direct means does not appear to have been suited to the scheme of common law procedure, and the efforts of the legislature were chiefly directed to arming the common law with the means of punishment and restitution.”).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 337 (describing how, in the rein of Edward III, “the Court of Chancery appears as a distinct court for giving relief in cases which required Extraordinary remedies”); Raack, *supra* note 33, at 554 (“Chancery did not have many cases when it first began to operate as a court; its caseload was small before 1417, but then began to grow rapidly. Between 1420 and 1450, Chancery’s business increased dramatically. By 1450, Chancery’s popularity among litigants made it the fourth major court at Westminster.”).

royal power delegated from the Crown, such as injunctive relief backed by the threat of contempt, which was generally not an available remedy at common law with few exceptions.<sup>52</sup>

Chancellors likely created the injunction from the Roman law tool of an interdict, by which a Praetor could direct defendants to do or not do certain things.<sup>53</sup> Writs of Prohibition, which were only available in real property cases after judgment in common law courts, are also pointed to as a precursor of the chancery court injunction.<sup>54</sup> The first recorded instance of an injunction is from the reign of Richard II (late 1300s), with chancery courts issuing them moving forward.<sup>55</sup>

For the next several hundred years, chancery courts ordered injunctions in a variety of cases, including real and personal property, tort, and contract cases. “[T]he single thread running through all of them was . . . that Chancery cases generally reflected some defect in the common law system, and it is illuminating to examine injunction cases in light of the shortcomings in the common law that they attempted to rectify.”<sup>56</sup> Inadequacies in common law courts occurred where no appropriate common law remedy existed, a common law remedy existed but was inadequate for a case-specific reason, or litigants were misusing common law procedures.<sup>57</sup>

English chancery courts would grant interlocutory injunctions to avoid irreparable injury. For example, such injunctions would issue “in cases where irreparable mischief may be done as in cases of waste . . . and perhaps in a plain case of nuisance.”<sup>58</sup> English chancery

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<sup>52</sup> Subrin, *supra* note 33, at 919 (“The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages.”).

<sup>53</sup> See SPENCE, *supra* note 32, at 669–71. For a detailed discussion of historical sources analyzing the interdict’s influence on chancellors using injunctions, see Raack, *supra* note 33, at 541, n.7.

<sup>54</sup> Raack, *supra* note 33, at 550.

<sup>55</sup> SPENCE, *supra* note 32, at 673–74; Raack, *supra* note 33, at 555 (“Injunctions appeared in Chancery as early as the 1390’s.”).

<sup>56</sup> Raack, *supra* note 33, at 555. See also Subrin, *supra* note 37, at 920 (“In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law.”).

<sup>57</sup> Raack, *supra* note 33, at 555–58.

<sup>58</sup> 2 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE COURT OF CHANCERY 217 (4th Am. ed. 1832); GEO TUCKER BISPHAM, PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF

courts would also preliminarily enjoin infringement of a copyright or patent “on affidavit and certificate” from the patent holder.<sup>59</sup>

For centuries, chancery courts enjoined litigants from proceeding in common law courts, or from enforcing common law court judgments.<sup>60</sup> In the early 1400s, a centuries-long power struggle began between English common law courts and parliament on the one hand and chancery courts on the other.<sup>61</sup> Despite common law courts’ origin as royal courts, they came to be associated with Parliament, while chancery courts were associated with royal power given that chancellors resolved disputes as direct agents of the crown.<sup>62</sup> Spence notes that despite this,

it was admitted by the Commons [Parliament] . . . that there were some cases in respect of which no remedy, or at least no effectual remedy, could be obtained, by the ordinary course of law, and over which the Court of Chancery might justifiably exercise jurisdiction. Nor was this altogether denied by the judge of the courts of common law.<sup>63</sup>

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CHANCERY pt. 3, § 440, at 611 (7th ed. 1905) (“[w]here, however, the emergency is pressing, and the threatened damage would be irreparable, and the plaintiff makes out a fair *prima facie* title, even though that title may be disputed, in such a case a special injunction ought to issue, but at the same time the complainant ought to take diligent steps to have his legal right tried and established”).

<sup>59</sup> MADDOCK, *supra* note 58.

<sup>60</sup> SPENCE, *supra* note 32, at 371, 673 (“the most frequent exercise of the jurisdiction of the Court in granting injunctions, was to restrain proceedings at law” and noting in the early 1600s, “an injunction to stay proceedings at law, might, as now [1846], be obtained as of course, where the defendant made default in appearing or answering”); Raack, *supra* note 33, at 568 (“it was not unusual [in the 1500s], for the Chancery to issue injunctions that prevented the parties from continuing an action or enforcing a judgment at law”); Bispham, *supra* note 58, pt. 3, § 407, at 564, n.1 (“[i]t is well established that equity will interfere to restrain proceedings at law wherever through fraud, mistake, accident or want of discovery one of the parties in a suit at law obtains, or is likely to obtain, an unfair advantage over the other so as to make the legal proceedings an instrument of injustice” and setting forth cases). See *e.g.*, Earl of Oxford’s Case, (1615) 1 Ch. Rep. 1, 21 Eng. Rep. 485 (Ch) (“when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside”).

<sup>61</sup> This centuries-long tension is discussed at length in Raack, *supra* note 33.

<sup>62</sup> Raack, *supra* note 33, at 559–61.

<sup>63</sup> SPENCE, *supra* note 32, at 349. Spence notes the first answer recorded printed in the Chancery calendars included the defense that the plaintiff had a remedy at common law. *Id.* at 373.

In the early 1600s, a dispute arose between Lord Chancellor Ellesmere and Justice Coke.<sup>64</sup> Justice Coke asserted that equity courts could not enjoin common law proceedings or the execution of common law judgments.<sup>65</sup> Chancellor Ellesmere defended the practice as follows: “When a judgment [of the Common Law Courts] is obtained by oppression, wrong and a hard conscience, the Chancellor will frustrate and set is aside, not for any error or defect in the judgment, but for the hard conscience of the party.”<sup>66</sup> Equity’s ability to enjoin other royal courts persevered because of its corrective function, its deep roots in the English legal system, and its close connection to the Crown.

In the early 1800s, John Mitford listed various bases for chancery jurisdiction, including (1) when common law courts give a right but do not have sufficient powers to afford a complete or adequate remedy, (2) when common law courts are made instruments of injustice, (3) when positive law is silent and “principles of universal justice” necessitate interference to prevent a wrong, (4) to “remove impediments to the fair decision of a question in another court,” (5) to preserve property in danger of being “dissipated or destroyed,” (6) to “restrain the assertion of doubtful rights” to avoid irreparable damage, (7) to prevent injury to a third person by the “doubtful title of others,” (8) to stop “vexatious and oppressive litigation, and prevent multiplicity of suits,” (9) to compel discovery, and (10) to preserve testimony.<sup>67</sup> All of these focus on the inadequacy of legal remedies, avoiding irreparable injury and the need to supplement common law courts. English scholars did not see equity jurisdiction as only allowable in a certain set of situations or cases, but as based

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<sup>64</sup> Raack, *supra* note 33, at 573-83.

<sup>65</sup> *Id.* at 575-76.

<sup>66</sup> Earl of Oxford’s Case, 21 Eng. Rep. 485, 487 (1615).

<sup>67</sup> See JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, BY ENGLISH BILL 133 (Josiah Smith ed., V. & R. Stevens and G.S. Norton, 5th ed. 1847) (1787).

on these principles.<sup>68</sup> As English courts developed, these principles acted as sideboards limiting chancery courts' jurisdiction.<sup>69</sup>

Throughout the 1600s, equity rules of court created heightened procedural requirements for the issuance of injunctions.<sup>70</sup> Improvements in common law courts made enjoining common law proceedings less necessary.<sup>71</sup> However, by the 19th century, the English legal community was fed up with the concurrent system, and rallied for legal reform.<sup>72</sup> The Judicature Act of 1873 merged equity and common law courts into a single high court with several divisions.<sup>73</sup> The chancellors' powers to apply equitable legal

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<sup>68</sup> *Id.* at 155-56 (principles of law guiding common law courts were "principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. Hence it has happened that, according to principles of natural and universal justice, there are many rights for injuries to which the law, as administered by those courts, has provided no remedy"). *See also id.* at 169 ("[c]ourts of equity will also prevent multiplicity of suits; and the cases in which it is attempted, and the means used for that purpose, are various").

<sup>69</sup> *See id.* at 164 ("[i]n all cases in which the interference of a court of equity is thus sought, if the bill should not clearly show the title of the plaintiff, or his right to demand the assistance of the court in his favor, or that the case is one to which the court will apply the remedy sought the defendant may demur"). *See also* MITFORD, *supra* note 67, at 155 (if a bill seeking equitable relief in a number of specific cases "does not show a sufficient ground for a court of equity to interfere, the defendant may demur for want of matter of equity"); 1 MADDOCK, *supra* note 58, at v ("aside from discretionary decisions regarding costs, "the system of our Courts of Equity is a labored, connected system, governed by established rules, and bound down by precedents, from which the judges do not depart . . ."); Samuel Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1010, 1012 (2015) (in 1789, "the 'hardening' of equity had already happened, and the chancellor had developed principles and rules for the exercise of his equitable discretion").

<sup>70</sup> Raack, *supra* note 33, at 585 ("[a]fter 1616 . . . there was a growing practice of citing cases - a practice which was "helping not only to settle still more exactly the true sphere of the court's jurisdiction, but also to make some fixed rules for the exercise of the chancellor's discretion""") (citing 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 337 (A. Goodhart & H. Hanbury eds. 1924)) (further citations omitted).

<sup>71</sup> Raack, *supra* note 33, at 585-91.

<sup>72</sup> *See* WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 634 (3d ed. 1922) ("[o]ne of the most inconvenient of all the anomalies which disfigured the English judicial system was the ill-defined and clashing jurisdictions of the various courts which administered the law"). For a discussion of the reform movement leading up to the 1873 Act, *see id.* at 634-38. This includes a discussion of the Common Law Procedure Act of 1854, which was a more limited precursor of the 1873 Act that attempted unsuccessfully to give limited equity powers to common law judges and limited common law powers to chancellors. *Id.* at 636-37.

<sup>73</sup> Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66. The Queen's Bench, Exchequer and Common Pleas divisions were subsequently consolidated into the Queen's Bench in 1881. *See also* K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 199 (3d ed. 1998).

principles and procedures and order equitable legal remedies were bedrock fundamentals of the merged courts.<sup>74</sup> Equity was meant to supplement and coexist peacefully with the common law in this new paradigm.<sup>75</sup>

### C. Remedial equity and injunctions received by the U.S. legal system as a legal transplant.

#### 1. *Equity and U.S. colonies prior to ratification.*

Concepts of equity did not flow directly from England to the ratification of Article III of the U.S. Constitution in 1788, but percolated through two centuries of colonial legal systems. At the time of ratification, all U.S. colonies had functioning courts and their own state constitutions. Because equity was associated with royal power, equity as a judicial power received a “mixed reception in the colonies” resulting in “significant variation of equity practices in the individual states.”<sup>76</sup> The colonies varied in their equity practices and debated equity’s reach and impact on the right to a jury trial.<sup>77</sup> In all the colonies, even those that accepted equity as practiced in English chancery courts, equity was modified by “local statutes, usages, and decisions” resulting in “far more deviations” from English equity

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<sup>74</sup> Supreme Court of Judicature Act, 1873, § 24.

<sup>75</sup> HAROLD POTTER, INTRODUCTION TO ENGLISH LEGAL HISTORY 91 (2d ed. 1926) (equity “is merely a supplement to or gloss on the [common law] and not an attempt to overrule it”); *See also* Chancellor Loreburn’s Answers to Mr. Justice Lurton’s Questions, 1912, set forth in JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 28 (2d. ed. 1918) (the merger of law and equity in England in 1873 had the “practical benefit” that “a litigant can no longer be tossed about from one of the King’s Courts to another, at great cost, and with needless delay, upon the grounds which have no justification of utility or public policy”).

<sup>76</sup> Kristin Collins, *A Considerable Surgical Operation: Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 267 (2010). *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 21 (3d ed. 2005) (“hostility to chancery courts [by the colonies] was fairly widespread in the eighteenth century”); Gallogly, *supra* note 29, at 1282 (“[e]quity was controversial in the American colonies” and “colonial government adopted diverse approaches to incorporating equity in their respective legal systems”); Subrin, *supra* note 33, at 926 (“many colonists distrusted separate equity courts. Equity represented uncontrolled discretion and needless delay and expense”). For a summary of colonies’ various receptions of equity, see Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, 18 AM. L. REV. 226 (1884), reprinted in 2 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908).

<sup>77</sup> Collins, *supra* note 76, at 269.

than from English common law in the colonies.<sup>78</sup> Some states created separate equity courts like England, and some did not. Some states gave courts or the governor power to apply equitable powers, and some significantly limited it.<sup>79</sup>

Despite variations, in the colonies “the practical need for equity was overwhelming.”<sup>80</sup> Why? Because of equity’s corrective function where legal remedies were inadequate. In Federalist No. 80, Hamilton wrote: “It has also been asked, what need of the word ‘equity’? What equitable causes can grow out of the Constitution and laws of the United States?”<sup>81</sup> Hamilton observed the corrective function of equity vis-à-vis the common law to, for example, provide “relief against what are called hard bargains” in cases involving fraud, accident, trust, hardship, deceit or agreements to convey lands claimed under the grants of different states.<sup>82</sup> “In such cases, where foreigners were concerned on either side, it would be impossible for

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<sup>78</sup> Joseph Story, *An Address Delivered Before the Members of the Suffolk Bar, at their Anniversary, at Boston* (Sept. 4, 1821), in 1 AM. JURIST 1, 22 (1829), cited by Collins, *supra* note 76, at 268. Accord G.T. Bispham, *Law In America, 1776-1876*, 250 N. AM. REV. 122, 169 (1876) (noting some changes in the law of private rights and the common law between England and the U.S. can be traced “to ideas which flourished in the Colonies during the ante-Revolutionary period” which were “the outgrowth of changed political conditions which had existed from the very early periods in colonial history”); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 796 (1951) (“[i]n view of the conditions which existed in America during the 17th century and early part of the 18th century, it is readily apparent that the English system of court organization and substantive and adjective law which it applied, could not have been duplicated *in toto* in the American colonies, and no scholar argues that it was.”); 1 JULIUS GOEBEL JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* 511 (1971) (“[t]he English form and practice books had been the sires and dams of all the American systems, but the indicia of origin were not everywhere manifest in equal degree because something of the history of each colony or province had bred characteristic changes into its law”); MAX RADIN, *RADIN ON ANGLO-AMERICAN LEGAL HISTORY* 22 (West Pub. 1936) (“[t]he development of [the United States] was by no means merely a record of the transplantation of full-grown English institutions to a new territory. These institutions suffered profound modification by the selective process inherent in colonization and above all by the physical and social background of what is in general called ‘the frontier’”).

<sup>79</sup> Collins, *supra* note 76, at 267.

<sup>80</sup> *Id.*

<sup>81</sup> THE FEDERALIST NO. 80 (Alexander Hamilton) (1788). See also Gallogly, *supra* note 29, at 1227, 1261 (discussing this source); Keenan, *supra* note 6, at 896-97 (arguing originalist interpretations of equity should not rely on Hamilton or Blackstone because neither “advocated a static view of equity” but “[t]hey simply recognized that, by the eighteenth century, England’s Chancery Court followed precedent”).

<sup>82</sup> THE FEDERALIST NO. 80, *supra* note 81. See also Collins, *supra* note 76, at 269.

the federal judicatories to do justice without an equitable as well as legal jurisdiction.”<sup>83</sup>

Hamilton discussed equity again in Federalist No. 83, in which he advocated to keep equity and law separate.<sup>84</sup> Hamilton argued “the great and primary use” of equity is “to give relief *in extraordinary cases*, which are *exceptions* to the general rules” and expressed concern that merging equity and the common law “might have a tendency to unsettle” common law’s “general rules.”<sup>85</sup> He reasoned:

the circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obligated to decide them before they were permitted to return to them.<sup>86</sup>

While common law jury trials “should be reduced to some single and obvious point,” the “litigations usual in chancery frequently comprehend a long train of minute and independent particulars.”<sup>87</sup>

## 2. “All cases, in Law and Equity” Under Article III

Article III of the U.S. Constitution gives the federal judiciary jurisdiction over “all cases, in Law and Equity” arising under the Constitution, federal law and treaties.<sup>88</sup> Historical sources suggest that “equity” was not used in Article III to refer to English chancery court practice in the 1780s with no ability to adapt or change.<sup>89</sup> Equity and law had not yet merged in England in the 1780s. The United States received equity as a category of judicial power separate from the powers available to judges in English common law courts. So

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<sup>83</sup> THE FEDERALIST NO. 80, *supra* note 81.

<sup>84</sup> THE FEDERALIST NO. 83 (Alexander Hamilton) (1788).

<sup>85</sup> *Id.* See also Keenan, *supra* note 6, at 888 (discussing The Federalist No. 83).

<sup>86</sup> THE FEDERALIST NO. 83, *supra* note 84.

<sup>87</sup> *Id.*

<sup>88</sup> U.S. CONST. art. III, § 2.

<sup>89</sup> See Gallogly, *supra* note 29, at 1288 (writing that it “seems unlikely” that “equity” in Article III referred to English chancery practice).

what do we know about what the founders meant regarding Article III's grant of equity jurisdiction? Unfortunately, very little.<sup>90</sup>

Constitutional convention minutes reflect scant debate concerning Article III.<sup>91</sup> Minutes reflect that attendee Dr. William Samuel Johnson "suggested that the judicial power ought to extend to equity as well as law – and moved to insert the words 'both in law and equity' after the words U.S. in the 1st line of Sect. I" of Article III on August 27, 1787, which passed by a vote of 6 yes, 2 no and 3 absent.<sup>92</sup> The dearth of explicit discussion regarding what "equity" meant in Article III is perhaps because it was not one of the founders' central concerns.<sup>93</sup>

Logic suggests the founders would have abhorred the idea of crystallizing equity as English practice in the 1780s. The founders did not intend to replicate the English judiciary under Article III. Instead, they merged equity and the common law into a single federal court, unlike England, which did not merge for another century.<sup>94</sup> Article III established an independent judiciary not present in England or any other country at that time within a then-novel separation of

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<sup>90</sup> RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1 ("[T]o 'one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention'") (quoting MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 154 (1913)); Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2024 (2022) ("without much discussion of the matter at the Constitutional Convention, the Framers of the Constitution assured equity a continuing role in their new government" through Article III).

<sup>91</sup> See Collins, *supra* note 76, at 269 ("relatively little debate concerning Article III occurred at the Constitutional Convention, and the decision to give federal courts powers in equity was no exception").

<sup>92</sup> MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 428 (1911); JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION 269 (2d ed. 1836).

<sup>93</sup> Gallogly, *supra* note 29, at 1258-59 (noting the founders "simply did not devote much time to expounding the specific inherent powers that those courts would possess"); Fallon, *supra* note 6, at 1314 ("[i]f anything seems clear about the original meaning of provisions involving judicial power, it is that the Constitution's Framers and ratifiers had not fully thought through the role of the courts").

<sup>94</sup> See Harrison, *supra* note 31, at 1921 (writing that the founders "clarif[ied] that the institutional divisions found in the English system did not matter, so that the new federal courts' jurisdiction based on the substance of the law being applied was comprehensive").

powers paradigm.<sup>95</sup> As explained by Julius Goebel, “perhaps even more than the scope and heads of federal jurisdiction, the problem of making the judiciary an independent branch of government fully coordinate with the other branches was to engage the Convention.”<sup>96</sup> Hamilton relied on Montesquieu’s famous quote “there is no liberty if the power of judging be not separated from the legislative and executive powers.”<sup>97</sup> Further, the founders were more familiar with equity practiced in the colonies than in England, and likely assumed federal courts would resolve disputes according to the more familiar equity.<sup>98</sup>

#### **D. Early U.S. statutes and rules of court did not restrict equitable remedies to English chancery practice in the 1780s.**

If the founders received English equity and injunctive power as a defined and limited set of powers, one would expect to see such limitations in the Constitution, federal statutes or rules of court. Specifically, the Federal Judiciary Act, the Process Acts of 1789, 1792 and 1828, the U.S. Supreme Court Rules of 1791, Equity Rules of 1822, 1866, 1912 and Fed. R. Civ. P. 65 illustrate numerous opportunities in which early U.S. legislatures, courts or scholars could have defined equity and injunctive relief as extending no further than English chancery practice in the 1780s. Tellingly, however, these sources did not limit federal courts’ equitable remedial power. Instead, they

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<sup>95</sup> See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, pt. 2, at 293 (William M. Lacy ed., Banks & Brothers Law Pub., 2d ed. 1892) (1827) (discussing life time tenure under Article III and noting such independence furthers “free exercise of judgment” and “[t]his principle, which has been the subject of so much deserved eulogy, was derived from the English constitution. The English judges anciently held their seats at the pleasure of the king, and so does the lord chancellor to this day”).

<sup>96</sup> GOEBEL, *supra* note 78, at xvii.

<sup>97</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (1788) quoting 1 MONTESQUIEU, SPIRIT OF LAWS 181 (1750). Justice Story focused on this same quote fifty years later in 1833 discussing the federal judiciary, and added “[t]he universal sense of America has decided, that in the last resort the judiciary must decide upon the constitutionality of acts and laws of the general and state governments, as far as they are capable of being made the subject of judicial controversy. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 820 (Cambridge 1833).

<sup>98</sup> See Gallogly, *supra* note 29, at 1259 (making this argument and discussing CHARLES WARREN, THE MAKING OF THE CONSTITUTION 332 (1928)); Fallon, *supra* note 6, at 1311 (“the Founding generation presupposed a background scheme of common law and equitable remedies through which the Constitution could be enforced and rights vindicated”).

referred to “principles, rules and usages” of equity, and authorized U.S. courts and federal statutes to shape federal equity.<sup>99</sup>

1. *The Judiciary Act of 1789*

The Judiciary Act of 1789 (“Judiciary Act”) created the federal courts and a framework for their and the U.S. Supreme Court’s functioning.<sup>100</sup> The Judiciary Act “supplemented the Constitution by infusing with life the inert clauses of Article III.”<sup>101</sup> Section 11 gave federal courts original jurisdiction, together with state courts, over civil suits in diversity “at common law or in equity.”<sup>102</sup> Section 16 stated, in part, “suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.”<sup>103</sup> Nothing in the Judiciary Act mentions English chancery courts or practice.<sup>104</sup> Courts repeatedly interpreted the language of Section 16 as declaratory of the well-established principle that equity jurisdiction is only appropriate where legal remedies are inadequate.<sup>105</sup> For example, in 1821, Justice Marshall held “I take this clause to be merely affirmative of the

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<sup>99</sup> The use of the term “principles, usages and terms” is discussed at length in this section with citations to applicable legislation and rules of court using it.

<sup>100</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>101</sup> GOEBEL, *supra* note 78, at 457.

<sup>102</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 79.

<sup>103</sup> Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.

<sup>104</sup> See Collins, *supra* note 76, at 270 (“nothing in the 1789 Act determined what source or sovereign would provide equity principles in the newly created federal courts”).

<sup>105</sup> See *e.g.*, Parker v. Winnipiseogee Lake Cotton & Woolen Co., 67 U.S. 545, 551 (1862) (describing § 16 as “merely declaratory of the pre-existing rule”); Baker v. Biddle, 2 F. Cas. 439, 444 (C.C.E.D. Pa. 1831) (No. 763) (“this section introduced no rule, but was declaratory of the common law . . . we must give it the effect of a declaratory law, which is to declare it for the past and settle it for the future”); Matthews v. Rogers, 284 U.S. 521, 525 (1932) (The Judiciary Act was “declaratory of the rule in equity, established long before its adoption, [] to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of equity where the right asserted may be fully protected at law”). See also BENJAMIN VAUGHAN ABBOTT, TREATISE UPON THE UNITED STATES COURT AND THEIR PRACTICE 465 (2d ed. 1871) (Section 16 is “declaratory; it merely states explicitly the rule which would have been deduced by the courts from the general nature of the jurisdiction in the absence of state. And the rule has been uniformly and steadily applied as an unquestioned limit to the equity powers of the courts. Where the injury of which the party complains is one for which he has a plain, complete, and adequate remedy at law, the courts of the United States cannot take jurisdiction of a bill in equity for relief”); Collins, *supra* note 76, at 270 (this section “memorialized the traditional limitation on equity”).

general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts.”<sup>106</sup>

The Judiciary Act drafters were “federally minded and so politically disposed to take a bold view of the legislative authority conveyed by Article III” but “wholly sensitive” to ongoing debates with antifederalists regarding the scope of federal power vis-à-vis the states.<sup>107</sup> The drafters consisted of three attorneys who had long practiced in various colonies.<sup>108</sup> Not surprisingly, the drafters engaged in selected borrowing from multiple colonies’ and states’ equity practice in addition to English chancery practice.<sup>109</sup> Regarding Section 16, senate minutes illustrate an intent to make clear equity’s supplemental and ameliorative function vis-à-vis the common law, and minimize its reach to preserve the right to a jury trial.<sup>110</sup>

Section 34 required federal courts to apply “the laws of the several states” in trials at common law where no federal law applied. Initial drafts defined state law to include “their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statute of the same . . .”<sup>111</sup> This language was deleted, likely because some drafters believed “it would be derogatory to adopt English common law and that the time for emancipation was ripe.”<sup>112</sup> This illustrates the founders’ purposeful rejection of references to English practice in reference to federal jurisdiction.

In sum, the Judiciary Act made no mention of English equity, drew from various colonies’ equitable practices, emphasized equity’s supplemental and ameliorative function, and explicitly excluded references to England describing state common law. This cuts against

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<sup>106</sup> *Bean v. Smith*, 2 F. Cas. 1143, 1150 (C.C.D.R.I. 1821).

<sup>107</sup> GOEBEL, *supra* note 78, at 457. Goebel described the Judiciary Act as “an instrument of reconciliation deliberately framed to quiet still smoldering resentments.” *Id.*

<sup>108</sup> *Id.* at 459.

<sup>109</sup> *Id.* at 479–84.

<sup>110</sup> *Id.* at 500 (citing S. JOURNAL, 1st Sess. 63 and discussing a Senator Pattern’s move to delete Section 16, potentially to “leave the development of equity jurisdiction fluid” and the Senate reinserting it and “tightening it by requiring a ‘plain adequate’ as well as ‘complete’ remedy at law”). Goebel notes “no doubt but that the inveterate belief in the virtues of jury trial had much to do with the apparent disinclination to implement the jurisdiction in equity.” *Id.*

<sup>111</sup> GOEBEL, *supra* note 78, at 502.

<sup>112</sup> *Id.*

any argument that the founders meant to crystalize injunctions as they existed in English courts in the 1780s.

2. *The Process Acts of 1789, 1792 and 1828*

Concurrent with the Judiciary Act, the first U.S. congress also passed the Process Act of 1789.<sup>113</sup> Although the Process Acts apply to equitable procedures, as opposed to remedies or causes of action, procedure, remedies and substantive laws were somewhat blended, and the contours of each impacted the other. For example, Section 11 of the Judiciary Act gave federal courts subject matter jurisdiction over claims in equity.<sup>114</sup> Further, Section 16 declared that federal equity jurisdiction is limited to situations in which legal remedies are inadequate. These sections impacted process, i.e., the filing of equitable actions, remedies, and the ability to issue injunctions.<sup>115</sup> The Process Acts regulated which law federal courts should apply when deciding equitable claims. Because state law regarding equity varied, this “process” issue had significant impacts on available causes of action and remedies. Accordingly, early procedural legislative acts and court rules are instructive in understanding the original meaning of equitable remedies, such as injunctions.

This first Process Act mandated that in federal courts, the forms of writs, modes of process and fees “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.”<sup>116</sup> Like the Judiciary Act, the first Process Act drew from colonial practices.<sup>117</sup> Regarding equity, it stated, in part “the forms and modes of proceeds in causes of equity, and of admiralty and maritime jurisdiction [ ] shall be according to the course of civil law . . .”<sup>118</sup> Neither judge nor lawyers were trained

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<sup>113</sup> An Act to Regulate Processes in the Courts of the United States, ch. 21, 1 Stat. 93 (Sept. 29, 1789) [Hereinafter 1789 Process Act]. For a discussion of the legislative history, see Sohoni, *supra* note 90, at 2024–25.

<sup>114</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

<sup>115</sup> *Id.* § 16

<sup>116</sup> 1789 Process Act, *supra* note 113, 1 Stat. at 93.

<sup>117</sup> GOEBEL, *supra* note 78, at 521-22, 525-30.

<sup>118</sup> 1789 Process Act, *supra* note 113, 1 Stat. at 94.

in the civil law, and therefore, this provision was criticized and short lived.<sup>119</sup>

In 1792, congress enacted a second process act.<sup>120</sup> Regarding equity, federal courts were to use processes

according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law; except in so far as may have been provided for by the [Judiciary Act of 1789], subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe. . . .<sup>121</sup>

Courts interpreted this mandate without reference to English courts' principles, rules and usages as of the 1780s, but more generally.<sup>122</sup>

The twentieth Congress revisited equity in the 1828 Process Act.<sup>123</sup> This act continued to mandate that federal courts sitting in equity follow "principles, rules and usages" of equity courts.<sup>124</sup> It also allowed other acts of congress beyond the Judiciary Act to modify such principles, rules and usages, and continued to allow the Supreme Court to prescribe rules.<sup>125</sup> It codified the federal courts' repeated holdings that in states without state equity courts, federal courts have "ordinary equity jurisdiction, the power of prescribing

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<sup>119</sup> GOEBEL, *supra* note 78, at 580 ("equity procedure had at first been placed on the vague footing of 'civil law'" and "[b]ecause the legal profession was hardly prepared to go to school to execute literally the injunction of the first Process Act, existing chancery practice was bound to be treated as substantial compliance"). Goebel suggested this reference to "civil law" was "something less contentious" in response to "explosions over adopting English chancery practice during the Judiciary Act debates." GOEBEL, *supra* note 78, at 534.

<sup>120</sup> An Act for Regulating Processes in the Courts of the United States and Compensation of Officers of the Courts, Jurors, and Witnesses, ch. 36, 1 Stat. 275 (1792) [Hereinafter 1792 Process Act].

<sup>121</sup> *Id.* § 2.

<sup>122</sup> See *Vattier v. Hinde*, 32 U.S. 252 (1833) ("this act has been generally understood to adopt the principles, rules and usages of the court of chancery of England. By the principles, rules and usages of that court, the plaintiffs, in such a case as this, must have amended their bill").

<sup>123</sup> An Act Further to Regulate Processes in the Courts of the United States, ch. 68, 4 Stat. 278 (1828) [Hereinafter 1828 Process Act].

<sup>124</sup> *Id.* at 280.

<sup>125</sup> *Id.* at 280-81.

the mode of executing their decrees in equity by rules of court.”<sup>126</sup> These early statutes evidence an expectation that U.S. federal judges would exercise equitable power as needed to adapt to changing circumstances where legal remedies are inadequate.

3. *Supreme Court Rule of 1791 and Equity Rules of 1822, 1842 and 1912*

The Judiciary Act authorized the U.S. Supreme Court to “make and establish all necessary rules for the orderly conducting of business” of the courts so long as such rules are “not repugnant” to federal law.<sup>127</sup> In 1790, the U.S. Supreme Court began promulgating Rules and Orders.<sup>128</sup> In 1791, the Court promulgated Rule VII, which stated “this court consider[s] the practice of the courts of king’s bench, and of chancery, in England, as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary.”<sup>129</sup> These rules’ use of “outlines for the practice” suggests not strict adherence to English chancery practice, but use of English practice as a framework or gap-filler where U.S. law had not yet developed. Additionally, this rule explicitly allowed for alterations as circumstances require, which is evidence of early U.S. courts’ understanding that equity jurisdiction would change when applied in U.S. courts from the form it took in English courts.

The U.S. Supreme Court promulgated several sets of “Equity Rules” beginning in 1822. The 1822 Rules made no mention of injunctions, and referred to English chancery practices as a gap-filler where no U.S. rules of court applied. Equity Rule XXXIII mandated “[i]n all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England.”<sup>130</sup> In 1842, the revised equity rules clarified the Court’s

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<sup>126</sup> *Id.* at 281.

<sup>127</sup> Judiciary Act of 1789, § 17.

<sup>128</sup> Rules & Orders of the Supreme Court of the U.S., 5 U.S. (1 Cranch), xvi (1804) (Rule VII, dated Aug. 8, 1791).

<sup>129</sup> *Id.* Goebel observed “[w]hat is impossible to document is the extent to which Circuit practice was affected by the Supreme Court rule of August 1792 [sic] that it considered the practices of the King’s Bench and the English Chancery as affording outlines for practice before it.” GOEBEL, *supra* note 78, at 580. See also Keenan, *supra* note 6, at 889 (discussing 1791 Rules).

<sup>130</sup> Equity Rule XXXIII (1822), reprinted in HOPKINS, *supra* note 75, at 5.

intent, stating: “In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.”<sup>131</sup> In 1852, the U.S. Supreme Court interpreted this rule as “when not otherwise directed, the practice in the High Court of Chancery, in England, shall be followed.”<sup>132</sup>

The 1842 change is significant in that it adds “present” to reflect the then-in-place practice of English courts.<sup>133</sup> Additionally, it puts inconsistent “local circumstances and conveniences” above such practices.<sup>134</sup> Third, it specifies that English chancery court practices are not adopted as “positive rules” but for “furnishing just analogies.”<sup>135</sup> This change signifies that U.S. courts are not bound by the laws of equity as it existed in the 1780s, and are not bound by English equity as a discrete set of established “positive laws.”<sup>136</sup> Annotations to these rules suggest adopting English chancery practices as a discrete set of positive laws was impossible, mainly because “of the enormous difficulty of ascertaining what the practice of the English court was at any particular time.”<sup>137</sup> Both the 1822 and 1842 rules referred to English chancery practice as a gap-filler, not as creating mandatory sideboards for federal equity practice.<sup>138</sup> Regarding injunctions, the 1842 Rules sets forth rules for enjoining proceedings at law specifically, but do not set forth specific procedures regarding obtaining preliminary injunctions generally.<sup>139</sup>

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<sup>131</sup> Equity Rule XC (1842), reprinted in HOPKINS, *supra* note 75, at 61. See also Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 438 (1913) (discussing 1842 court rules).

<sup>132</sup> *Bein v. Heath*, 53 U.S. (12 How.) 168, 169 (1852).

<sup>133</sup> Equity Rule XXXIII, *supra* note 130.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> HOPKINS, *supra* note 75, at 7.

<sup>138</sup> See Collins, *supra* note 76, at 274 (the Equity rules of 1822 and 1842 “pointed federal judges to ‘the practice of the High Court of Chancery in England’ to fill any gaps left after consulting the equity rules and any local rules promulgated by the circuit courts”).

<sup>139</sup> Equity Rule LV (1842), reprinted in HOPKINS, *supra* note 75, at 54.

As the Supreme Court prepared to amend the Equity Rules in 1912, U.S. Supreme Court Justice Lurton “visited England with a view to studying the modern practice in actual operation.”<sup>140</sup> Justice Lurton also submitted to Lord Chancellor Loreburn, the “highest of all living authority” of “modern English practice” several questions about English chancery procedures.<sup>141</sup> None of the questions or answers addressed injunctive relief. Equity Rule 73 of the 1912 Rules entitled “Preliminary Injunction and Temporary Restraining Orders” governed injunctions and temporary restraining orders. Rather than set forth allowable or prohibited injunctions, Equity Rule 73 stated “[n]o preliminary injunction shall be granted without notice to the opposite party,” and set forth rules regarding when notice is required for TROs.<sup>142</sup> According to the annotations, the 1912 Equity Rules addressed preliminary injunctions and restraining orders “in substantial accord with settled practice” that “embod[ied] principles long established and enforced by the national courts of equity.”<sup>143</sup> These rules make no suggestion that equitable remedies were limited to those that existed in English chancery courts in the 1780s.

#### 4. *Federal Rule of Civil Procedure 65*

Subsequent to the Rules Enabling Act of 1934,<sup>144</sup> the U.S. Supreme Court promulgated the Rules of Civil Procedure in 1938.<sup>145</sup> These rules combined actions at common law and in equity as a “civil action” subject to the Rules. Rule 65 addressed preliminary injunctions and temporary restraining orders. Similar to Equity Rule 73, it did not set forth strict limitations on categories of cases in which an injunction may issue, but instead mandated notice, hearing and bond requirements and set forth what such orders must include.<sup>146</sup> As explained by a leading treatise, under Rule 65, “the substantive prerequisites for obtaining an equitable remedy as well as the general

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<sup>140</sup> HOPKINS, *supra* note 75, at 27.

<sup>141</sup> *Id.*

<sup>142</sup> Equity Rule 73 (1912), *reprinted in* HOPKINS, *supra* note 75, at 250.

<sup>143</sup> HOPKINS, *supra* note 75, at 34, 250.

<sup>144</sup> An Act to Give the Supreme Court of the United States Authority to Make and Publish Rules in Actions at Law, Pub. L. No. 73-415, 48 Stat. 1064 (codified as 28 U.S.C. §§ 2071-2077).

<sup>145</sup> Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 647 (1939).

<sup>146</sup> FED. R. CIV. P. 65.

availability of injunctive relief are not altered by the rule and depend on traditional principles of equity jurisdiction.”<sup>147</sup>

In sum, from ratification in the 1780s to adoption of the federal rules of civil procedure in 1938, federal statutes and rules describe a principle-based adaptable federal equity jurisdiction. This undercuts the equitable originalism claim that federal equitable remedial powers were crystalized as they existed in the 1780s.

### III. U.S. RECEPTION OF EQUITY AND INJUNCTIONS AS PRINCIPLE-BASED JURISDICTION

Similar to U.S. statutes and court rules, early U.S. caselaw and scholars conceived of injunctive power as a principle-based type of judicial power.<sup>148</sup> The inadequacy of legal remedies is the glue that held together a uniform federal approach to judicial power in the face of diverging state laws relating to equity and injunctions. Preliminary injunctive relief was based on the principle of avoiding irreparable injury, which was a power only available in equity.

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<sup>147</sup> 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2941 (3d ed. 2004). Citing to *Grupo Mexicano*, the treatise observes “applications for injunctions continue to be considered in accordance with the practice developed by the English courts of chancery by which the question whether injunctive relief is to be granted or withheld is addressed to the judge’s discretion.” *Grupo Mexicano* relied on a 1928 treatise by A.M. Dobie in support of its restrictive view of injunctive power. See ARMISTEAD, M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE (1928). In 1939, U.S. scholar A.M. Dobie authored a Virginia Law Review article introducing the new federal rules of civil procedure A.M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261 (1939). Dobie cites to 3 Moore, 3 Federal Practice (1938), p. 3317 as stating Rule 65 “reflects the long established policy of strict control of the injunctive process which is also reflected in the sparing exercise of the power to issue the injunction.” *Id.* at 301, n.182. This observation is either wishful thinking not borne out in the language of Rule 65 or an observation that the judiciary had long limited its use of injunctions by declining to exercise it when legal remedies are adequate. Dobie took an anomalous view of federal equity in the early 1900s that does not reflect the tradition established by court rules, statutes, other scholars and caselaw.

<sup>148</sup> See e.g., *Pierpont v. Fowle*, 19 F. Cas. 652, 658 (C.C.D. Mass. 1846) (No. 11,152) (equity “is not making new principles, but applying old ones to new facts or cases”). See Bray & Miller, *supra* note 28, at 1780-81 (discussing fundamental difference between equity and the common law or statutory causes of action in that equity jurisdiction is based on “patterns of equitable intervention” such as inadequate legal remedies).

### A. Early U.S. Caselaw and Treatises

In 1796, less than a decade after the Judiciary and Process Acts, the U.S. Supreme Court noted that the “general rule” applicable to it in equity “prescribes to us an adoption of that practice, which is founded on the custom and usage of Courts of Admiralty and Equity, constituted on similar principles.”<sup>149</sup> An 1805 American edition of a 1793 English treatise on equity noted that no matter the factual variation in a case before a court in equity, “courts of equity constantly proceed upon the some clear and established principle, sufficiently comprehensive to meet the circumstances of the particular case to which it is applied” as opposed to “vague, arbitrary and indefinite powers.”<sup>150</sup> In 1852, the Supreme Court discussed equity as principles, stating:

Whenever 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.<sup>151</sup>

In other areas of equitable jurisdiction, such as trusts, the Court similarly looked to principles of equity, not fixed rules of equity.<sup>152</sup>

Equity as a supplemental and ameliorative remedy where the common law’s remedies are inadequate is the fundamental principle

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<sup>149</sup> *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320, 320 (1796). See also *Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 222 (1809) (“[i]n all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles” and “the court . . . will exercise [] jurisdiction in conformity with the settled principles of a court of chancery. It will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this court as the principles of equity require its application”); Gallogly, *supra* note 29, at 1271-72 (discussing *Bodley* and arguing it refers to inherent judicial power under Article III).

<sup>150</sup> 1 HENRY BALLOW, A TREATISE ON EQUITY WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES (Fonblanque ed., W. Clark & Sons 1805) (1793). See Gallogly, *supra* note 29, at 1288 (citing and discussing passage).

<sup>151</sup> *Neves v. Scott*, 54 U.S. (13 How.) 268, 272 (1852).

<sup>152</sup> See e.g., *Nat’l Bank v. Ins. Co.*, 104 U.S. 54, 70 (1881) (“[t]his doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property”).

that the United States received under Article III and the Judiciary Act.<sup>153</sup> In 1833, the U.S. Supreme Court discussed equity's needed corrective function as follows:

[A]s an essential branch or exercise of judicial power, it is acknowledged to exist everywhere; nor is it possible for any one acquainted with its nature and character, and the remedies it affords for the assertion of rights or the punishment of wrongs, to doubt that the power to exercise it, and the means of exercising it, must exist somewhere; or the administration of justice will be embarrassed, if not incomplete.<sup>154</sup>

Pomeroy's authoritative treatise explained that equity served this supplemental function by reliance on "already settled principles of equity jurisprudence" with the understanding that:

[t]hose principles and doctrines may unquestionably be extended to new facts and circumstances as they arise, which are analogous to facts and circumstances that have already been the subject-matter of judicial decision, but this process of growth is also carried on in exactly the same manner and to the same extent by the courts of law.<sup>155</sup>

In 1867, in *Watson v. Sutherland*, the U.S. Supreme Court interpreted Section 16 of the Judiciary Act to mean that "[t]he absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of this case, as disclosed in the pleadings."<sup>156</sup> Two years later, the U.S. Supreme Court affirmed this exact language in *Payne v. Hook*.<sup>157</sup> Just prior to the merger of law and equity, in 1935 the U.S. Supreme Court in *Gordon v. Washington* held courts have interpreted the Judiciary Act's phrase of "suits . . . in equity" to "refer to suits in which relief is sought

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<sup>153</sup> POMEROY, *supra* note 42, §50 ("[i]t was undoubtedly a maxim, even in the earliest times, that the equitable jurisdiction of chancery only extended to such matters as *were not remediable by the common law*").

<sup>154</sup> *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 547 (1833).

<sup>155</sup> POMEROY, *supra* note 42, § 47.

<sup>156</sup> *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74, 79 (1867).

<sup>157</sup> *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869).

according to the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts.”<sup>158</sup>

Four years later, in *Atlas Life Insurance Company v. W.I. Southern, Inc.*, the U.S. Supreme Court cited *Payne v. Hook* and *Gordon v. Washington* approvingly for the proposition that the Judiciary Act conferred jurisdiction on federal courts to “administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”<sup>159</sup> *Atlas* referenced “principles,” not bright-line rules, and did not overrule *Gordon* and *Payne’s* holdings that U.S. courts apply English equity principles “as they have been developed in the federal courts.”<sup>160</sup>

“Maxims” of equity were the building blocks of equity jurisdiction in England and the United States. Justice Story emphasized that equity acts on “well settled” and “fixed principles.”<sup>161</sup> In 1918, W.H. Lyon’s annotations to Story’s 1835 *Equity Jurisprudence* introduced Story’s discussion of the maxims by explaining “[c]ertain principles in equity are established and dominate in the administration of justice in that field with as much certainty as do principles upon the law side, so to speak, of the court.”<sup>162</sup> Lyon wrote “[w]hile new principles are not to be added to those long established for the government of equitable remedies,” “the existing principles are susceptible of expansion along every line necessary to reach new conditions. The ingenuity of man in devising new forms of wrong cannot outstrip such development.”<sup>163</sup>

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<sup>158</sup> *Gordon v. Washington*, 295 U.S. 30, 36 (1935). *Gordon* is cited by both the majority and dissent in *Grupo Mexicano*, with the dissent more accurately capturing its holding to observe “we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.” 527 U.S. at 336.

<sup>159</sup> *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939). Subsequent decisions have imprecisely relied on *Atlas* to hold that equitable relief “must be within the traditional scope of equity as historically evolved in the English Court of Chancery.” See e.g., *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945); *Grupo Mexicano*, 527 U.S. at 318. These cases fail to appreciate the emphasis in *Atlas* and the precedent on which it relied or principles of equity arising out of England, which is very different than the scope of equitable powers being limited to the cases in which they were used in the 1780s.

<sup>160</sup> 306 U.S. at 568.

<sup>161</sup> JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 20 (W.H. Lyon ed., 14th ed. 1918) (1835).

<sup>162</sup> *Id.* § 63.

<sup>163</sup> *Id.*

Building off the maxim “equity follows the law,” the dominant principle guiding U.S. courts’ equity jurisdiction was that equitable remedies were only available where legal remedies were inadequate.<sup>164</sup> When the Judiciary Act of 1789 set forth this requirement, it adopted a long-followed principle in England that equity was the ameliorative branch of justice supplemental to the common law writ-based courts. One early U.S. treatise interpreted the Judiciary Act’s equity jurisdiction as requiring that federal courts, “when sitting in equity, are, in general, guided by the standard principles and authorities of equity jurisprudence in England,” with a focus on inadequate legal remedies at law as the guiding principle in both England and the United States.<sup>165</sup>

Recognizing equity as a principle-based and adaptable judicial power does not mean that federal equitable power is unbridled,

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<sup>164</sup> For cases, *see e.g.*, *Smith v. McIver*, 22 U.S. (9 Wheat.) 532, 534 (1824) (“[a] question decided at law, cannot be reviewed in a Court of equity, without the suggestion of some equitable circumstance, of which the party could not avail himself at law”); *Shapley v. Rangeley*, 21 F. Cas. 1164, 1165 (C.C.D. Me. 1846) (No. 12,707) (“[w]hy should this court then interfere, when the rights of the parties can be fully adjusted at law”); *S.F. Nat’l Bank v. Dodge*, 197 U.S. 70, 108 (1905) (the rule that “equity will not interfere where there is a plain, adequate, and complete remedy at law” is “not only the rule of the court of chancery in England, but it is the command of the [Judiciary Act of 1789]”); *McConihay v. Wright*, 121 U.S. 201, 206 (1887) (“the adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of congress”). For treatises, *see e.g.*, WILLIAM WAIT & EDWIN BAYLIES, TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF LAW, WHETHER OF A LEGAL, OR OF AN EQUITABLE NATURE, INCLUDING THEIR RELATIONS AND APPLICATION TO ACTIONS AND DEFENSES IN GENERAL 135 (1885) (“what mainly gave rise to equity jurisprudence was the inadequacy of the common-law procedure to do full and complete justice in all cases”). Wait & Baylies wrote “the granting of injunctions is one of the most important heads of equity jurisdiction . . . The ground of its exercise is that there is either no remedy at law, or that the legal remedy is imperfect and inadequate.” *Id.* at 139. *See also* STORY, *supra* note 161, § 33 (“[p]erhaps 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 the case of rights, recognized and protected by the municipal jurisprudence, and a complete remedy cannot be had in the Courts of Common Law”); JAMES HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 2 (1880) (equity jurisdiction to order mandatory injunction “is exercised with extreme caution, and is confined to cases where the courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages”); Collins, *supra* note 76, at 266 (“[a]s 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”).

<sup>165</sup> ABBOTT, *supra* note 105, at 465.

unchecked, or impervious to legislative restriction.<sup>166</sup> In fact, courts dutifully denied equitable relief when legal remedies were adequate as mandated by the Judiciary Act.<sup>167</sup> Throughout the 1800s, courts regularly declined to exercise federal equity jurisdiction due to the presence of adequate legal remedies.<sup>168</sup> Early U.S. scholars uniformly recognized this limiting principle.<sup>169</sup> Pomeroy rejected the idea that

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<sup>166</sup> See Roberts, *supra* note 6, at 500 (“[e]ven a strong view of federal equity power, however, does not mean that such power should lack restraint. . . Federal courts must exercise this power of equity carefully, as unbridled discretion diminishes respect for the rule of law generally”).

<sup>167</sup> See Pfander & Formo, *supra* note 6, at 753 (“equity authorizes and limits the use of [TROs] and preliminary injunctions, assuring measured consideration of exigent circumstances and the adequacy of remedial alternatives”).

<sup>168</sup> See e.g., *Graves v. Bos. Marine Ins. Co.*, 6 U.S. (2 Cranch) 419, 444 (1805) (“[u]nder the circumstances of the case a court of equity cannot relieve against the mistake which has been committed; and as the remedy of the plaintiff, *Graves*, on the policy to the extent of his interest is complete at law, the decree of the circuit court dismissing his bill must be affirmed”); *Ewing v. City of St. Louis*, 72 U.S. (5 Wall.) 413, 417 (1867) (“[t]he case is not one for the exercise of the equitable jurisdiction of the court, because if the court could take jurisdiction of all of the revision of the mayor’s proceedings, there is a plain, adequate, and complete remedy at law”); *Baker v. Biddle*, 2 F. Cas. 439 (C.C.E.D. Pa. 1831) (No. 764) (stating the Judiciary Act of 1789 required a limitation on equity that English Courts recognized but did not always follow. It “made out by a duty more imperative and safe rule than the usage or discretion of a chancellor”); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). The U.S. Supreme Court noted this limitation on federal courts equity jurisdiction “protect[ed] states from the encroachments which would result from the exercise of equity powers by federal courts failing to afford it.” *Atlas Life Ins. Co.*, 306 U.S. at 569; *Matthews v. Rogers*, 284 U.S. 521, 526 (1932) (“[i]f the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts”). The U.S. Supreme Court further noted that state law cannot expand federal equitable powers to allow the exercise of them when legal remedies are adequate. See *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491 (1923). In *Pusey*, a state law attempted to allow an unsecured contract creditor to appoint a receiver for defendant’s assets. While *Grupo Mexicano* describes *Pusey* as an example of a restricted reception of existing equity jurisdiction, it could more accurately be explained as observing that state law cannot preempt the judiciary Act. *Pusey* held “[t]hat a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear. . . Nor can it be so narrowed.” 261 U.S. at 497-98. See *McConihay v. Wright*, 121 U.S. 201, 206 (1887) (federal equity jurisdiction “is vested, as a part of the judicial power of the United States, in its courts by the constitution and acts of congress in execution thereof. Without the assent of congress, that jurisdiction cannot be impaired or diminished by the statutes of the several states”).

<sup>169</sup> See e.g., POMEROY, *supra* note 42, § 1338 (“[e]quity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction”); GEORGE L. CLARK, EQUITY AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS 7

an equity court would “assume to decide the facts of a controversy according to his own standard of right and justice, independently of fixed rules.”<sup>170</sup> Instead, argued Pomeroy, a judge “is governed in his judicial functions by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges.”<sup>171</sup> Pomeroy argued that the United States received equity as a relatively fixed set of principles, and judges should not exercise equity jurisdiction where the facts or circumstances did not bring it within those established principles.<sup>172</sup>

However, there is a qualitative difference between applying a set of established principles to new facts and circumstances as industry, society and technology change, and only applying equitable remedies within the same set of facts upon which a court previously provided such remedy. Linking injunctive relief to English practice in the 1780s would tie federal courts’ hands in a way that deviates from the historical reality of equity in the U.S. legal system as an adaptable principle-based system. Instead, allowing equity to continue functioning as a supplement to changing laws, subject to precedent and statutory prohibitions, is in keeping with the U.S. legal tradition relating to federal equity jurisdiction.

#### **B. Injunctions where legal remedies are inadequate and to avoid irreparable harm in U.S. law.**

Regarding injunctions specifically, early federal courts and treatises also focused on principles guiding the appropriateness of injunctions as opposed to rigid rules or categories of cases.<sup>173</sup> One

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(1919) (equity will not interfere if the common law remedy has always been plain, adequate, and complete”); ABBOTT, *supra* note 105, at 465 (“Where the injury of which the party complains is one for which he has a plain, complete, and adequate remedy at law, the courts of the United States cannot take jurisdiction of a bill in equity for relief”); THOMAS POWELL, ANALYSIS OF AMERICAN LAW § 3, at 522 (1870) (“[e]quity does not assume to control and direct the law, but only to follow and aid it; its first principle is, that it only takes jurisdiction of cases where there is not a plain and adequate remedy at law”).

<sup>170</sup> POMEROY, *supra* note 42, § 47.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* § 62.

<sup>173</sup> See, e.g., Parker v. Winnipiseogee Lake Cotton & Woolen Co., 67 U.S. 545, 551 (1863) (“A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, such as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensure. .

1870 treatise described injunctions as “creatures of chancery jurisdiction, and owe their existence to the principles upon which that court acts, and the manner in which it exercises its powers.”<sup>174</sup> In 1881, Pomeroy explained “[w]hile injunctions may [ ] be final, or preliminary and ancillary to other final relief, they all depend on the same *general* principles, doctrines and rules which determine and regulate the exercise of the jurisdiction to award them.”<sup>175</sup>

In 1835, Justice Story discussed injunctions as follows:

Courts of Equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs.<sup>176</sup>

English cases and treatises long followed this same approach.<sup>177</sup> English and U.S. scholars and courts in the 1800s emphasized equitable judicial discretion “is by no means arbitrary” and “is to be exercised in accordance with established principles of law and equity. ‘In no case does it contradict or overturn the grounds and principles thereof.’”<sup>178</sup> English treatises and early U.S. courts and treatises consistently identified significant irreparable injury and

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. . . It will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as from its continued or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction.”).

<sup>174</sup> POWELL, *supra* note 169, at 526.

<sup>175</sup> POMEROY, *supra* note 42, § 1337.

<sup>176</sup> STORY, *supra* note 161, § 1293 at 639. *See also* Haines, *supra* note 6, at 462-64 (discussing Story’s multiple statements in his treatise regarding the adaptability of Equity to address various situations when legal remedies are inadequate).

<sup>177</sup> *See, e.g.*, ROBERT H. EDEN & THOMAS W. WATERMAN, COMPENDIUM OF THE LAW AND PRACTICE OF INJUNCTIONS, AND OF INTERLOCUTORY ORDERS IN THE NATURE OF INJUNCTIONS §§ 11-1-11-4 (3d ed. 1852) (listing numerous situations in which an injunction may issue, then noting “[t]hese, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of the Writ of Injunction.”).

<sup>178</sup> HIGH, *supra* note 164, § 15, at 13 n.7 (citing Lord Romilly, Master of the Rolls, in *Haywood v. Cope*, 25 Beav. 151).

multiplicity of suits as situations in which legal remedies are inadequate.<sup>179</sup> Like English courts and treatises, U.S. courts and scholars focused on preserving the status quo and preventing immediate and irreparable injury as the purpose of interlocutory injunctions.<sup>180</sup>

Story emphasized that injunctive power was “subject to abuse” and “ought therefore to be guarded with extreme caution and applied only in very clear cases.”<sup>181</sup> This was nothing new, however, as English and early U.S. decisions and scholars expressed the same caution.<sup>182</sup> In fact, English and U.S. courts had consistently focused

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<sup>179</sup> See, e.g., MITFORD, *supra* note 67; *supra* pp. 15-16, 31; BLACKSTONE, *supra* note 43, \*439 (“[O]f waste and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction.”); WILLIAM P. FISHBACK, *MANUAL OF ELEMENTARY LAW: BEING A SUMMARY OF THE WELL-SETTLED ELEMENTARY PRINCIPLES OF AMERICAN LAW* § 577 (4th ed. 1901) (“The aid of a court of equity is sought where it is necessary to prevent the doing of some act which will result in such injury to one’s property or rights as can not be adequately compensated in damages, as the destruction of trees, the infringement of copyrights or trade-marks, the creating or continuance of a nuisance, the keeping of ferocious animals, the making of noises at unseasonable hours near one’s dwelling, and for other causes.”); HIGH, *supra* note 164, § 12 at 11 (“The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction.”).

<sup>180</sup> See *Irwin v. Dixon*, 50 U.S. 10, 16 (1850) (preliminary injunction where private party sues in case of public right is allowable only where “community at large, or some individual, felt interested in having the supposed nuisance immediately prostrated on account of its great, continued, and irreparable injury; and it was then used as a sort of preventative remedy to a multiplicity of suits, and in cases where an action at law would yield too tardy and imperfect redress”); HIGH, *supra* note 164, § 4, at 5 (“The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and without determining any questions of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. . . . The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction”). See also *supra* notes 59-60 (discussing English sources).

<sup>181</sup> STORY, *supra* note 161, § 1293, at 639.

<sup>182</sup> See *id.* at 639, n.3 (setting forth English and U.S. cases recommending “caution, deliberation and sound discretion” when issuing an injunction) (citations omitted). See also HIGH, *supra* note 164, § 10, at 9 (“Interlocutory injunctions being often sought for the purpose of harassing and annoying defendants, the utmost care should be observed in the exercise of the jurisdiction, and the relief should only be allowed upon a clear necessity being shown of affording immediate protection to some right or interest of the party complaining which would otherwise be seriously injured or

on adequacy of legal remedies, irreparable injury and balance of the hardships for well over 100 years in a myriad of types of cases.<sup>183</sup>

U.S. courts have long recognized categories of cases in which injunctions are generally prohibited, relying in part on English chancery practice. One example is a prohibition on injunctions relating to criminal proceedings.<sup>184</sup> Another prohibition is enjoining defendants who were not party to the underlying suit seeking injunction.<sup>185</sup> These cases, however, preclude the exercise of equity in the facts before the court because of a violation of “principles” of equity – not because of a categorical prohibition or because of English chancery practice in the 1780s.<sup>186</sup> Additionally, courts have also long

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impaired.”); *id.* § 22 at 20 (“An injunction, being the ‘strong arm of equity,’ should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity.”) (citations omitted).

<sup>183</sup> See HIGH, *supra* note 164, § 13 at 11 (“Where the legal right is not sufficient to enable a court of equity to form an opinion, it will generally be governed in deciding an application for a preliminary injunction by considerations of relative convenience and inconvenience which may result to the parties from granting or withholding the writ.”); POMEROY, *supra* note 42, § 1338 (“This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and convenience which confine its application to those cases in which the legal remedy is not full and adequate.”).

<sup>184</sup> See *In re Sawyer*, 124 U.S. 200, 210-211 (1888) (noting the long settled practice in England that courts of chancery have no power to “restrain criminal proceedings” and observing that American courts follow this same practice). See also *Barton v. Barbour*, 104 U.S. 126 (1881) (affirming established requirement that a receiver cannot be sued unless leave is obtained by the court appointing the receiver); *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. 545, 552 (1863) (“A Court of Equity will interfere when the injury by the wrongful act of the adverse party will be irreparable. . . . [D]iminution of the value of the premises without irreparable injury is no ground for interference.”).

<sup>185</sup> See *Scott v. Donald*, 165 U.S. 107, 117 (1897).

<sup>186</sup> See, e.g., *id.* (“[W]e do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction.”); *Cates v. Allen*, 149 U.S. 451, 458 (1893) (“Doubtless new classes of cases may by legislative action be directed to be tried in chancery, but they must, when tested by the general principles of equity, be of an equitable character, or based on some recognized ground of equity interposition.”); *In re Sawyer*, 124 U.S. 200, 224 (1888) (Harlan, J., dissenting) (“As this suit is one arising under the Constitution of the United States, and is of a civil nature, the inquiry in the mind of the circuit judge, when he read the bill, was whether, according to the principles of equity, a decree could be properly rendered against the defendants?”); *Dows v. City of Chicago*, 78 U.S. 108, 112 (1871) (“If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights.”).

recognized that congress can restrict or require courts' exercise of equitable powers, such as injunctions.<sup>187</sup>

The majority in *Grupo Mexicano* believed granting an unsecured creditor a preliminary injunction to stop a defendant from dissipating assets was one such category. Early U.S. caselaw prohibiting an unsecured creditor from proceeding in equity exists.<sup>188</sup> However, *Grupo Mexicano* dissent's view was such caselaw did not set up a categorical prohibition on an injunction in such cases.<sup>189</sup> Instead, technology or other changes or case-specific facts may bring a case within allowable limits of injunctive relief where legal remedies are inadequate, including to avoid irreparable harm.<sup>190</sup>

### C. Federal equity in contradistinction to state law.

Early federal caselaw characterized equity as a set of principles received from England in contradistinction to state laws. Courts relied on equitable principles to establish a uniform federal equity jurisdiction regardless of state law. Federal courts' main preoccupation with equity during the 1800s was whether state codes could impact federal courts' ability to issue equitable remedies. The answer was a very clear no – under Article III, federal courts could

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<sup>187</sup> See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 342 (1999) (Ginsberg, J., dissenting) (observing that Congress can require federal courts to issue preliminary injunctions “freezing assets pending final judgment,” or alternatively prohibit them from issuing such injunctions; then quoting *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945); then citing *Yakus v. United States*, 321 U.S. 414, 442 (1944)); *Baker v. Biddle*, 2 F. Cas. 439, 444 (C.C.E.D. Pa. 1831) (“There can be no doubt of the power of congress to define what should be a case in equity.”); *York*, 326 U.S. at 105 (“Congressional curtailment of equity powers must be respected.”); *Yakus*, 321 U.S. at 442, n.8 (1944) (statutes regulating federal equity power). See also *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (“The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations.”).

<sup>188</sup> E.g., *Wiggins v. Armstrong*, 1 N.Y. Ch. Ann. 324 (N.Y. Ch. 1816); *Cates v. Allen*, 149 U.S. 451 (1893).

<sup>189</sup> See 527 U.S. at 338-39 (Ginsberg, J., dissenting) (“[I]ncreasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity.”).

<sup>190</sup> *Id.*

order equitable remedies as needed pursuant to applicable rules of court and the Judiciary Act without regard to state law.<sup>191</sup>

*Robinson v. Campbell* first pronounced in 1818 “the remedies in the courts of the United States, 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.”<sup>192</sup> In 1832, the Supreme Court again referred to “general principles of courts of equity” when identifying the applicable law regarding injunctions, as opposed to potentially applicable state laws.<sup>193</sup> Federal courts saw English chancery practice as principles

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<sup>191</sup> See HOPKINS, *supra* note 75, at 13 (“[A]daptability to the law side of local State practice does not extend in any extent to the equity side.”); Taylor v. Louisville & N.R. Co., 88 Fed. Rep. 350, 357 (1898) (noting that only Congress, not the states, can “restrict or diminish the power or jurisdiction” of federal courts of equity); Gordon v. Hobart, 10 F. Cas. 795, 797 (C.C.D.Me. 1836) (“[T]he equity jurisdiction of this court is wholly independent of the local laws of any state; and is the same in its nature and extent, as the equity jurisdiction of England, from which ours is derived, and is governed by the same principles.”); Mayer v. Foulkrod, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (“[S]tate laws, respecting rights, are to be considered by courts of the United States as rules of decision . . . But as to suits in equity, state laws, in respect to remedies, whether prior or subsequent to the [Process] Act of 1792, could have no effect whatever on the jurisdiction of the court.”).

<sup>192</sup> *Robinson v. Campbell*, 16 U.S. 212, 222-223 (1818). See also *U.S. v. Howland*, 17 U.S. 108, 115 (1819) (irrespective of Massachusetts law to the contrary, “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”); ABBOTT, *supra* note 105, at 463 (relying on *Robinson* and other early caselaw to observe “the rule is that the remedies in the courts of the United States are to be at common law or equity, not according to the practice of the particular State, but according to the general principles of common law and equity jurisprudence, as those systems are distinguished and defined in England”); Collins, *supra* note 76, at 272-73, 275-76 (discussing *Howland* and *Robinson*).

<sup>193</sup> *Boyle v. Zacharie*, 31 U.S. 648, 658 (1832). See also *Neves v. Scott*, 54 U.S. 268, 272 (1852) (“[I]n all the states, the equity law, recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this Court.”); *Surgett v. Lapice*, 49 U.S. 48, 53 (1850) (“[E]quity jurisdiction of the courts of the United States is the same in one state as in another and wholly independent of the local law of every state, without distinction.”); *Noonan v. Lee*, 67 U.S. 499, 509 (1863) (“The equity jurisdiction of the Courts of the United States is derived from the Constitution and Laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This Court is invested by law with authority to make such rules. In all these respects they are unaffected by State legislation.”).

upon which to exercise federal equity jurisdiction in the face of potentially applicable state laws.<sup>194</sup>

Despite affirming federal equitable powers relative to inconsistent state laws, these decisions do not speak of this retained equitable power as a cabined-in set of discrete rules. Instead, these cases saw equity powers as a set of principles received from England. In 1821, for example, Justice Marshall stated federal courts' equity jurisdiction "does not depend upon what is exercised by courts or equity or courts of law, in the several states; but depends upon what is a proper subject of equitable relief in the courts of equity in England, the great reservoir from which we have extracted our principles of jurisprudence."<sup>195</sup> Similarly, in *Smyth v. Ames* in 1898, the U.S. Supreme Court considered whether a federal court sitting in equity must decline a case where a state law provided a cause of action and legal remedy. <sup>196</sup> *Smyth* held state law did not "conclusively determine" a federal court's equity jurisdiction, and "[o]ne who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court."<sup>197</sup>

In 1869, the Supreme Court decided *Payne v. Hook*, in which the Court discussed equity's outer bounds in relation to state laws.<sup>198</sup> After re-stating the well-established precedent that federal equity power cannot be impaired by state law, the Court distinguished equity from common law on the grounds that "[t]he equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery possesses; it is subject to neither limitation or

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<sup>194</sup>See, e.g., *Surgett*, 49 U.S. at 53 ("[R]emedies in courts of the United States must be at common law or in equity, not according to the practice of the state courts, but according to principles of common law or equity, as distinguished and defined in that country from which we derive our knowledge of those principles. . . . Being a case which, upon general principles, is a *peculium* of equity, its jurisdiction in the Circuit Courts of the United States was not taken away by a law of Massachusetts giving the common law courts jurisdiction of the same matter.").

<sup>195</sup> *Bean v. Smith*, 2 F.Cas. 1143, 1150 (1821). See also *Boyle*, 31 U.S. at 658 ("[R]emedies 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; subject of course, to the provisions of the acts of congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe").

<sup>196</sup> *Smyth v. Ames*, 169 U.S. 466 (1898).

<sup>197</sup> *Id.* at 516.

<sup>198</sup> *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869).

restraint by State legislation, and is uniform throughout the different states of the Union.”<sup>199</sup> *Payne* used the term “possesses” as opposed to “possessed” which suggests that in 1868, the Supreme Court did not believe equity was cabined in to its crystallized form at the time of the American Revolution. *Payne* held that the federal court in that case had jurisdiction to hear the Plaintiff’s bill if it stated a case for “equitable relief” “according to the received *principles* of equity.”<sup>200</sup>

#### D. U.S. Judges and scholars recognized equity’s natural law roots.

Early U.S. legal writers acknowledged the concept of equity came from natural law roots most clearly manifested in Roman and Greek law.<sup>201</sup> For example, in 1835, Justice Story described equity as “composed partly of the principles of natural law, and partly of artificial modifications of those principles.”<sup>202</sup> Justice Story traced equity’s corrective function to Aristotle’s definition of equity as “the correction of the law wherein it is defective by reason of its universality.”<sup>203</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (emphasis added). See also *id.* at 432 (“[A] court of equity adapts its decrees to the necessities of each case.”). See generally ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 20 (1938) (“[O]ur courts had to complete the development of equity . . . concurrently with the English courts”).

<sup>201</sup> See POMEROY, *supra* note 42, § 2 (“[T]he equity administered by the early English chancellors, and the jurisdiction of their court, were confessedly borrowed from the *aequitas* and judicial powers of the Roman magistrates.”); HOPKINS, *supra* note 75, at 1 (“[T]he *aequitas* of Roman law, the justice or natural law of the Pandects, although the latter embodies the modern idea of equity, gives us no practical assistance in developing the origin of equity jurisprudence.”); EDMUND P. DOLE, TALKS ABOUT LAW: A POPULAR STATEMENT OF WHAT OUR LAW IS AND HOW IT IS ADMINISTERED 505 (1892) (describing equity as more noticeably influenced than the common law by “the spirit of Roman jurisprudence”); WILLIAM F. CLARK, SOUL OF THE LAW 207 (1942) (“The best method to follow . . . in any discussion of equity is to define it without reference to any particular system of law, define it in relation to the history of English law, and examine the controversy with the intent to return to something solid and simple which will save the *idea* of equity no matter how involved may become the controversy . . . Aristotle defined equity as ‘the correction of the law wherein it is defective by reason of its universality.’”); POWELL, *supra* note 169, at 521 (“Equity is founded in natural justice, honesty, and common sense.”); PAUL VINOGRADOFF, COMMON-SENSE IN LAW 209 (1914) (“Therefore law must be supplemented by equity (*epieikeia*); there must be a power of adaptation and flexible treatment, sometimes suggesting decisions which will be at variance with formally recognized law, and yet will turn out to be intrinsically just.”); BRAY, *supra* note 69, at 1037 (describing equity’s roots in Aristotle).

<sup>202</sup> See, e.g., STORY, *supra* note 161, at xi; WAIT & BAYLIES, *supra* note 164.

<sup>203</sup> STORY, *supra* note 161, § 3 at 3.

Early U.S. treatises recognized the Roman and natural law roots of equity as “a natural right or justice . . . mitigating the rigor of the law through a liberal and rational interpretation of its principles, or by adapting remedies more exactly to the exigencies of particular cases.”<sup>204</sup> In the early 1900s Paul Vinogradoff noted “equity appears not only as the most ancient but also as the most modern form of legal action.”<sup>205</sup> Vinogradoff cautioned “[a]ny attempt to get rid of this contradictory tendency in the evolution of law would speedily reduce legal systems to hopeless formalism and intolerable pedantry.”<sup>206</sup> Early U.S. scholars were careful to advocate for a relatively more predictable and controlled “equity” as compared to equity’s natural law historical roots.<sup>207</sup> However, these repeated references connecting natural law and equity highlight equity’s nature as a principle-based legal system designed to correct unjust application of general laws.

#### IV. THE U.S. LEGAL SYSTEM RECEIVED EQUITY AND INJUNCTIONS AS A FLEXIBLE CATEGORY OF JUDICIAL POWER THAT COULD ADAPT TO CHANGING CIRCUMSTANCES.

Early U.S. judges and scholars received equity and injunctive power as a flexible judicial power that would change to adapt to changing circumstances. While the principles underlying the injunctive power did not change, the application of those principles could respond to changing economies, technologies and cultures. Flexibility is inherent in the nature of equity’s corrective function. There is no doubt that the U.S. received English common law with the expectation that it would change. It would be illogical for equity, as a corollary to the common law, to be incapable of the change expected of the common law.

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<sup>204</sup> WAIT & BAYLIES, *supra* note 164. See also Bispham, *supra* note 78, at 181 (“That rigid rules are generally requisite for the regulation of civil conduct, but that under certain circumstances, and in certain exceptional circumstances, these rules require modification, is an elementary truth in the administration of justice which is readily recognized by everyone.”).

<sup>205</sup> VINOGRADOFF, *supra* note 201, at 221.

<sup>206</sup> *Id.*

<sup>207</sup> See POMEROY, *supra* note 42, § 43.

**A. Historical analysis evidences a consistent expectation by U.S. courts and scholars that equity would change.**

From the 1780s into the early 1900s, the supreme court and congress understood equity jurisdiction would change as it developed in the United States. Just two years after the Judiciary Act, the Supreme Court's Rule VII stated the Court could use English chancery courts' practice as "affording outlines" for the Court, and specified that the Court would "make such alterations therein as circumstances may render necessary."<sup>208</sup> In 1796, the U.S. Supreme Court noted its ability to "make such deviations [from the custom and usage of Courts of Equity] as are necessary to adopt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration, and control, of the Legislature."<sup>209</sup> In 1856 the U.S. Supreme Court reaffirmed that "[t]he practice of the courts of the United States corresponds with that of the chancery of Great Britain, except where it has been changed by rule, or is modified by local circumstances or local convenience."<sup>210</sup>

The Process Acts of 1792 and 1828 explicitly allowed courts to change equity "principles, usages and rules" by rulemaking and or adopting state approaches.<sup>211</sup> As interpreted by Justice Marshall, this enabled federal courts "to make such improvements in [their] forms and modes of proceeding, as experience may suggest, and especially to adopt such State laws on this subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789."<sup>212</sup>

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<sup>208</sup> Rules & Orders of the Supreme Court of the U.S., 5 U.S. (1 Cranch), at xvi (1804) (quoting rule VII, dated Aug. 8, 1791).

<sup>209</sup> Grayson v. Virginia, 3 U.S. 320, 320 (1796). See also ABBOTT, *supra* note 105, at 465, n.2 ("[T]he United States courts of equity and admiralty jurisdiction adopt, as a general rule, that practice which is founded on the custom and usages of courts of admiralty and equity, constituted on similar principles; but the courts are authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of the country, subject to the control of the legislature.").

<sup>210</sup> Hipp for Use of Cuesta v. Babin, 60 U.S. 271, 278 (1856).

<sup>211</sup> See discussion *supra* II.D.2 See also Gallogly, *supra* note 29, at 1305 ("[E]quitable remedies, while remaining rooted in English principles, began to take on an American character."); Resnik, *supra* note 6, at 240 ("[T]he constitutional charter for 'courts' with jurisdiction 'in law and equity' can be [ ] read to authorize institutions that, like other countries' courts, have the capacity to respond to changing demands, so long as federal courts work within the boundaries of their subject matter authority.").

<sup>212</sup> Wayman v. Southard, 23 U.S. 1, 42-43 (1825).

When the U.S. Supreme Court amended the Equity Rules in 1828, a supreme court justice went to England and consulted with an English Chancellor, not as a historian, but to understand “modern English practice.”<sup>213</sup> Courts were not looking backward when trying to understand equity and promulgate amended equity rules, but looking forward. In 1891, the North Carolina federal district court applying the state’s code observed that the code’s abolition of the distinction between actions at law and in equity did not abolish “equitable rights and principles.”<sup>214</sup> Instead, “elementary principles of law and equity were developed by centuries of parallel and distinctive growth, and still have an harmonious co-existence in English and American jurisprudence.”<sup>215</sup>

The practical reality was it was difficult for early U.S. courts, lawyers and scholars to discern the exact contours of English equity in the 1780s. A lack of accessibility to English cases existed in the 1700s and 1800s.<sup>216</sup> Many early U.S. decisions in equity struggled to identify the actual practice of English equity courts, or to discern English precedent based on inconsistent decisions.<sup>217</sup> The same difficulty existed with discerning English common law.<sup>218</sup> This would have made applying equity and injunctions just as they were in the 1870s a practical impossibility.

Colonial state governments had largely “winged it” when adopting English law prior to independence. The founders were not fresh from Westminster, but several generations past the early U.S.

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<sup>213</sup> See discussion at *supra* Section II.D.3

<sup>214</sup> *Lockett v. Rumbaugh*, 45 F.23, 29 (C.C.W.D.N.C. 1891). See also *Baker v. Biddle*, 2 F.Cas. 439, 447-8, No. 763 (C.C.E.D. Penn. 1831).

<sup>215</sup> *Lockett*, 45 F. at 29.

<sup>216</sup> See Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 16 (1910) (discussed in relation to U.S. state courts finding English common law).

<sup>217</sup> See, e.g., *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. 174, 185 (1823) (discussing English caselaw regarding mistake of law in a contract case and concluding “I am unable to reconcile these cases with the idea, that there is any universal rule on the subject, still less that it can be applied to the present case”); *Gaines v. Chew*, 43 U.S. 619, 645 (discussing inconsistent English precedent regarding whether a court of equity could provide relief against a fraudulently obtained will and concluding the cases offer “no very satisfactory result” as to this question).

<sup>218</sup> See Pope, *supra* note 216, at 13-17 (“[T]here is great uncertainty as to what this English common law thus adopted is. . . [T]here was the further practical difficulty, if all English decisions prior to a particular period were to be regarded as binding, in the fact that not all such decisions were accessible to the courts. In such a situation it was easier to adopt the general principles of the common law than its particular applications by English courts.”).

colonists who had long since adapted English law to suit their own situational needs.<sup>219</sup> “Regardless, the English court system was largely unsystematized during the first centuries of U.S. colonies. Those colonists who were familiar with English law were not necessarily familiar with well-established heads of jurisdiction that over time became more systemized and discrete.”<sup>220</sup>

Scholars throughout the 1800s and 1900s defined equity by established principles “refined and improved” with judicial discretion as applied to new situations.<sup>221</sup> In 1835, Justice Story observed “[w]here a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose.”<sup>222</sup> Story wrote “one of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest.”<sup>223</sup> Pomeroy similarly wrote that while equitable principles were established by 1881, such principles “possess an inherent vitality and a capacity of expansion, so as ever to meet the wants of progressive civilization.”<sup>224</sup>

Pomeroy connected the flexibility of equity with its function vis-à-vis the common law, noting “[a]s the expansive tendencies of the common law are thus confined within certain limits . . . the English and American system of equity is preserved and maintained to supply the want, and to render the national jurisprudence as a whole adequate to the social needs.”<sup>225</sup> Pomeroy defined precedent in

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<sup>219</sup> See GOEBEL, *supra* note 78, at 5 (noting that, with respect to enacting English law, the colonists were initially left to themselves, which gave a “peculiar quality” to the initial introduction of English law in America).

<sup>220</sup> *Id.*

<sup>221</sup> See Edwin B. Gager, *Equity 1701 - 1901*, in MEMBERS OF THE FACULTY OF THE YALE LAW SCHOOL, TWO CENTURIES' GROWTH OF AMERICAN LAW 1701-1901 125 (1901) (“the course of equity has been a true growth, an expansion in the details of application within definitely determined limits, an expansion always tested and corrected by reference to the older precedents; yet there has always been present a certain discretion, peculiar to Equity, by which insensibly the doctrines of Equity have been refined and improved”).

<sup>222</sup> STORY, *supra* note 161, § 4 at 5.

<sup>223</sup> *Id.* § 28 at 24.

<sup>224</sup> POMEROY, *supra* note 42, § 60.

<sup>225</sup> *Id.* § 67.

equity cases as examples of the manner and extent to which principles have been applied, but emphasized that equity courts “always must have, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines” they administer.<sup>226</sup>

In 1876, G.T. Bispham published an article entitled “Law in America, 1776-1876.”<sup>227</sup> Bispham identified numerous ways in which U.S. law has departed from “English principles” because “American jurisprudence has found the rules of English law unsuited to the conditions of American life, has therefore repudiated or modified them, and has established a set of legal rules which may be termed essentially and properly American.”<sup>228</sup> Bispham lauded equity as applied in U.S. courts having made greater gains regarding protecting married women’s property rights than equity in England.<sup>229</sup> In addition, he lauded other U.S. changes to English equity and common law such as criminal justice reforms, riparian rights changes and compulsory public education.<sup>230</sup> Bispham suggested U.S. adaptation of English law is an “obvious” truth one would see when any group of people adapt laws from another group of people somewhere else.<sup>231</sup>

In a 1897 Yale Law Review article, W.A. Woods wrote “[e]quity as a system, more perhaps than the Common Law, has been enlarged and modified to meet the changing conditions of business and civilization.”<sup>232</sup> Woods noted:

Steam power, electricity, railroads, telegraphs, corporate organizations, labor unions, trusts and other agencies and schemes of modern enterprise have vastly extended the field and multiplied the occasions for the exercise of equity powers including the power to enjoin, but the character of the jurisdiction and the principles which govern its exercise

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<sup>226</sup> *Id.* § 60.

<sup>227</sup> Bispham, *supra* note 78, at 154-181.

<sup>228</sup> *Id.* at 156.

<sup>229</sup> *Id.* at 155-56.

<sup>230</sup> *Id.* at 159-168, 173. Bispham discussed differences in riparian rights because of physical differences in rivers, the law of waste and use of land as collateral due to the difference in landmass size. *Id.*

<sup>231</sup> *Id.* at 158.

<sup>232</sup> W.A. Woods, *Injunction in the Federal Courts*, 6 YALE L.J. 245, 245 (1897).

have been changed or enlarged no more than the provisions and underlying principles of the National Constitution.<sup>233</sup>

Regarding injunctions, Judge Woods wrote “[n]o decision of the Supreme Court, or of any United States Circuit Court of Appeals, touching the subject of injunction, can be said to be founded on or to involve any new doctrine, or any application of established principle which was new save in the circumstances and conditions brought under consideration.”<sup>234</sup> In 1901, one scholar noted “[t]he apparent extensions of Equity in quite recent times, as in the case of injunction . . . are but the application to modern industrial conditions, enormous sometimes in their extent and importance, of principles of common application in chancery . . .”<sup>235</sup> All of these historical sources explicitly expect federal remedial power to use existing principles to adapt to changing circumstances.

#### **B. Flexibility and judicial discretion were hallmarks of equity.**

For over 150 years, U.S. courts and scholars have emphasized flexibility as a hallmark of equity. In order to be flexible, equity must be adaptable, and therefore, this emphasis on flexibility supports early U.S. understandings of equity’s adaptability. Equity’s flexibility is inherent in its ameliorative function to step in where legal remedies are inadequate.<sup>236</sup> In 1896, the U.S. Supreme Court observed “the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.”<sup>237</sup> In 1869,

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Gager, *supra* note 221, at 147. See also VINOGRADOFF, *supra* note 201, at 232 (“[E]quity as a method of judicial discretion is inseparable from a complex and efficient system of law. . . . The method will retain its value and will have to be exercised in order to supplement the rigidity of prospective general rules.”).

<sup>236</sup> See POWELL, *supra* note 169, at 524 (“[W]here any particular case involves circumstances to which the framers of the rule do not appear to have averted, and which, in a court of law, from its established usage and course of proceedings, cannot be available there, courts of equity will interfere for the purpose of giving to such circumstances the effect to which they may be equitably entitled.”); Bray & Miller, *supra* note 28, at 1777 (“Grievances recognized in corrective equity implicate hardships that are difficult to foresee or define, or that may be foreseeable but . . . less common—indeed, rare—to refer to corresponding underlying primary rights.”).

<sup>237</sup> *Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 600-01 (1896) (cited by dissent in *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 337 (1999)).

the U.S. Supreme Court held “a court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties.”<sup>238</sup>

The Court approvingly cited the following language from Pomeroy:

[E]quity . . . “has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.”<sup>239</sup>

Throughout the 1800s and early 1900s, U.S. treatises emphasized the “almost indefinite variety of circumstances, where the remedy given by law is in its nature inadequate and one more complete is possible, [and] the aid of equity may be invoked.”<sup>240</sup> In 1914, Paul Vinogradoff described this as “equitable individualization,” defined as “the adaption of a general rule to particular circumstances.”<sup>241</sup>

Early U.S. cases and treatises emphasized the need for judicial discretion in equity cases. In 1838, the Supreme Court described the exercise of judicial discretion as “a leading principle of equity.”<sup>242</sup> The Court has consistently affirmed the importance of judicial discretion in the exercise of equitable relief.<sup>243</sup> In 1944, the U.S.

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<sup>238</sup> *Seymour v. Freer*, 75 U.S. 202, 218 (1869) (cited by dissent in *Grupo Mexicano*, 527 U.S. at 336). See also *Providence Rubber Co. v. Goodyear*, 76 U.S. 805, 807 (1869) (“[T]he . . . [c]ourt which tries the case will doubtless so exercise its flexible jurisdiction in equity as to protect all rights and do justice to all concerned.”) (cited by dissent in *Grupo Mexicano*, 527 U.S. at 342).

<sup>239</sup> *Union Pac. Ry. Co.*, 163 U.S. at 601 (citations omitted).

<sup>240</sup> DOLE, *supra* note 201, at 504. See also FISHBACK, *supra* note 179, § 576 (discussing equity jurisdiction to “give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of common law.”).

<sup>241</sup> VINOGRADOFF, *supra* note 201, at 222.

<sup>242</sup> *Galloway v. Finley*, 37 U.S. 264, 288 (1838).

<sup>243</sup> See, e.g., *Gaines v. Chew*, 43 U.S. 619, 619 (1844) (“It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion.”); *Oliver v. Piatt*, 44 U.S. 333, 333 (1845) (“Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances

Supreme Court again affirmed that “flexibility rather than rigidity has distinguished” equity jurisdiction.<sup>244</sup> More recently, in the last fifty years the U.S. Supreme Court has repeatedly quoted the following language: “Once invoked, the scope of a district court’s equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.”<sup>245</sup> This is consistent with English caselaw also emphasizing the importance of judicial discretion.<sup>246</sup>

It is true that some early U.S. caselaw focused on English law as it existed at the time of the American revolution.<sup>247</sup> When courts made this choice, however, they did so conscious that it was a case-specific justification, and these decisions do not assert any constitutional or statutory mandate to do so.<sup>248</sup> Regardless, this caselaw is a drop in a sea of cases and treatises recognizing the changing principle-based nature of equity and injunctions. The importance of judicial discretion in equity jurisdiction is far better

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of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court.”); *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943) (“An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.”); HIGH, *supra* note 164, § 11 at 9 (“The right to a preliminary injunction is not *ex debito justitiae*, but the application is addressed to the sound discretion of the court to be guided according to the circumstances of the particular case.”).

<sup>244</sup> *Hecht v. Bowles*, 321 U.S. 321, 329 (1944) (finding court has discretion to grant or not grant injunction even where statutory right to injunction exists) (cited by dissent in *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 336).

<sup>245</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978); *Brown v. Plata*, 563 U.S. 493, 538 (2011).

<sup>246</sup> *Conley*, *supra* note 37, at 11-12.

<sup>247</sup> See, e.g., *Cathcart v. Robinson*, 30 U.S. 264 (1831) (applying English law at the time of the American revolution when interpreting state law that had specifically received the English law); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 519 (1852) (“[C]hancery jurisdiction is conferred on the courts of the United States by the Constitution, under certain limitations; and, under these limitations, the usages of the High Court of Chancery, in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the States, and even in those where no State chancery system exists. Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.”); *Fontain v. Ravenel*, 58 U.S. 369 (1855) (considering English cases on law of trusts).

<sup>248</sup> *Cathcart*, 30 U.S. at 280 (applying English statute in effect at time of American revolution when interpreting state statute that had received English law, and noting the rule to interpret English statutes as English courts interpret them “may be susceptible of some modification”; and U.S. courts have the option to look at English law at the time of the American revolution or consider or follow subsequent decisions, but are not bound to do either).

established than the notion that federal courts are restricted to a crystallized version of equitable remedies from the 1780s.

**C. The U.S. legal system received the common law as adaptable to new circumstances.**

When the United States received English law, English common law and equity courts were still separate, and therefore, Article III gave federal courts jurisdiction both at law and equity. Looking at the U.S. reception of common law provides useful information on how the United States received equity as well.<sup>249</sup> There is no doubt that United States received English common law with an expectation it would change.<sup>250</sup> As explained by one historian, “[t]he sense of what constituted the ‘common’ law was in many colonies a product of selective and conscious incorporation of English law placed side-by-side with an indigenous colonial product.”<sup>251</sup> In 1881, Justice Holmes wrote “[i]f truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow.”<sup>252</sup> In 1928, the Ninth Circuit observed “[t]he common law consists of principles, and not of set rules. It therefore admits of different applications under different conditions. Moreover, by the terms of our statute it is to be ascertained by American as well as by English decisions.”<sup>253</sup>

It would be illogical for this concept of growth and adaptability to apply to the common law of England, but not to federal courts’ equity jurisdiction. Put simply, “[i]f law is not static, the equity that

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<sup>249</sup> Pfander & Wentzel, *supra* note 22, at 1355 (“[H]istorically minded scholars and jurists should consult both the equitable and common law traditions when assessing the scope of Article III judicial power. In defining judicial power, it makes little sense to examine the power of a court of equity or common law in isolation.”).

<sup>250</sup> Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMPAR. L. 1, 9 (1990) (“English common law was received in the United States and creatively adapted to North American conditions.”). As Pope noted in 1910, in addition to interpreting English law through the lens of current conditions, U.S. courts could simply address English caselaw as “not the law, but only evidence of the law.” Pope, *supra* note 216, at 16. In either case, early U.S. courts did not evidence an obligation to be found by English law as it existed at the time of the American Revolution.

<sup>251</sup> SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 56 (1990).

<sup>252</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 37 (1881).

<sup>253</sup> Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582, 583 (9th Cir. 1928) (citations omitted).

corrects and supplements it cannot be static either.”<sup>254</sup> In the same way that “it was the English common law that was adopted and not the decisions of English courts,”<sup>255</sup> it was English principles of equity that were adopted, not English chancery court practice.

U.S. states enacted “reception statutes” receiving English common law.<sup>256</sup> These reception statutes were gap-fillers where state laws were undeveloped or silent, which many were while U.S. states’ legal systems developed.<sup>257</sup> When interpreting reception statutes, state courts repeatedly rejected the idea that they were bound by English common law as it existed at the time of the Revolution. In 1806, in *Baring v. Reeder*, the Supreme Court of Virginia held English judicial opinions are “merely [] affording evidence of the opinions of eminent Judges as to the doctrines in question.”<sup>258</sup> *Baring* posited the theoretical questions: “[s]hall we not have the privilege every day exercised in England, of detecting the errors of former times? Shall we ‘take our law of evidence from Keeble and Siderfin?’ Shall we go back to the Gothic days of Lord Coke, and reject every man as a witness who is not a Christian?”<sup>259</sup> State courts repeatedly affirmed this broad flexible reading of English common law throughout the 1800s and 1900s.<sup>260</sup> In 1933, the U.S. Supreme Court observed:

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<sup>254</sup> Bray & Miller, *supra* note 28, at 1796. Stephen Subrin argued that equity lost its corrective function relative to the common law once federal courts began applying state common law. See Subrin, *supra* note 33, at 931. However, federal equitable remedies, such as injunctions and preliminary injunctions, are concerned with the adequacy of legal remedies and avoiding irreparable harm, respectively. These remedial principles remained salient regardless of whether federal courts applied state or federal substantive law.

<sup>255</sup> Pope, *supra* note 216, at 12.

<sup>256</sup> See, e.g., MONT. CODE ANN. § 1-1-109 (2021) (“The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state.”).

<sup>257</sup> See Hall, *supra* note 78, at 802 (“As a practical matter the courts needed some body of general law to ‘supply the defects of a necessarily imperfect legislation,’ and it was natural that they should turn to the common law, which was the only system of jurisprudence accessible to any extent.”) (citing *Ohio v. Lafferty*, 1 TAPPAN 113 (Ohio C.P. 1817)).

<sup>258</sup> *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 162 (1806).

<sup>259</sup> *Id.* at 163.

<sup>260</sup> See, e.g., *Chilcott v. Hart*, 23 Colo. 40, 56 (1896) (“The common law thus being a constant growth, gradually expanding and adapting itself to the changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that, aside from the influence of statutory enactments, the latest judicial announcement of

[t]he judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.<sup>261</sup>

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the courts is merely declaratory of what the law is and always has been. We are at liberty, therefore, if not absolutely bound thereby, to avail ourselves of the latest expression of the English courts upon any particular branch of the law, in so far as the same is applicable to our institutions, of a general nature, and suitable to the genius of our people, as well as to consult the English decisions made prior to 1607.”); *Bloom v. Richards*, Ohio St. 2d 387, 391 (1853) (“The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio. But wherever it has been found wanting in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or, if necessary, to wholly depart from it.”); *Carson v. Blazer*, 2 Binn. 475, 483-84 (Pa. 1810) (“[T]he uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident. The adoption of a different rule would, in the language of Sir Dudley Ryder, resemble the unskilful physician, who prescribes the same remedy to every species of disease.”); *Perin v. Carey*, 65 U.S. 465, 466 (1860); *Williams v. Miles*, 68 Neb. 463 (1903); 94 N.W. 705, 705-06 (Neb. 1903) (interpreting Nebraska’s reception statute’s use of the term “common law of England” as referring to “that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.”); *Katz v. Walkinshaw*, 141 Cal. 116, 124 (1903) (“[I]n many instances in this country, in states where the common law is held to be in force, some of its rules are held to be not applicable to the conditions different from the place of its origin.”); *Trustees of the Freeholders & Commonality of Brookhaven v. Smith*, 188 N.Y. 74, 79, 80 N.E. 665, 667 (N.Y. 1907) (“The adoption by the people of this state of such parts of the common law as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles, which are inapplicable to our circumstances, and which are inconsistent with our notions of what a just consideration of those circumstances demands.”); *Latz v. Latz*, 10 Md. App. 720, 731 (Md. App. Ct. 1971) (“[Article 5 of the Maryland Declaration of Rights] referring to the common law en masse existing here either potentially or practically, as it prevailed in England on 4 July 1776 . . . does not preclude a change of it by judicial decision.”); *Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857 (1979) (summarizing over a century of precedent relating to the well-established rule that the common law was adopted by states with the intent that it would change to fit the circumstances of the state over time).

<sup>261</sup> *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933). See also *Pfander & Wentzel*, *supra* note 22, at 1356.

Another example is provided by an early U.S. court decision emphasizing the need to modify English common law regarding navigable waters “as is applicable to their own situation and the condition of an infant colony.”<sup>262</sup> In *Morgan v. King* in 1866, the New York Court of Appeals held:

There can be no doubt that the rule of the common law, as to what degree of capacity renders a river navigable, in fact, should be received, in this country, with such modifications as will adapt it to the peculiar character of our streams, and the commerce for which they may be used. This accords with the general principle of the common law of England, that English subjects, colonizing a new country, carry with them only so much of the laws of the mother country as is applicable to their own situation and the condition of an infant colony. . . . It is also consistent with the nature of the rule itself, which is but an outgrowth or product of the peculiar circumstances and necessities of the people with whom it originated . . . .<sup>263</sup>

It was the principles underlying English common law, rather than English precedent itself, that bound early U.S. courts. As U.S. law grew and morphed, it supplanted English law.<sup>264</sup> After *Erie v. Thompkins* in 1938, the contours of federal common law were less substantively important since *Erie* abolished federal common law in all but a few pockets. However, *Erie* did not prohibit or restrict

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<sup>262</sup> *Perin v. Carey*, 65 U.S. 465, 500 (1861). For a discussion of early judicial interpretations of the common law as received from England, see Pope, *supra* note 216. See also, e.g., *Kansas v. Colorado*, 206 U.S. 46, 97 (“[T]he common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.”).

<sup>263</sup> *Morgan v. King*, 35 N.Y. 454, 458-59 (N.Y. 1866).

<sup>264</sup> Pope, *supra* note 216, at 15 (“[A]pplicable English precedent” when based on general principles, or on general sources of law common to all courts, will always be persuasive and especially valuable for purposes of argument; *but not because they constitute any part of the adopted common law of England.*”) (alteration in original). Pope noted as U.S. courts began to apply “*stare decisis* to their own decisions, then there began to develop in each state a law of that state in precisely the same sense that there existed a common law in England developed by the English courts.” Pope, *supra* note 216, at 17. See also POUND, *supra* note 200, at 20 (“Legislatures and courts and doctrinal writers had to test the common law at every point with respect to its applicability to America. Judges and doctrinal writers had to develop an American common law, a body of judicially declared or doctrinally approved precepts suitable to America, out of the old English cases and the old English statutes. They did this . . . .”).

federal courts from utilizing federal equitable remedial powers, like injunctions, in federal question and diversity cases.<sup>265</sup> Pre-*Erie* discussions of the U.S. reception of English common law illustrate that the common law, and therefore, logically equity, was expected to change as new conditions arose.

#### V. THE EQUITABLE ORIGINALISM VIEW OF INJUNCTIONS DOES NOT COMPORT WITH U.S. LEGAL HISTORY.

Historical analysis of the constitutional convention, the Judiciary Act, caselaw, rules of court, early federal statutes and treaties do not support the equitable originalism view of injunctive power. It is not surprising, therefore, that several scholars have recently raised questions regarding the historical accuracy of the “history and tradition” or originalist view of federal equity jurisdiction.<sup>266</sup> Many terms exist for the judicial philosophy seen in *Grupo Mexicano* and the recent concurrences discussed above that look to history to determine the outer bounds of federal equity today. The most obvious is “originalism,” but there are many definitions and subcategories of originalism.<sup>267</sup> One recent article used the term “equitable traditionalism.”<sup>268</sup> Another used the term “confused

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<sup>265</sup> See *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 112 (1945) (requiring federal courts to adhere to state statutes of limitation when issuing equitable relief, but noting equity remains “an independent body of law”). See also Roberts, *supra* note 6, at 528 (arguing in favor of preserving federal equity remedial power, and noting that after *Erie*, the Supreme Court created “inroads establish[ing] a path for federal courts to execute equity pursuant to traditional principles, even when resolving state substantive claims”). For a discussion of the argument that federal equity jurisdiction should be constrained like *Erie* constrained federal common law, see Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217 (2018).

<sup>266</sup> See, e.g., Gallogly, *supra* note 29; Fallon, *supra* note 6; Keenan, *supra* note 6, at 902 (“[E]quitable traditionalism . . . seems to freeze equity in time.”); Resnik, *supra* note 6, at 240-42 (citing to scholarly works demonstrating that “specifically in terms of equity . . . federal judges repeatedly responded to litigants’ claims through devising remedies other than those stipulated in statutes and rules” and describing *Grupo Mexicano* as creating “new, and atextual, constraints on the federal judicial role”); Bray, *supra* note 69, at 1011 (referring to *Grupo Mexicano* as “misguided” and “seeking an equity that seemed almost frozen in time: the remedies that could have been given, or that were analogous to the remedies that could have been given, by the chancellor in 1789”).

<sup>267</sup> For a useful and recent description of types of originalism and related doctrines, see Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. L. REV. 433 (2023); Sohoni, *supra* note 29, at 954-966. Regarding the development of originalism and remedies, see *id.* at 965-969.

<sup>268</sup> Pfander & Wentzel, *supra* note 22, at 1273 (“originalist applications of equitable traditionalism”); Keenan, *supra* note 6, at 898.

equitable originalism” as “obscur[ing] the original understanding of federal equity power.”<sup>269</sup>

Does originalism “simply reflect a decision by today’s law to grant continuing force to the law of the past”?<sup>270</sup> Or is originalism “fidelity to the original meaning of the Constitution’s text and to the principles that underlie the text”?<sup>271</sup> Some originalists look to original meaning, with a focus on what the public believed the term to mean in the 1780s. “Public meaning originalism” is based on the tenets that the original meaning of the constitution is fixed at the time of drafting and ratification, and constitutional practice should be “consistent with, fully expressive of, and fairly traceable to” that meaning.<sup>272</sup> Public meaning originalism posits that the “communicative content” of the constitution’s text that was accessible to the public provides the best understanding of the original meaning.<sup>273</sup> This requires construction of constitutional provisions without clear original public meaning based on the “original purpose(s) or function(s) of the relevant constitutional provisions.”<sup>274</sup> Originalist methodology relies on the constitutional record, historical linguistics and “deep knowledge of the historical period” of ratification through direct or secondary sources to determine the function and purpose of a constitutional provision.<sup>275</sup> Some scholars note that anticipated applications of less structural constitutional clauses, such as “due process” can indeed change, as long as such applications are consistent with original meaning.<sup>276</sup>

Another “faint hearted originalism” is “conservative constitutional pluralism,” which justifies constitutional interpretations that run counter to text by looking to history,

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<sup>269</sup> Gallogly, *supra* note 29, at 1312.

<sup>270</sup> William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810 (2019).

<sup>271</sup> Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007).

<sup>272</sup> Barnett & Solum, *supra* note 267, at 437. See also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887-88 (1985) (discussing original intent as an interpretive strategy); Balkin, *supra* note 271, at 445 n.49 (collecting various public meaning originalist works).

<sup>273</sup> Barnett & Solum, *supra* note 267, at 437.

<sup>274</sup> *Id.* at 438.

<sup>275</sup> *Id.* at 439.

<sup>276</sup> Balkin, *supra* note 271, at 433-34.

tradition and precedent.<sup>277</sup> This form of originalism allows deviation from the text “on the basis of history, tradition, or longstanding precedent.”<sup>278</sup> This approach is juxtaposed with “the ‘lion hearted originalism’ that is associated with Justice Thomas.”<sup>279</sup> Conservative constitutional pluralism builds off Justice Scalia’s originalism looking at both original meaning and intended application, that is, the application of the constitutional text intended by the founders.<sup>280</sup>

Another variation on this approach is the “history and tradition” approach. *Grupo Mexicano* and the recent concurrences discussed above all discuss history or tradition.<sup>281</sup> Some scholars refer to this as “historical traditionalism,” which justifies constitutional interpretations “only if they are deeply rooted in the history and traditions of the United States” as seen through “longstanding and continuous” historical practice, precedent, customs, and social

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<sup>277</sup> Barnett & Solum, *supra* note 267, at 452 (quoting Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 16 (2006)). Justice Scalia coined the term “faint-hearted originalist” in Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989), discussed below. See also Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 570 n.3 (1998).

<sup>278</sup> Barnett & Solum, *supra* note 267, at 452.

<sup>279</sup> *Id.* (citing Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 531-33 (2022)).

<sup>280</sup> In 2007, Balkin acknowledged Mitch Berman’s argument that only Justice Scalia’s form of originalism requires adherence to both original meaning and intended application. Balkin, *supra* note 271, at 442. Since then, however, in the realm of injunctions and Article III, recent concurrences adhere to this rigid form of originalism, but do so based on inaccurate historical analysis of the founders’ intent regarding what the term “equity” meant. In contradistinction to this approach, Balkin argues, “We must believe that the text has sufficient adaptability to remedy the injustices of the present and the challenges of the future, that our political institutions are not incorrigible, and that our nation is able to learn from its mistakes and improve itself over time.” *Id.* at 440. While Scalia admitted “in a crunch I may prove a faint-hearted originalist,” his approach to injunctions in *Grupo Mexicano* facially requires fidelity to original and intended application, both of which I argue were based on inaccurate historical analysis. See Scalia, *supra* note 277, at 864.

<sup>281</sup> *Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (“[W]e should exercise [equity jurisdiction] in a manner consistent with our history and traditions.”) (Thomas, J., concurring); *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (holding that courts can only issue relief “traditionally accorded by courts of equity”); *Trump v. Hawaii*, 138 S.Ct. 2392, 2425-2429 (2018) (noting that nationwide injunctions “did not emerge until a century and a half after the founding” and “appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts”); *Dep’t of Homeland Sec. v. New York*, 140 S.Ct. 599, 600 (2020) (“Universal injunctions have little basis in traditional equitable practice.”); *Whole Woman’s Health v. Jackson*, 142 S.Ct. 522, 535 (2021) (“The equitable powers of federal courts are limited by historical practice.”).

norms.<sup>282</sup> Of course, history and tradition are different things.<sup>283</sup> Traditions can emerge at any point in history, and history can be inconsistent with previous or subsequent traditions, even sometimes purposefully.<sup>284</sup>

Whether faint-hearted or lion-hearted, neither the text, history, tradition nor precedent justifies the position that “equity” in Article III crystallized equity as it existed in English Chancery Courts in the 1780s without the ability to adapt to changed circumstances. That is nowhere in the text, history or tradition of equity jurisdiction or injunctive power. Fidelity to the original meaning, public understanding and founders’ intent necessitates the conclusion that the term “equity” referred to a principle-based jurisdiction that would adapt and change just like the common law. Court opinions, treatises, federal legislation and court rules all point in this direction. These sources illustrate that “equity” as used in Article III is a constitutional provision that created a “relatively open-ended framework for governance on which later generations must build, creating new institutions and practices to implement constitutional values and carry out governmental functions.”<sup>285</sup>

Ironically, the equitable originalism approach to equity is making a mistake that was criticized by a preeminent early U.S. scholar. When discussing the accretion of equitable principles through precedent during the development of English chancery courts, Pomeroy observed that in the face of established chancery precedent, chancellors “sometimes fell into the mistake of refusing relief in a case plainly within the scope of established principles, because there was no precedent which exactly squared with the facts in controversy.”<sup>286</sup> While history and tradition supports prohibiting injunctions where legal remedies are adequate, it does not support prohibiting injunctions simply because courts did not grant similar injunctions in the 1780s.

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<sup>282</sup> Barnett & Solum, *supra* note 267, at 453.

<sup>283</sup> *Id.* at 451.

<sup>284</sup> *See id.* at 453-54 (offering the possibilities of precedents that emerged during the New Deal era or the *Slaughterhouse Cases* era as forming historical traditions).

<sup>285</sup> *See* Balkin, *supra* note 271, at 435. Balkin did not make this assertion regarding “equity” and Article III but observed that some constitutional provisions serve this role. *Id.*

<sup>286</sup> POMEROY, *supra* note 42, § 58.

If historical analysis does not support the original meaning, history or tradition of equity or injunctions as crystallized in the form they took in English chancery courts in the 1780s, then what is “originalist” or based on “history and tradition” about arguments in support of this approach to federal equity?<sup>287</sup> The debate about the outer bounds of equitable remedies should be based on present-day considerations, including existing precedent and statutory frameworks, and an accurate understanding of the U.S. reception of equity.

This article does not take a position on the merits of originalism, the extent of inherent judicial power in Article III, or the types of injunctions present in England in the 1780s. This article’s aim is to suggest that historical analysis shows that the founders and early U.S. courts and scholars conceived of federal injunctive power as a principle-based judicial power that would and should adapt to changing circumstances. The foundational principle regarding equitable remedies was that they should be used where legal remedies were inadequate. With a changing common law, equitable remedies necessarily needed to keep up by being adaptable.

The equitable originalism approach to injunctions, therefore, is incongruent with the original meaning, function, purpose, history and tradition of federal equity jurisdiction and injunctive power. As such, it is hard to see how it is originalist in any meaningful sense of the term. Rather than rely on an inaccurate historical understanding, debates about the outer bounds of federal equitable powers should focus on the current U.S. legal landscape, not the English chancery courts in the 1780s.

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<sup>287</sup> Pfander & Wentzel, *supra* note 22, at 1275-26 (“[A]ccepting the premise that historical precursors can help inform the scope of appropriate equitable relief today, one must take care to get the history right.”).