

# THE PAST AND FUTURE OF EQUITABLE REMEDIES: AN ESSAY FOR FRANK JOHNSON

*James E. Pfander & Wade Formo*

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# THE PAST AND FUTURE OF EQUITABLE REMEDIES: AN ESSAY FOR FRANK JOHNSON

*James E. Pfander\* & Wade Formo\*\**

*The Supreme Court has lately deployed a backward-looking and largely static approach to defining the scope of federal remedial authority. In a series of decisions on the scope of federal equity, including Grupo Mexicano and Exceptional Child, the Court has invoked an idealized (but often inaccurate) view of the origins and historic scope of equitable remedies. Coupled with its recent decisions in Ziglar v. Abbasi and Hernandez v. Mesa, which downplay remedial adequacy as a factor in the recognition of suits under Bivens, the Court's turn to equity's static past threatens to separate legal and equitable remedies that can best be understood as part of a single system.*

*This Essay explores the risk that a static conception of equity poses to the remedial powers of lower federal courts, powers nowhere better illustrated than in the jurisprudence of Judge Frank Johnson. Johnson granted system-wide relief to address a range of problems, including segregated schools, inadequate prisons, persistent racial discrimination in public employment, and schemes to disenfranchise minority voters. While one can readily view the growth of these remedial powers over the course of the twentieth century as the legacy of the Supreme Court's decision in Ex parte Young, one has difficulty locating authority for the judicial oversight of public institutions in precedents drawn from equity's distant past.*

## INTRODUCTION

Among its more striking features, the equity jurisprudence of Judge Frank Johnson, Jr. displays a good deal of confidence in the necessity for system-wide relief and in the legitimacy of using federal judicial power to oversee the belated reconstruction of Southern institutions.<sup>1</sup> His opinions display wide-ranging concern with the equality of public schools, with the fairness of electoral pro-

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1. On the man and his jurisprudence, see Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 *YALE L.J.* 1237 (2000). See also ROBERT FRANCIS KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY* (1978); TINSLEY E. YARBROUGH, *JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA* (1981).

cedures, with the treatment of prisoners, and with discrimination against minority applicants for public-sector jobs.<sup>2</sup> But as far-reaching as they sometimes were in their willingness to press for institutional change, Johnson's opinions betray few doubts as to the legitimacy of the judicial role. One finds little hand-wringing about the limits of judicial power, in part because Johnson's jurisprudence so clearly drew its inspiration from a series of Supreme Court decisions that deputized the lower federal courts to end Jim Crow.<sup>3</sup> Johnson's opinions occasionally invoke the *Ex parte Young* doctrine but focus on the Eleventh Amendment immunity strand of the analysis and largely presume the viability of a right to sue for equitable relief.<sup>4</sup>

Today, things have changed. Apart from questions about the wisdom of structural remedies, scholars and jurists have begun to express doubts about the powers that Judge Johnson deployed to such striking effect.<sup>5</sup> This Essay focuses on one feature of the new dubiety that has cropped up with increasing frequency in Supreme Court decisions that address equitable remedial authority: its reliance on history to define the scope of equitable power. One can see the Court's approach in such disparate fields as creditors' remedies and pension

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2. See generally JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993); JACK BASS, UNLIKELY HEROES (1981) (recounting Judge Johnson's role in the litigation that was to help desegregate the South).

3. See generally Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979); Frank M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981) [hereinafter Johnson, *Institutional Litigation*].

4. See *Sims v. Amos*, 340 F. Supp. 691, 694 n.8 (M.D. Ala. 1972) (citing *Ex parte Young* in connection with a discussion of official accountability in contempt proceedings to enforce a decree). Of course, by the 1960s, the Court's revival of § 1983 had taken hold, providing a statutory foundation for the rights of individuals to sue state and local officials. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 168–69 (1961).

5. For early doubts about structural-reform litigation, see Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 949–50 (1978). See also John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1167 (1996). For evidence that the Supreme Court has constricted remedial options, see Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231 (2003).

Focused as he was on state institutions, Judge Johnson had little reason to issue what have come to be known as nationwide injunctions against federal actors. For a critical account of such remedies, see generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Howard M. Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018). Cf. Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1065 (2018) (arguing for the necessity of nonparty protective relief in some situations); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. (forthcoming 2020) (draft on file with authors) (tracing the origins of equitable relief in public law proceedings to the common law writs of mandamus and certiorari and describing the way courts sometimes used those writs to issue nonparty protective relief); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 921 (2020) (demonstrating that broad-based nonparty protective injunctions date from the early twentieth century). Statewide relief of the kind Judge Johnson decreed could lead to similar criticisms, although use of the class action to join relevant parties would largely address any such concerns.

administration under ERISA,<sup>6</sup> where the Court has persisted in defining equity by reference to a somewhat idealized vision of history and tradition. This emerging reliance on idealized history, which its leading academic defender describes as historically inapt but jurisprudentially sensible,<sup>7</sup> produces a new equity jurisprudence that harkens back to the “days of the divided bench,” when courts of law and equity did their work in separate proceedings.<sup>8</sup>

In treating equity as a stand-alone jurisprudence, the Court has acted in the name of judicial restraint. But its approach risks a serious distortion of the law.<sup>9</sup> One can see both features of the Court’s equity jurisprudence on display in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*<sup>10</sup> There, the Supreme Court ruled that the equitable powers of the federal courts did not extend to the issuance of pre-judgment asset-freeze orders.<sup>11</sup> Such orders, known as *Mareva* injunctions after the leading case in the United Kingdom, have become an increasingly common feature of modern international-commercial litigation.<sup>12</sup> But looking backward and speaking through Justice Scalia, the Court concluded that federal courts of equity did not offer asset-freeze relief to pre-judgment

6. For examples of the Court’s new equity jurisprudence, see generally *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (strictly applying the *eBay* standards in the context of a preliminary injunction); *eBay v. MercExchange, LLC*, 547 U.S. 388 (2006) (articulating standards for the issuance of permanent injunctive relief); *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (narrowing the scope of relief available under ERISA). Criticisms of the Court’s handiwork abound. See, e.g., John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1317 (2003) (criticizing *Knudson*); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008) (criticizing *eBay*).

7. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1020 (2015) (describing the Court’s approach as poor history but suggesting that it might provide the basis for good jurisprudence).

8. See *id.* at 1017 n.106 (tracing the phrase to Justice Scalia’s opinion in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993), and identifying its use in a series of decisions).

9. See, e.g., Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 81 (1993) (urging that we should focus not on the historical content of law and equity but on the content of “our law” as a whole); Robert Allen Sedler, *Equitable Relief, but Not Equity*, 15 J. LEG. EDUC. 293, 294 (1963) (describing it as “highly undesirable” to teach students that equity operates as a “separate system”).

10. 527 U.S. 308 (1999).

11. See *id.* at 333.

12. See *Mareva Compania Naviera S.A. v. Int’l Bulkcarriers, S.A.*, [1980] 1 All ER 213 (AC 1975). For accounts of the *Mareva* injunction in operation, see Lawrence Collins, *The Territorial Reach of Mareva Injunctions*, 105 LAW Q. REV. 262 (1989) [hereinafter Collins, *The Territorial Reach of Mareva Injunctions*]. For criticism of the *Mareva* injunction’s rejection in *Grupo Mexicano*, see generally David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161 (2005); Lawrence Collins, *United States Supreme Court Rejects Mareva Jurisdiction*, 115 LAW Q. REV. 601 (1999) [hereinafter Collins, *United States Supreme Court Rejects Mareva Jurisdiction*]. For an account of the modern-day flexibility of the *Mareva* injunction, see Paul McGrath, *The Freezing Order: A Constantly Evolving Jurisdiction*, 31 CIV. JUST. Q. 12 (2012).

creditors in the late eighteenth and early nineteenth centuries and are not authorized to do so today.<sup>13</sup> Justice Scalia justified the decision, in part, by suggesting that Congress should take the lead in updating federal judicial power to offer asset-freeze relief.<sup>14</sup>

One finds a disquieting echo of this call for judicial restraint in the Court's approach to constitutional torts in *Ziglar v. Abbasi*.<sup>15</sup> In an opinion by Justice Kennedy, the Court turned away the claims of Muslim men in the New York area who were rounded up in the wake of the September 11 attacks and subjected to harsh and degrading conditions of confinement at a detention facility there.<sup>16</sup> The claims, based on allegations that high-ranking government officials had targeted the men for harsh treatment on the basis of their religion and national origin, were said to have arisen in a new context.<sup>17</sup> It was thus necessary to consider a range of factors in deciding whether to allow a *Bivens* action to proceed. In a break with earlier decisions, the Court gave no sustained attention to the adequacy of remedial alternatives.<sup>18</sup> Instead, the Court established a new, self-contained body of law that will typically result in the denial of any right to sue. Framed in terms of judicial restraint, *Ziglar* and the Court's later decision in *Hernandez v. Mesa* assign Congress responsibility for striking the proper remedial balance.<sup>19</sup>

Meanwhile, on the equity side of the Court's divided approach to constitutional remediation, the venerable *Ex parte Young* action<sup>20</sup> may soon take its cues less from the remedial needs of the twenty-first century than from a conception of "federal equity" that traces its roots to the nineteenth century. The Court's decision in *Armstrong v. Exceptional Child Center, Inc.* tells an origin story that links the *Ex parte Young* action to a cluster of nineteenth-century decisions about the availability of equitable remedies.<sup>21</sup> On one reading of *Exceptional Child*, the Court's emphasis on the history of equitable remedies to justify and to define

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13. See *Grupo Mexicano*, 527 U.S. at 318–20 (evaluating the availability of asset-freeze injunctions circa 1789 on the theory that the federal courts were invested with equity power under the Judiciary Act of that year).

14. *Id.* at 322.

15. 137 S. Ct. 1843 (2017).

16. *Id.* at 1851–53, 1869.

17. *Id.* at 1857–58.

18. See *id.*

19. See *id.* at 1858; *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (emphasizing legislative primacy in the creation of rights to sue and describing the "expansion of *Bivens* [as] 'a "disfavored" judicial activity'").

20. 209 U.S. 123 (1908).

21. See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–27 (2015).

the implied right to sue for equitable relief<sup>22</sup> may present a threat to the structural injunction as deployed in the hands of such twentieth-century jurists as Judge Johnson.<sup>23</sup>

*Exceptional Child's* turn to the past may pose the same threat of distortion one sees in *Grupo's* refusal to consider pre-judgment creditors' remedies at law. During the nineteenth century, the individual's right to sue federal officers at common law shaped the availability of equitable remedies in a host of ways.<sup>24</sup> But the Court in *Ziglar* has now effectively disabled the individual's right to sue federal officers for damages, making equity's past an inherently unreliable source of remedial adequacy today.<sup>25</sup> What's more, the *Hernandez* Court confirmed that it no longer views the adequacy of alternative remedies as a central focus of the evaluation of the individual's right to sue under *Bivens*.<sup>26</sup> Coupled with *Ziglar* and *Hernandez*, the Court's turn in *Exceptional Child* to a static body of nineteenth-century equity presents the worrisome prospect that the Court will now construct two separate bodies of remedial jurisprudence.

This Essay questions the separation of law and equity and argues in favor of a more integrated, system-wide perspective. Part I offers a detailed case study of the perils of remedial separation as reflected in the *Grupo Mexicano* Court's studied refusal to consider the context in which nineteenth-century equity developed.<sup>27</sup> The closest equitable remedy the Court could find, the creditors' bill to assist with collection efforts, was limited to those who had already secured a judgment from a common law court.<sup>28</sup> But in concentrating its analysis on the state of equitable remedies, the Court failed to explore the *other* nonequitable

22. See *id.* 326–27; *cf. id.* at 339–40 (Sotomayor, J., dissenting) (criticizing the majority's failure to account for the growth in the *Ex parte Young* action during the twentieth century). Importantly, though, Justice Scalia's majority opinion invokes the common law history of equitable relief, a history that may provide a stronger foundation for modern applications of *Ex parte Young*. See *id.* at 326–27 (majority opinion) (citing scholarship by Louis Jaffe and Edith Henderson that traces the use of common law writs of mandamus and certiorari by the King's Bench to oversee the legality of government action).

23. For accounts of the rise and importance of structural remedies in the twentieth century, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982). *Exceptional Child* itself had no occasion to comment on the viability of federal equitable actions to enforce constitutional rights.

24. On the nineteenth century's reliance on common law remedies against federal officials, see JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 4–17 (2017). See also James E. Pfander, *Suits Against Officeholders*, in THE CAMBRIDGE COMPANION TO THE CONSTITUTION 360 (Karen Orren & John W. Compton eds., 2018). On the way rights at common law shape equitable remedies, see Part II.B.

25. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). For one thing, early equity concerned itself primarily with the enforcement of private rights (contract and property) and rarely offered relief in connection with public-law disputes. See generally James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153 (2016) (emphasizing the private-law origins of the equitable antisuit injunction).

26. *Hernandez v. Mesa*, 140 S. Ct. 735, 750 n.12 (2020); *cf. Ziglar*, 137 S. Ct. at 1858.

27. See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (asking if the relief in question was “traditionally accorded by courts of equity”).

28. *Id.* at 319–21 (noting that the creditor's bill was limited to judgment creditors and explaining that a pre-judgment or general creditor had “no cognizable interest, either at law or in equity, in the property of his debtor and therefore could not interfere with the debtor's use of that property”).

remedies available to pre-judgment creditors. Thus blinded, the Court failed to consider the possibility that the absence of equitable relief arose not from a universal barrier to pre-judgment assistance but from an application of the ancient rule barring equitable intervention when remedies at law appear to be adequate.<sup>29</sup> Part I further describes the surprisingly effective set of pre-judgment attachment proceedings that were available to creditors in the nineteenth century and explains how such remedies may have discouraged routine equitable intervention.<sup>30</sup> By looking backward to equity alone during the days of the divided bench, the *Grupo Mexicano* Court obscured system-wide remedies and ignored intervening changes that could have altered the assessment of the need for equitable intervention.<sup>31</sup>

Part II shows that the separation of remedial forms that skewed the Court's analysis of creditors' rights in *Grupo Mexicano* now threatens to infect the Court's approach to constitutional remedies as well.<sup>32</sup> This Part begins with an overview of the *Ziglar* Court's deliberate decision, echoed in *Hernandez*, to downplay the significance of remedial alternatives in its evaluation of the right to sue for damages. Worrisome in its own right, the Court's approach poses greater concerns when coupled with *Grupo Mexicano's* static conception of equitable remedies. By looking to the past to define the breadth of equitable remedies for threatened violations of constitutional and statutory rights, as it did in *Exceptional Child*, the Court may repeat the mistake it made in *Grupo Mexicano*. Past decisions do not anticipate the new field of operations opened by the *Ex parte Young* decision and do not always anticipate all that has been done in its name in the years that have followed.<sup>33</sup> Inflexibly linking equitable remedies to the past offers little hope for a supple remedial jurisprudence that can respond to current challenges; indeed, it may threaten the remedial framework on which Judge Johnson based many of his decrees.

The Essay concludes with a sketch of the jurisprudential benefits of a more system-wide remedial perspective. We do not oppose the use of history. To the contrary, we view history, done well, as essential to a full understanding of the role of equity in a remedial system. We cannot look to equity, as represented in the treatises and decisions of a specific time in the distant past, as the basis for defining the scope of equitable remediation today. Equity tempered the relatively harsh, formal rules of the common law, and litigants were entitled to claim

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29. Ironically, the Court has recited this maxim in new equity decisions. *See, e.g., eBay v. MercExchange*, 547 U.S. 388, 391 (2006) (making the inadequacy of remedies at law, such as money damages, a factor in the assessment of the propriety of permanent injunctive relief). For an argument that inadequacy be broadly applied to allow equitable relief whenever the choice of remedy might matter, see DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 22–23, 35–36 (1991) (viewing as inadequate remedies at law unless they offer relief as complete, practical, and efficient as that available in equity).

30. *See infra* Part I.

31. *See infra* Part I.

32. *See infra* Part II.

33. *See infra* Part II.

remedies in both court systems. To examine only one part of those complementary bodies of law is to miss the dynamic quality of the system as a whole. Rather than asking about the history of law or equity, we must explore the history of the system. Only then can we begin to reason from the past about how to frame a dynamic remedial system for today.

### I. *GRUPO MEXICANO* AND THE PROPRIETY OF *MAREVA* INJUNCTIONS

In *Grupo Mexicano*, the Supreme Court was called upon to decide whether federal courts may grant pre-judgment *Mareva* injunctions to freeze a debtor's assets in appropriate cases.<sup>34</sup> Rather than evaluate that question in light of the adequacy of other remedies today, the Court chose to consult the history of federal equity in the late eighteenth and early nineteenth century.<sup>35</sup> Thus, *Grupo Mexicano* discussed the use of a creditors' bill, an equitable proceeding that was designed to assist creditors in securing assets to satisfy their claims. Turning to an early decision by Chancellor Kent,<sup>36</sup> *Grupo Mexicano* observed that the creditors' bill was traditionally available only to those who have reduced their claims to judgments. Drawing a more general conclusion,<sup>37</sup> the Court found that equity's refusal to assist pre-judgment creditors was based on the principle<sup>38</sup> that debtors had a substantive right to control their property, free from interference, until a judgment has been entered.<sup>39</sup> Viewing any proposal to alter that right as work of a legislative character, the Court refused to authorize federal courts to grant a *Mareva* remedy.<sup>40</sup>

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34. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 310 (1999).

35. *Id.* at 319–20.

36. *Id.* (citing *Wiggins v. Armstrong*, 2 Johns. 144 (N.Y. 1816)).

37. *Id.*

38. Justice Scalia explained that, as he understands things, the creditor's bill was generally withheld prior to judgment as a matter of substantive rights, because:

The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that . . . “until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights.”

*Grupo Mexicano*, 527 U.S. at 319–20.

39. Having characterized the general rule as substantive, Justice Scalia explained that the Court was “not inclined to speculate upon the existence or applicability to this case of any exceptions, and follow the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property.” *Id.* at 321.

40. See Masayuki Tamaruya, *The Anglo-American Perspective on Freezing Injunctions*, 29 CIV. JUST. Q. 350, 364 (2010) (“Freezing injunctions in England . . . cannot be ordered for the purpose of providing security. Applications for freezing injunctions where there is no danger of asset dissipation are regarded as an abuse.”); see also Capper, *supra* note 12, at 2170; Collins, *United States Supreme Court Rejects Mareva Jurisdiction*, *supra* note 12, at 604.

Critics of the *Grupo Mexicano* decision have advanced a range of cogent arguments,<sup>41</sup> but the problems go much deeper. As this Part of the Essay explains, the Court ignored a vibrant set of remedies that courts made available to creditors in pre-judgment in rem or quasi in rem attachment proceedings.<sup>42</sup> Pioneered in the Mayor's Court in London and incorporated into the law of British North America in the seventeenth century,<sup>43</sup> these remedies will be familiar from such casebook standards as *Pennoyer v. Neff*<sup>44</sup> and *Harris v. Balk*.<sup>45</sup> The existence of in rem remedies in the eighteenth-century period that the *Grupo Mexicano* Court treated as its equitable touchstone explains why equity may have been slow to intervene on behalf of pre-judgment creditors.<sup>46</sup> But all of that had changed by the time of the *Grupo Mexicano* decision, which came down long after the due process revolution of the twentieth century and the ultimate demise of pre-judgment attachment as the predicate for in rem jurisdiction.<sup>47</sup> With

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41. Dissenting in *Grupo Mexicano*, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, called for a functional approach that would define “the scope of federal equity in relation to the principles of equity existing at the separation of this country from England.” *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., dissenting) (rejecting the majority’s attempt to “limit[] federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor” and characterizing the approach as suffering from an “unjustifiably static conception of equity jurisdiction”). Professor Daniel Meltzer and Professor Judith Resnik echoed the dissenters’ concerns, criticizing the majority’s static reliance on history. See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 348 (2002) (characterizing decisions as insisting “that judges today should look to the pre-1938 division of law and equity” and arguing against the use of historical-analog methodology for problems of modern statutory interpretation); Resnik, *supra* note 5, at 253 (expressing concern that *Grupo Mexicano*’s holding “could be used to undermine the fusion of law and equity and the authority of common law courts to apply equitable remedies”). Professor Stephen Burbank explained that the Court overlooked the *Erie* doctrine in the course of ruminating on the scope of federal equitable remedies for rights grounded in state law. See Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1312 (2000).

42. Notably, the practice on foreign attachment was incorporated into federal law as part of the nation’s first federal judiciary act. Section 12 of the Judiciary Act of 1789 provides that, after removal of an action from state to federal court on the basis of diversity:

[A]ny attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced.

Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

43. On the use of foreign attachment as a creditors’ remedy under the Custom of London and the transplantation of that remedy to the colonies of British North America, see Nathan Levy, Jr., *Attachment, Garnishment and Garnishment Execution: The American Problems Considered in Light of the English Experience*, 5 CONN. L. REV. 399, 405–26 (1973) [hereinafter Levy, *Attachment*]; Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 94 (1968) [hereinafter Levy, *Mesne Process*]. See generally ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 482 (1952) (citing WILLIAM BOHUN, PRIVILEGIA LONDINI: OR, THE LAWS, CUSTOMS, AND PRIVILEGES OF THE CITY OF LONDON 261 (3d ed. 1723)).

44. 95 U.S. 714 (1877).

45. 198 U.S. 215 (1905).

46. See Part I.C.

47. Due process norms, deployed in *Shaffer v. Heitner*, 433 U.S. 186 (1977), now foreclose the assertion of jurisdiction on the sole basis of pre-suit attachment of a debtor’s property. Due process norms also require the creditor to give notice to the debtor before seizing property in the pre-judgment setting. Beginning in

the rise of a global economy, the proposed issuance of *Mareva* injunctions presents a very different question today than it did in the time of Chancellor Kent and Justice Story.

This Part tells the story of foreign attachment in the United States, its rise as an essential creditors' remedy, and its declining effectiveness under the pressure of changing due process norms. By tracing the rise and fall of creditors' remedies, we can more clearly see the problems with the *Grupo Mexicano* Court's remedial methodology. Now that changes in due process norms have altered the effectiveness of those alternative remedies, the equity jurisprudence of the early republic that arose in the shadow of in rem procedure has doubtful relevance to an evaluation of the propriety of *Mareva* injunctions today.

### A. Foreign Attachment in the United States

Best known from such early twentieth-century due process oddities as *Harris v. Balk*<sup>48</sup> and *Ownbey v. Morgan*,<sup>49</sup> American practice on foreign attachment and garnishment stretches back to colonial British North America.<sup>50</sup> The New England colonies appear to have introduced the Custom of London as a matter of customary law; many of the other colonies adopted statutes to facilitate or regulate foreign attachment and garnishment.<sup>51</sup> As with the practice in the Mayor's Court of London, early attachment statutes imposed a lien on the defendant's attached assets; similarly, the defendant could typically secure release of the assets during the pendency of the litigation by posting a bond.<sup>52</sup> These

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1969, a series of familiar cases read the Due Process Clause as entitling debtors to notice and some kind of hearing before the state can allow a creditor to invoke such pre-judgment remedies as garnishment, replevin, and asset attachment. *See* *Connecticut v. Doehr*, 501 U.S. 1 (1991) (foreclosing pre-judgment attachment of a debtor's real property in litigation over an unliquidated tort claim); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (recognizing that due process similarly requires notice and an opportunity to be heard before a creditor can invoke replevin); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (interpreting due process to require notice prior to the garnishment of wages).

48. 198 U.S. 215, 217 (1905).

49. *See* 256 U.S. 94, 111 (1921); *see also* Levy, *Attachment*, *supra* note 43, at 400–03. Professor Beale criticized this aspect of the practice as an instrument of fraud in those cases where the defendant is too remote from the forum, and the claim too small, to make the proceedings worth the defendant's while to actually litigate. Joseph H. Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 121–22 (1913).

50. *See* Levy, *Attachment*, *supra* note 43, at 404 (suggesting that foreign attachment under the Custom of London—a process analogous to the practice at issue in *Harris*—may have “afforded an escape valve for pressure that might have brought about procedural reforms in the common law courts much earlier than they occurred,” and noting that the eventual emergence of procedural reforms in the common law courts “almost certainly played a large role in the . . . demise of foreign attachment”); Levy, *Mesne Process*, *supra* note 43, at 95.

51. *See* Levy, *Attachment*, *supra* note 43, at 401.

52. Millar, *supra* note 43, at 491 (“First, it usually involves an affidavit setting forth the nature of the plaintiff's demand and the amount claimed to be due, and also bringing the case within the ground relied upon, ordinarily by stating this in terms of the statute.”); *see, e.g.,* *Tennent v. Battey*, 18 Kan. 324, 328 (1877) (“Attachment-liens do not, with us, as in some states, require a judicial order for their creation. The mere affidavit of the creditor is sufficient, and that affidavit too, alleging only in general terms the existence of one of the statutory grounds for attachment.”).

statutes tracked the Mayor's Court's practice by allowing a creditor to satisfy any ultimate judgment on the merits from the assets that had been attached (or from the bond that had been posted to procure their release).<sup>53</sup> The creditor's priority in those attached assets (or bond) ran from the date of first attachment, rather than from the date of the creditor's judgment on the underlying claim.<sup>54</sup>

As confirmed in the Supreme Court's well-known decision in *Pennoyer v. Neff*, the process of foreign attachment put a powerful set of asset-freeze remedies in the hands of pre-judgment creditors.<sup>55</sup> To be sure, *Pennoyer* invalidated one specific assertion of jurisdiction over real property that had been seized to satisfy an ordinary commercial debt.<sup>56</sup> But the Court confirmed the propriety of pre-judgment attachment of assets unrelated to the claim at issue (quasi-in-rem jurisdiction) and the use of substituted forms of notice, as through publication in a local paper, when the defendant could not be found in the jurisdiction. Indeed, *Pennoyer* itself approved the attachment of the property of a nonresident defendant; Neff was living in California at the time and was unaware of the Oregon proceeding until after his Oregon property had been sold

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53. Millar, *supra* note 43, at 496 ("The defendant may generally obtain release of the attached property by furnishing substituted security.").

54. Millar, *supra* note 43, at 493 ("The attachment which is found to be supported has created a lien upon the attached property, real or personal, which takes priority from the date of the levy, while a personal judgment can take no priority of lien in advance of its date."); see also RUFUS WAPLES, ATTACHMENT AND GARNISHMENT 22 (Chicago, Callaghan & Co. 1885) ("This lien . . . arises by operation of law upon circumstances existing with regard to the debtor in his relation to his creditor, and upon *the authorized preliminary seizure of property to conserve it for the eventual satisfaction of the debt*. The legislator cannot arbitrarily give one man a lien upon the property of another any more than he can thus transfer the property itself from the owner to the favored donee; but, by general laws, a lien, not the result of the consent of parties, may constitutionally spring into existence upon the happening of certain conditions, and possess all the qualities of a conventional incumbrance upon specific property." (emphasis added)). The United States further strengthened the interest conferred via attachment by holding it immune to attack via bankruptcy petition. WOODTHORPE BRANDON, THE CUSTOMARY LAW OF FOREIGN ATTACHMENT AND THE PRACTICE OF THE MAYOR'S COURT OF THE CITY OF LONDON 58 (London, Butterworths 1861); JOHN LOCKE, THE LAW AND PRACTICE OF FOREIGN ATTACHMENT IN THE LORD MAYOR'S COURT, UNDER THE NEW RULES OF PRACTICE 36 (London, S. Sweet 1853) ("Upon this principle, an attachment of bankrupt's property after a proceeding in a foreign country, which is equivalent to an adjudication under the English Bankrupt Laws, is invalid; but where the attachment is already made, such a proceeding in a foreign country will not defeat it.").

55. See 95 U.S. 714 (1877).

56. The glitch on which the Court focused was Mitchell's failure to attach Neff's property at the outset of the litigation. Faulting the Oregon process for having failed to assert judicial power over the property as an initial condition of adjudication, the *Pennoyer* Court left ample room for familiar forms of pre-judgment attachment. *Id.* at 720. For an account of the holding of *Pennoyer*, see Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 10–12, 11 n.46 (2006) (collecting sources on the inclusion of personal jurisdiction analysis in dicta); Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1311 (2017) ("First, and most simply, *Pennoyer's* discussion of the Due Process Clause really was dicta. The problem wasn't that Mitchell's original judgment predated the Fourteenth Amendment, as is often thought; the problem was that the case arose from Neff's *federal* suit to undo the sale, filed in the Circuit Court for the District of Oregon."). Seen as implementing Justice Story's territorial-power theory of personal jurisdiction, *Pennoyer* served as the dominant framework for assessing the exercise of personal jurisdiction at least through the Court's decision in *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

by the sheriff to satisfy Mitchell's claims.<sup>57</sup> Nothing in the Due Process Clause, then, would have prevented Mitchell from pursuing Neff's property wherever it could be found.<sup>58</sup>

The Court's decision in *Harris v. Balk* confirmed the highly mobile character of pre-judgment remedies. In what strikes the modern eye as an absurd application of quasi-in-rem jurisdiction, the Court upheld the efforts of a Maryland-based creditor, one Epstein, to collect on a commercial account with Balk, a North Carolina resident.<sup>59</sup> Epstein did so by bringing a garnishment action against Balk's debtor, the hapless Harris, who was passing through Maryland on business (with Epstein).<sup>60</sup> As was typical in a garnishment proceeding, Epstein attached assets of the defendant (Balk) "in the hands" of the garnishee (Harris).<sup>61</sup> He did so by having Harris summoned to appear in court in Maryland and held on civil process, thereby compelling Harris to pay Epstein the money Harris owed to Balk.<sup>62</sup>

Whatever the wisdom of this conception of territorial power over unrelated, intangible assets as a matter of due process, one can perhaps better understand the decision to expand the rights of creditors from a remedies perspective.<sup>63</sup> Garnishment statutes reflect the view that many commercial debt proceedings, such as Epstein's debt claims against Balk, enjoy legal and factual support and that the law should enable the Epsteins of the world to enforce their contracts. At the same time, garnishment statutes put in place mechanisms

57. See *Pennoy*, 95 U.S. at 723.

58. *Id.* Cf. sources cited *infra* note 78 (discussing restrictions on early federal courts' exercise of jurisdiction over defendants and property).

59. *Harris v. Balk*, 198 U.S. 215, 221 (1905).

60. *Id.* at 216.

61. *Id.* at 217.

62. *Id.* at 216. After returning to North Carolina and notifying Balk of the Maryland proceeding, Harris found himself in court again—this time as a defendant in Balk's suit to collect the same debt that had occasioned Harris's arrest and payment in the Maryland garnishment proceeding. *Id.* at 216–17. The case thus presented the question of whether Maryland's garnishment proceeding comported with due process such that Harris's payment to Epstein discharged his debt to Balk. The Court upheld the Maryland proceeding and directed North Carolina to honor the Maryland discharge, thereby protecting Harris. *Id.* at 228. Balk's ability to contest the merits of the debt claim would require him either to travel to Maryland (a trip that might cost him more than the debt) or to retain counsel there. In the end, then, the decision in *Harris v. Balk* seemingly allows state courts to exercise quasi-in-rem jurisdiction over the tangible and intangible assets of the debtors of the world, whenever they happen to find those assets in the state.

63. Charles E. Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation*, 31 HARV. L. REV. 905, 911 (1918) (arguing that garnishment promotes "the application of valuable assets of the debtor, which could not otherwise be reached, to the payment of his debts" and that the contemporary practice is "very likely . . . framed with the deliberate purpose of covering debts wherever payable, and of catching the garnishee whether a resident or not"). Professor Joseph Beale endorsed the practice of in rem and quasi-in-rem jurisdiction as a tool for avoiding strategic behavior by defendants within reach of the personal jurisdiction of the forum but criticized the practice of foreign attachment as unfair to garnishees and debtors. Joseph H. Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 109, 120–22 (1913); see also Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 49 n.70 (1978) (noting that Carpenter and Beale provided early commentary on *Harris*); cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (1971).

that allow the Balks to contest the merits of the debt claim.<sup>64</sup> Like attachment, then, garnishment assists pre-judgment creditors by allowing them to obtain a security for the ultimate enforcement of their claim through the seizure of the debtor's property.<sup>65</sup>

Despite territorial restrictions, moreover, a defendant was not limited to pursuit of recovery in only one forum. While *Pennoyer's* regime of strict territoriality would not allow asset-freeze orders to operate across state borders, nothing would prevent the creditor from pursuing the same sort of relief in the courts of other states in which the debtor held property. So long as attachments were made in these various jurisdictions, an energetic creditor could use the judgment in one forum to execute on property located across multiple jurisdictions, receiving priority from the time of attachment. Therefore, all of the defendant's assets held within the United States would have been available for attachment, so long as a cause of action would support it in each jurisdiction in which assets were sought. Pre-suit attachment could thus provide creditors with remedies at law that were in some ways comparable to a latter-day *Mareva* injunction.

### B. *Equity's Attitude Toward Pre-Judgment Creditors' Remedies*

The *Grupo Mexicano* Court correctly identified the prevailing rule: nineteenth century courts of equity would generally decline to intervene on behalf of pre-judgment creditors. But two problems come to mind. First, one must consider the possibility that the refusal of courts of equity to assist pre-judgment creditors was a reflection of equity's refusal to intervene when other remedies were available. True, the King's Bench and the other superior courts of common law provided little assistance to pre-judgment creditors; attachment of property was used solely to compel the appearance of a slippery defendant and any property so attached was forfeited to the Crown if the defendant failed to appear in the proceeding.<sup>66</sup> But unlike practice before their common law

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64. First, the Court (and many garnishment statutes) required notice to the indebted defendant of the action against the garnishee. (The duty to provide notice fell upon the garnishee, as a condition of perfecting the discharge of his debt to the defendant.) Second, most statutes required the Epsteins to post a bond and gave the Balks one year (and a day) to enter an appearance and contest the claim of indebtedness. If Balk could show that he owed Epstein nothing, the bond ensured that he could recover back the amount Harris paid to Epstein.

65. For discussion of the differences between attachment and garnishment and of different forms of each, see Nathan Levy, Jr., *Mesne Process in the Early American Colonies*, 44 *MISS. L.J.* 671, 671–72 (1973) (distinguishing primarily based on the extent that process is required prior to levy and execution and on the nature of the assets available while recognizing that the various permutations fit within the prevailing personal jurisdiction norms to which they were subject).

66. That the property attached in service of common law process was unavailable to satisfy the claims of the creditor, even after judgment, helps to explain the rise of civil-side outlawry proceedings, which served as a roundabout way to give creditors some access to property in the hands of the Crown. For an account of outlawry as a creditors' remedy, see Levy, *Mesne Process*, *supra* note 43, at 83–87.

counterparts, courts administering the Custom of London had, since the fifteenth century, provided prompt remedies for merchants seeking pre-judgment attachment of property to satisfy their debts.<sup>67</sup> With such remedies available to creditors, one can understand equity's diffidence, in part, as a reflection of the perceived remedial adequacy of practice on foreign attachment.<sup>68</sup>

Turning to eighteenth- and nineteenth-century sources, we find evidence (suggestive if not definitive) that remedial adequacy may indeed have driven equity's practice at least in part. For starters, such leading treatises on equity pleading as that by George Cooper would restate the general rule that equity does not intervene to assist creditors "at large"<sup>69</sup> but would also recognize that changes in the scope of common law remedies would necessarily influence the breadth of equitable relief:

In some cases, however, where courts of equity formerly lent their aid, the legislature has by express statute provided for the relief of creditors in the courts of common law, and consequently rendered the exertion of this jurisdiction in such cases unnecessary.<sup>70</sup>

John Mitford's treatise on equity pleading contains language to almost precisely the same effect.<sup>71</sup> These statements certainly suggest that equity's refusal to intervene on behalf of pre-judgment creditors may have resulted less from the application of the strict principle voiced in *Grupo Mexicano* than from the perceived adequacy of the Custom of London.

Second, remedial history refutes the argument that debtors were seen as enjoying an unfettered right to control their property before a judgment was entered by a court of common law. While leading eighteenth- and early nineteenth-century authorities recognize the general rule against the use of the creditor's bill to assist pre-judgment creditors,<sup>72</sup> they also recognize situations in which equitable intervention was available to assist pre-judgment claimants. Just to mention two examples: pre-judgment claimants in ejectment actions were entitled to seek relief in equity to stay any waste or destruction of the property

67. See *supra* notes 45–46 and accompanying text.

68. Equity deferred not only to common law courts but also to the remedies available in such other courts as the high court of admiralty and the ecclesiastical courts.

69. See GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 148–49 (New York, I. Riley 1813); JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY 111–15 (Philadelphia, P. Byrne 1812) (explaining that "the courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice" and observing that the creditor must show by bill "that he has proceeded at law to the extent necessary to give him a complete title" and must "sue[] out the writs [of] execution" as a prelude to invoking equity's assistance). Mitford (1748–1830) wrote as a baron of the exchequer before serving in the high court of chancery as Lord Redesdale.

70. COOPER, *supra* note 69, at 148.

71. See MITFORD, *supra* note 69, at 114–15 (describing the displacement of equitable relief by the legislative decision to offer relief to creditors in the courts of common law).

72. See, e.g., *Wiggins v. Armstrong*, 2 Johns. 144 (N.Y. 1816); COOPER, *supra* note 69, at 148–49; MITFORD, *supra* note 69, at 115.

during the pendency of their proceeding at law, and creditors seeking to establish claims against the estate of a decedent were free to file bills in equity to prevent the dissipation of the estates' assets.<sup>73</sup> Judgments at law were not an indispensable feature of equitable intervention.

Perhaps most intriguing, one finds a good deal of evidence that courts of equity did, in fact, intervene on behalf of pre-judgment creditors who had pursued foreign attachment and secured a lien on the debtor's property. Nineteenth-century decisions to that effect were announced in New York, where the lien of the attaching creditor was viewed as establishing a claim to the property that warranted protection of the creditor from the debtor's fraudulent conveyances.<sup>74</sup> Other states followed the same approach, including California, Connecticut, Minnesota, New Hampshire, New Jersey, and Texas, among others.<sup>75</sup> Recognizing some contrariety of views,<sup>76</sup> one leading treatise on garnishment described the claim of the lien-holding, pre-judgment creditor as "too just in principle and beneficent in results, to be long overborne by the single objection that none but a judgment-creditor can maintain such a bill."<sup>77</sup> Such authority challenges both ideas in *Grupo Mexicano*: that courts of equity refused to interpose on behalf of pre-judgment creditors and that they did so on the basis of a consistently held view that equity must await the formal entry of a judgment.<sup>78</sup>

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73. One leading treatise explains that in the course of litigation over the effects of a dead person, "a court of equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined." MITFORD, *supra* note 69, at 123. Similarly, pending the resolution of an ejectment action at law to try title to land, a court of equity "will restrain the tenant in possession from committing waste, by felling timber [or] ploughing ancient meadow." *Id.* Not only did equity act during litigation to protect property rights for the benefit of pre-judgment claimants, it also did so dynamically to address gaps that developed in the common law. Thus, common law courts had previously protected against waste through the writ of estrepement, but the switch to ejectment meant that such common law protection was no longer available. No worries: "courts of equity, proceeding on the same principles, supplied the defect." *Id.*

74. *See, e.g.,* Greenleaf v. Mumford, 19 Abb. Pr. 469 (N.Y. Sup. Ct. 1865) (recognizing that attachment liens entitle plaintiff to intervention of equity to set aside fraudulent conveyances).

75. *See, e.g.,* Heyneman v. Dannenberg, 6 Cal. 376 (1856) (recognizing the general rule but treating the case of a lien-holding creditor as deserving of equitable protection against fraudulent conveyances); Hunt v. Field, 9 N.J. Eq. 36 (N.J. Ch. 1852) (recognizing that lien-holding creditors may ask for the equitable assistance but finding that the bill was poorly drawn in other respects).

76. The refusal to follow New York's approach may have reflected in part the ex parte character of some local practice on foreign attachment. *See, e.g.,* Tennent v. Battey, 18 Kan. 324, 328 (1877) ("Attachment-liens do not, with us, as in some states, require a judicial order for their creation. The mere affidavit of the creditor is sufficient, and that affidavit too, alleging only in general terms the existence of one of the statutory grounds for attachment."). Obviously, the denial of equitable relief in such a setting does not bar relief in cases where the creditor must notify the defendant and make a showing of likely success on the merits before the issuance of an asset-freeze order.

77. CHARLES DANIEL DRAKE, THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES § 225, at 150 (Boston, Little, Brown, & Co. 1866).

78. Federal courts resisted the use of attachment as a source of original jurisdiction over the assets of a nonresident defendant, reasoning that federal law did not authorize process to extend beyond the territorial boundaries of the district in which the court sat. *See* Toland v. Sprague 37 U.S. (12 Pet.) 300, 330 (1838) (invalidating the attachment of assets by a federal district court under the Judiciary Act of 1789 on the basis that the property of the alien defendant was not subject to process outside of the district in which he resided).

Indeed, if we examine the practice of the Supreme Court in the early republic, shortly after the adoption of the Judiciary Act of 1789, we find no sign of strict adherence to the *Grupo Mexicano* principle. To the contrary, in *Georgia v. Brailsford*, the Court issued an asset-freeze injunction on behalf of the state of Georgia, a pre-judgment creditor, staying other parties from asserting control over the proceeds of a penalty bond pending the determination of Georgia's claim.<sup>79</sup> Georgia claimed it had forfeited the proceeds of the bond into its own treasury in legislation adopted during the Revolutionary War.<sup>80</sup> Brailsford, a subject of Great Britain, claimed a private right to the proceeds of the bond.<sup>81</sup> The case, on the merits, ultimately turned on whether Georgia's legislation perfected forfeiture of the bond (as an asset of certain disloyal citizens of Georgia who refused to take an oath of allegiance to the state) before the 1783 Treaty of Peace ended the war and foreclosed any further forfeitures of British property.<sup>82</sup> In the end, the Court ruled against Georgia.<sup>83</sup>

But in the meantime, pending the trial of Georgia's claim, the Court granted and continued injunctive relief that effectively froze the debtors' assets in the hands of the marshal of the circuit court in Georgia, where the bond dispute was pending.<sup>84</sup> Four of the Court's six Justices voted to grant injunctive relief, articulating slightly different rationales.<sup>85</sup> Two Justices dissented. In one dissent, Justice Johnson applied a test similar to that for a preliminary injunction today,

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in absence of congressional authorization). But state courts and federal courts exercising removal jurisdiction were not subject to this limitation. See *id.* at 336–37 (Taney, C.J., concurring) (recognizing that courts had, in practice, embraced the use of prejudgment attachment); see also *supra* note 42 (noting that the Judiciary Act allowed for the removal of a case to federal court and provided that attachment would hold the property in question). For an account of the federal courts' exercise of territorial jurisdiction in the early republic, see generally Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. (forthcoming 2020). As Professor Sachs explains, federal courts were cognizant of statutory limits and reluctant to use free-standing powers to attach property under principles of international law. *Id.* State courts faced constraints imposed by the Full Faith and Credit Clause. *Id.* But those limits would not prevent a state from controlling title to property within its own territory.

79. For the initial grant of injunctive relief, see *Georgia v. Brailsford (Brailsford I)*, 2 U.S. (2 Dall.) 402 (1792). For the extension of such relief six months later, see *Georgia v. Brailsford (Brailsford II)*, 2 U.S. (2 Dall.) 415 (1793). The Court's final decision on the merits (after a jury trial of a feigned issue from the Court, sitting in equity) rejected Georgia's claim to the frozen assets. See *Georgia v. Brailsford (Brailsford III)*, 3 U.S. (3 Dall.) 1 (1794). Little attention has been paid to *Brailsford* and its provision for pre-judgment equitable relief. For an important exception, see *Bray, supra* note 7, at 1009 n.57 (acknowledging the *Brailsford* injunction as “[a] possible exception” to the rule restated in *Grupo Mexicano*). For further history on the dispute underlying the *Brailsford* line of cases, see Doyle Mathis, *Georgia Before the Supreme Court: The First Decade*, 12 AM. J. LEGAL HIST. 112, 112–15 (1968).

80. *Brailsford I*, 2 U.S. (2 Dall.) at 404–05.

81. *Id.* at 404.

82. *Id.*

83. *Id.*

84. Georgia had sought to intervene in the circuit court, but its attempt to do so was rebuffed on the theory that the Supreme Court had been given exclusive jurisdiction over claims involving state parties. *Id.* at 406 (opinion of Iredell, J.).

85. *Id.* at 405–09. Chief Justice Jay wrote a short opinion in which he found equitable relief appropriate without providing explanation. *Id.* at 408–09. Justice Iredell emphasized the need to provide the remedy in the absence of an opportunity for the State of Georgia to interplead at the circuit level. *Id.* at 405–06.

explaining that a bill for injunction “should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court.”<sup>86</sup> Justice Cushing’s dissent took the view that Georgia could pursue a legal action against either prevailing party in the circuit court, thus obviating the need for equitable intervention.<sup>87</sup> Neither dissenting Justice, however, articulated a categorical rule of equity, barring intervention on behalf of pre-judgment creditors.

Five months later, the Court unanimously upheld the prior decree, preserving the injunction in anticipation of trial.<sup>88</sup> In a short opinion that spoke for four Justices,<sup>89</sup> Chief Justice Jay recognized that although “the State of Georgia has a right . . . to be pursued at common law,” the “ground of equity for granting an injunction continues the same—namely, that the money ought to be kept for the party to whom it belongs.”<sup>90</sup> Justice Blair explained his similar decision as follows:

Presuming, then, that there was a remedy at law, I have hitherto thought that there was no ground for the interference of this Court, as a Court of Equity. But, upon reflection, it appears, that if Brailsford, who is a British subject, should get the money, under the present judgment, and leave the country, there would be great danger of a failure of justice. It was for this reason, that the Injunction was originally granted; and I think the reason ought to carry us still farther.<sup>91</sup>

Justice Iredell echoed these sentiments, stating that he “should never have consented to issue an injunction, if I had thought the legal remedy of the State was plain, adequate, and compleat.”<sup>92</sup> But having found “that the State of Georgia has no remedy at law,” Justice Iredell joined with the other Justices in upholding the injunction.<sup>93</sup> So much, then, for the claim that courts of equity categorically refused to intervene on behalf of pre-judgment creditors.

### *C. Foreign Attachment After the Due Process Revolution*

Two familiar refinements of the idea of due process have narrowed the nineteenth-century practice of foreign attachment and garnishment. In the first, the Court, in *International Shoe v. Washington*, articulated a due process standard for the exercise of personal jurisdiction that emphasized the quality and nature

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86. *Id.* at 405 (opinion of Johnson, J., dissenting).

87. *Id.* at 408 (opinion of Cushing, J., dissenting).

88. *Brailsford II*, 2 U.S. (2 Dall.) 415 (1793).

89. Justice Johnson did not participate. *See id.* at 415.

90. *Id.* at 418–19 (opinion of Jay, C.J.).

91. *Id.* at 418 (opinion of Blair, J.).

92. *Id.* at 417 (opinion of Iredell, J., dissenting).

93. *Id.*

of the defendant's purposeful contacts with the forum state.<sup>94</sup> The switch to minimum contacts would lead—inexorably, it appears in hindsight—to the eventual curtailment of quasi-in-rem jurisdiction by foreign attachment or garnishment over the assets of a nonresident defendant. The Court's proclamation in *Shaffer v. Heitner* that “all assertions” of jurisdiction must meet the fairness standard of *International Shoe* was self-consciously designed to end quasi-in-rem jurisdiction—at least when the property at issue was unrelated to the claim of the pre-judgment creditor.<sup>95</sup> Thus, plaintiffs can no longer proceed by garnishing property in the hands of their debtor's debtor unless the underlying claim against the debtor has some substantial connection to the forum state.<sup>96</sup>

Due process norms of notice and an opportunity to be heard also took their toll on the use of attachment and garnishment remedies. As we have seen, nineteenth-century pre-judgment creditors could often attach property by submitting an ex parte application supported by affidavits and the posting of a bond.<sup>97</sup> Such a submission set in motion the machinery of the law, resulting in the sheriff's attachment of specified debtor's property and the creation of a lien that would hold the property to satisfy any eventual judgment. Today, due process forbids the use of many ex parte proceedings.<sup>98</sup> Even when the debtor remains in possession of the property, the Court ruled in *Connecticut v. Doebr* that the imposition of a lien on the basis of an ex parte application posed too great a threat of erroneous deprivation to comport with due process.<sup>99</sup> A relatively

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94. See 326 U.S. 310, 320–21 (emphasizing the quality and nature of the defendant's contacts with the forum state and the importance of conducting a realistic inquiry into the evaluation of the exercise of authority over out-of-state corporations). Subsequent decisions came to highlight the importance of purposeful contacts. See *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 874 (2011) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987)) (stressing the importance of finding that the defendant has purposefully availed itself of the privilege of conducting activities in the state).

95. See 433 U.S. 186, 207–08 (1977) (extending *International Shoe* to state assertions of jurisdiction based on the presence of property within the territorial boundaries of the state and invalidating Delaware's exercise of jurisdiction over the sequestered property of a nonresident defendant).

96. See *Rush v. Savchuk*, 444 U.S. 320 (1980) (invalidating Minnesota's exercise of in rem jurisdiction over an Indiana defendant whose garnished insurance policy was said to be “present” in Minnesota by virtue of the insurance company's ties to the state). Some states continue to invoke forms of quasi-in-rem jurisdiction to fill gaps in their long-arm statutes. See Michael B. Mushlin, *The New Quasi-In-Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1063 (1990). In addition, the Anticybersquatting Consumer Protection Act authorizes a civil in rem suit against a domain name in the judicial district where the name was registered. See 15 U.S.C. § 1125(d)(2)(A) (2018).

97. See MILLAR, *supra* note 43, at 491.

98. See *Connecticut v. Doebr*, 501 U.S. 1 (1991) (invalidating ex parte attachment of the defendant's home that had been granted by a judge on the basis of the plaintiff's affidavit that the defendant was liable to him in tort); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (upholding sequestration as a pre-judgment remedy where the decision was made by a judge, plaintiff posted a bond, and the defendant could promptly contest sequestration).

99. See *Doebr*, 501 U.S. at 10–18 (applying *Mathews v. Eldridge*, 424 U.S. 319 (1976), in concluding that the risk of erroneous deprivation outweighed the value of the proceeding). The Court emphasized that the Connecticut procedure that applied to unliquidated obligations, such as tort claims, failed to provide a pre-attachment hearing without some showing of “exigent circumstance.” Four Justices went further, arguing

prompt post-attachment opportunity to contest the legality of the claim was thought insufficient to protect the defendant.<sup>100</sup>

One need not decry these developments—and we certainly do not—to recognize that they work a crucial change in the efficacy of creditors’ pre-judgment remedies. The *Shaffer* decision ends the exercise of judicial power on the basis of property alone—at least in the pre-judgment context. (The Court approved the exercise of property-based jurisdiction once a creditor has secured a judgment.)<sup>101</sup> True, a creditor can still invoke attachment remedies in a forum state in which the defendant has sufficient contacts to warrant the exercise of in personam jurisdiction.<sup>102</sup> But that places a good deal of the property of far-flung enterprises beyond the pre-judgment reach of a forum court.<sup>103</sup> Similarly, the *Doehr* Court found that due process requires notice and an opportunity to be heard before attachment of the defendant’s property.<sup>104</sup> Except on a showing of somewhat ill-defined “exigent circumstances,” pre-judgment creditors can no longer secure their claims by obtaining an ex parte lien.<sup>105</sup>

To be sure, the pre-judgment creditor may have other tools at her disposal. Failure to pay by the debtor may trigger an involuntary bankruptcy proceeding, a consequent stay of litigation, and the eventual prospect of an equitable adjustment of the claims of all creditors.<sup>106</sup> One need not denigrate its importance to recognize that bankruptcy remedies may not offer quick and inexpensive satisfaction of a creditor’s claim. Similarly, creditors may claim protection under fraudulent conveyance laws. The Uniform Fraudulent Transfer/Conveyance Act (now the Uniform Voidable Transactions Act), first promulgated in 1918 and reworked in 1984, was drafted broadly to protect everyone with a claim

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that due process required the plaintiff to post a bond and to convene a prompt post-attachment hearing. *See Doehr*, 501 U.S. at 18 (White, J., concurring) (writing for the majority of the court in an earlier part of the opinion but “deem[ing] it appropriate to consider whether due process also require[d] the plaintiff to post a bond or other security” in a part that was not joined by the majority of the court). For a full account of the case, see Robert G. Bone, *The Story of Connecticut v. Doehr: Balancing Costs and Benefits in Defining Procedural Rights*, in *CIVIL PROCEDURE STORIES* 159 (Kevin M. Clermont ed., 2d ed. 2008).

100. *See Doehr*, 501 U.S. at 8 (rejecting the argument that the state’s post-deprivation hearing requirement obviated any due process concern).

101. *See Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) (indicating that judgment creditors may pursue property of the debtor wherever found, “whether or not that State would have jurisdiction” to adjudicate the creditor’s claim as an original matter).

102. In some cases involving the extension of credit to finance the purchase of consumer goods, the company seeking to collect a debt and the consumer will be from the same state. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating a Florida-based firm’s use of replevin to reclaim Florida consumers’ property without some kind of hearing).

103. Some states have begun to make garnishment available in respect of out-of-state assets, so long as the state first secures in personam jurisdiction over the garnishee firm. *See, e.g., Hotel 71 Mezz Lender LLC v. Falor*, 926 N.E.2d 1202, 1208 (N.Y. 2010).

104. *Doehr*, 501 U.S. at 16–18.

105. *Id.* at 18.

106. Creditors today cannot institute an involuntary petition on the basis of “acts of bankruptcy” as they once could. Involuntary bankruptcy petitions must be brought by at least three creditors who, in the aggregate, have something over \$15,000 in uncontested, unsecured debt and can show that the debtor has failed to pay debts as they become due. *See S. REP. NO. 95-989*, at 34 (1978); *see also* 11 U.S.C. § 303(h) (2018).

against the debtor; it does not limit the universe of claimants to those with valid judgments.<sup>107</sup> It thus offers protection against fraudulent transfers that a court can reach and unwind within the confines of its jurisdiction and subpoena power. Bankruptcy, needless to say, expands the jurisdictional reach of these provisions to some extent. But the presence of property overseas—the focus of the *Mareva* injunction—may continue to pose substantial challenges.

#### D. Grupo Mexicano and Federal Equity in a Post-Erie World

Professor Stephen Burbank's critique of *Grupo Mexicano* correctly focused on its failure to attend to the implications of the remedial question from the perspective of the Federal Rules of Civil Procedure and *Erie Railroad Co. v. Tompkins*.<sup>108</sup> Before *Erie* and its extension in *Guaranty Trust v. York*,<sup>109</sup> one might have said that federal courts exercised equity powers that were best understood as a freestanding body of remedial law that was not constrained by the corresponding remedial law of the states.<sup>110</sup> Today, we have grown accustomed to the idea that equitable doctrines once regarded as remedial may have so dramatic an impact on the outcome of litigation as to warrant deference to state law.<sup>111</sup> In many circumstances, state law defines the mix of remedies for creditors; federal courts, sitting in diversity, will be loath to vary the remedial options.<sup>112</sup> *Grupo Mexicano* was a dispute between a bond fund in New York and a Mexican construction firm.<sup>113</sup> No federal question was presented.<sup>114</sup>

One might dismiss *Grupo Mexicano* as essentially symbolic, aimed as it was at a target (deference to congressional primacy) that bore little connection to the state-law questions of remedial authority on which the litigation should have

107. The Uniform Fraudulent Transfer Act (UFTA) was first promulgated in 1984, building on an earlier law, the Uniform Fraudulent Conveyance Act, that dates from 1918. The UFTA was amended in 2014 and renamed the "Uniform Voidable Transactions Act." See Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 BUS. LAW. 777, 807 (2015). On the self-conscious drafting of the UFTA to coincide with the provisions of the Bankruptcy Code, see generally Michael L. Cook & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87 (1988).

108. 304 U.S. 64 (1938). See generally Burbank, *supra* note 41.

109. 326 U.S. 99 (1945). For a criticism of *Guaranty Trust's* approach to equity and a proposed approach that would let state law define the scope of equitable remedies for state-law claims, see generally Michael Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217 (2018).

110. On the development of the principle of federal equitable uniformity and the inapplicability of state rules defining the scope of equitable remedies, see Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 274–80 (2010) (citing *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818)) (articulating a rule of national uniformity for federal equity and rejecting an argument that the scope of equitable remedies in federal court was limited by state law).

111. See, e.g., Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1862–64, 1879–80 (2017).

112. *Id.* at 1863–64.

113. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 310–11 (1999).

114. The dispute arose under New York state law as an action for breach of contract and was brought in federal court in New York, where the defendant had consented to suit. *Id.* at 312.

turned.<sup>115</sup> But one must recognize that *Grupo Mexicano* brings to the process of equitable remediation a style of jurisprudence that one commentator has aptly described as “judicial passivity.”<sup>116</sup> That construct nicely captures the idea that certain Justices have reacted against what they perceive as the unwarranted judicial activism of the Warren Court by assigning ever greater responsibility to Congress to keep the law in good repair.<sup>117</sup> Passivity has been deployed to justify the Court’s refusal to recognize implied rights of action as well as its refusal to fill other gaps in the law.<sup>118</sup> Passivity often, perhaps needless to say, results in a denial of access to judge-made remedies.

*Grupo Mexicano* can best be seen as the extension of judicial passivity to the task of equitable adjustment. Such passivity matters less in connection with the application of pre-judgment remedies to disputes governed by nonfederal law; as to those disputes, *Erie* assigns gap-filling responsibilities to the states. *Grupo Mexicano* matters more if it becomes the primary method by which the Court adjusts and updates the law of federal equity. Federal equity appears in a variety of different guises: it governs the power of federal courts to grant *Ex parte Young* relief to suitors who claim that state laws or practices violate the Constitution and laws of the United States, and it governs the many federal statutes in which Congress has conferred a measure of lawmaking power on federal courts by assigning them authority to grant “equitable relief” or “equitable remedies.”<sup>119</sup> As the next Part explains, *Grupo Mexicano*’s method—demonstrably wrong in the case itself—also poses a threat to the law of remedies in these other important contexts.

## II. ZIGLAR/HERNANDEZ AND THE SEPARATION OF CONSTITUTIONAL REMEDIES

Recent decisions suggest that *Grupo Mexicano*-like methods have taken hold in the way the Court fashions remedies for constitutional violations. On the damages side of the federal remedial equation, the Court’s decisions in *Ziglar v. Abbasi* and *Hernandez v. Mesa* virtually eliminate any prospect for the assertion

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115. See sources cited *supra* note 41.

116. See Meltzer, *supra* note 41, at 354–46.

117. *Id.*

118. *Id.* at 345, 370–74.

119. For a summary of such laws, see Bray, *supra* note 7, at 1014–24.

of novel constitutional tort claims against federal officers.<sup>120</sup> Whatever the wisdom of and historical justification for this turn against the suit for damages,<sup>121</sup> *Ziglar* poses a serious threat to the sufficiency of federal remediation when coupled with the possible extension of *Grupo Mexicano*'s approach to equity in such cases as *Armstrong v. Exceptional Child Center, Inc.*<sup>122</sup> After tracing these developments, this Part concludes with a rumination on what may be lost through remedial isolation.

### A. *Ziglar/Hernandez and Grupo Mexicano*

The Court's decision in *Ziglar v. Abbasi* will make it exceedingly difficult to mount a constitutional tort claim against federal officials. True, *Ziglar* tepidly reaffirmed the right to sue in a handful of established prior contexts: suits against law enforcement officers and prison guards under the Fourth and Eighth Amendments.<sup>123</sup> But *Ziglar* also made clear that the *Bivens* right of action was to apply primarily to street-level interactions between individuals and federal officers.<sup>124</sup> It was not to be used as a mechanism for testing the legality of the government's policy.<sup>125</sup> Such policy-based challenges were to be handled through other modes of litigation.<sup>126</sup>

120. See, e.g., Benjamin C. Zipursky, *Ziglar v. Abbasi and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2173 (2018) (characterizing the decision as "quite shocking"); see also Shirin Sinnar, *The Ziglar v. Abbasi Decision: Unsurprising and Devastating*, STAN. L. SCH. BLOG (June 20, 2017), <https://law.stanford.edu/2017/06/20/the-ziglar-v-abbasi-decision-unsurprising-and-devastating/> (explaining that "the lesson is clear: unless one manages to sue for injunctive relief or to bring a habeas claim while the abuse is *still ongoing*, there will often be no remedy" due to the Court's preoccupation with allowing only those claims whose factual and legal bases align with early *Bivens* decisions); Case Note, *Constitutional Remedies—Bivens Actions—Ziglar v. Abbasi*, 131 HARV. L. REV. 313, 318 (2017) ("The Court is already close to limiting the *Bivens* cause of action to the circumstances of *Bivens*, *Davis*, and *Carlson*, as it will be very difficult for any case not presenting those facts to survive *Abbasi*'s three-part test.").

121. See, e.g., James E. Pfander, *Dickey's Nightmare: An Essay on the Rule of Law*, 107 CAL. L. REV. 737 (2019) (contrasting the relative effectiveness of the common law suit for damages in the arsenal of remedies against federal officials in the early nineteenth century with the declining effectiveness of constitutional remedies today); James E. Pfander, Alexander Reinert & Joanna Schwartz, *The Myth of Personal Liability: Who Pays when Bivens Claims Succeed*, 72 STAN. L. REV. (forthcoming 2020) (concluding from a study of payment practices in suits against officials of the Federal Bureau of Prisons that individual officers receive complete protection from any monetary liability in over 95% of the cases).

122. 575 U.S. 320 (2015).

123. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

124. *Id.* at 1861 ("First, respondents' detention policy claims challenge more than standard law enforcement operations." (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990))); *id.* at 1863 ("If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.").

125. *Id.* at 1860 (finding "that a *Bivens* action is not 'a proper vehicle for altering an entity's policy'" (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001))).

126. *Id.* at 1862–63 ("Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able

In justifying restrictions on access to damages, the *Ziglar* Court relied, in part, on the perceived adequacy of other remedies. As a general matter, the Court expressed a preference for the adjudication of challenges to legality through the vehicle of suits for declaratory or injunctive relief.<sup>127</sup> Both the petition for habeas corpus and the *Ex parte Young* action qualify as suits for the sort of relief the Court now favors in considering challenges to government policy.<sup>128</sup> Although not entirely novel, the Court's unfavorable view of damages was odd for two reasons. First, the litigants in question had no real access to any form of declaratory or injunctive relief.<sup>129</sup> Second, in other contexts, the Court has consistently adhered to the view that equity affords a fallback remedy, available only in extraordinary circumstances.<sup>130</sup> Now it seems that the suit for damages has been relegated to that of a backstopping role.

In *Ziglar*, the Court conducted no serious evaluation of the adequacy of alternative remedies; instead, the Court fashioned an independent doctrinal test for the assessment of the right to sue for damages. First, a lower court must conduct a searching evaluation to determine if the suit for damages arises in a new context.<sup>131</sup> The Court identified a host of relevant factors, virtually ensuring that all contexts will be regarded as new, aside from those on all fours with *Bivens* and *Carlson*.<sup>132</sup> (Prior lower court authority, the Court made clear, could not establish a right to sue for this purpose.)<sup>133</sup> Second, assuming the Court has found a new context, it must consider whether to recognize a right to sue in

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to challenge their confinement conditions via a petition for a writ of habeas corpus.” (citing *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979))).

127. *Id.*

128. *Id.* See generally *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015).

129. *Ziglar*, 137 S. Ct. at 1879 (Breyer, J., dissenting). See generally Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 957–59 (2018).

130. Godfrey, *supra* note 129, at 958 (observing that “the idea that an equitable remedy should be obtained when legal remedies might be possible contradicts the historical notion that an equitable remedy should be sought only when legal relief is insufficient”).

131. *Ziglar*, 137 S. Ct. at 1859–60 (“The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.”).

132. *Id.*; see also *Sinnar*, *supra* note 120 (identifying “rank of the officers” as a particularly specious basis for distinguishing a case to test the legality of government conduct under the Constitution); *Zipursky*, *supra* note 120, at 2172 (“In other words, nearly any kind of difference will create an obligation to consider ‘special factors.’”).

133. *Ziglar*, 137 S. Ct. at 1859 (emphasizing that “[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new”).

that context, taking due account of special factors counseling hesitation.<sup>134</sup> The Court identified an expansive collection of such factors and concluded that deference to Congress would be appropriate in virtually all such cases.<sup>135</sup>

The Court relegated the adequacy of alternative remedies to one factor among many that were to be considered.<sup>136</sup> This represented a departure from the approach in *Wilkie v. Robbins*, where the Court devoted the first step of its analysis to an assessment of alternatives.<sup>137</sup> What's more, the Court did not conduct a terribly searching evaluation of remedial options.<sup>138</sup> Thus, the Court suggested that injunctive and habeas relief might have been available to the litigants as a way to test the legality of their conditions of confinement.<sup>139</sup> But the Court did not appear to take the question at all seriously. The Court did not specifically

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134. *Id.* at 1857–58 (“This Court has not defined the phrase ‘special factors counselling hesitation.’ The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a ‘special factor counselling hesitation,’ a factor must cause a court to hesitate before answering that question in the affirmative.”).

135. *Id.* (stating that “[i]t is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others,” and establishing that such burden should be cautiously levied with deference to “its impact on governmental operations systemwide,” including “the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies,” and further emphasizing deference to Congress where a statutory remedy hasn’t been made, while leaving a catch-all that “sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization,” before concluding that “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III”). One might easily read such an exhaustive consideration of government interests as foreclosing the possibility that consideration of special factors could ever lead to the conclusion that a *Bivens* remedy is appropriate and wonder how *Bivens*, *Carlson*, and *Davis* have ever survived such considerations. *See, e.g.*, Zipursky, *supra* note 120, at 2171–72.

136. *Ziglar*, 137 S. Ct. at 1858 (briefly identifying the presence of alternative remedies as a sufficient but unnecessary basis to deny a *Bivens* remedy while giving no weight to the absence of alternatives as persuasive towards finding *Bivens* relief appropriate).

137. 551 U.S. 537, 550 (2007) (identifying a two-step analysis in which the first question was “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages”). In *Ziglar*, Justice Kennedy recasts this front-end inquiry as a first safety valve that serves to cut off analysis of whether a *Bivens* remedy should be established, rather than as a means of funneling suitable claims into a congressionally preferred mechanism of recovery, and did so while establishing that such inquiry need not be concrete to the case so long as some hypothetical relief might be available. *Ziglar*, 137 S. Ct. at 1858.

138. *Ziglar*, 137 S. Ct. at 1862–63 (briefly hypothesizing that the “detainees *may* seek injunctive relief” and that the Court “left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus,” while emphasizing that “the Court need not determine the scope or availability of the habeas corpus remedy” to invoke it as a plausible alternative (emphasis added)).

139. *Id.* at 1863–65.

find that habeas would *definitely* provide relief, only that it *might*.<sup>140</sup> And even that assertion will strike students of habeas as a bit adventuresome.<sup>141</sup>

The Court in *Hernandez v. Mesa* was, if anything, even more dismissive of the relevance of alternative remedies as a factor deserving of consideration in its analysis of the need for an implied right to sue.<sup>142</sup> *Hernandez* arose in what the Court deemed a “new context”<sup>143</sup>—it was a cross-border shooting of a Mexican teenager killed on the Mexican side of the border by an officer of U.S. Customs and Border Protection.<sup>144</sup> The Court acknowledged that remedies for such an allegedly unjustified killing were unavailable under the Federal Tort Claims Act and other sources of law.<sup>145</sup> But rather than viewing the absence of any remedy as a strong argument for the implication of a *Bivens* action, the Court viewed these gaps as an implicit argument against the recognition of any remedy.<sup>146</sup> Far from treating remedial inadequacy as a justification for intervention, as in previous discussions,<sup>147</sup> the Court found the gaps to signal a congressional desire to foreclose any remedy. Confirming its distaste for legal remediation, the Court embraced a trend in the lower courts that views gratuitous payments to foreign nationals injured by government actions abroad as justifying the denial of any right to sue for damages.<sup>148</sup>

The approach to equitable remedies on display in *Grupo Mexicano* suggests that the assessment of the viability of equitable intervention will often depend on equity in isolation. The *Grupo Mexicano* Court took its cues from the historic

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140. *Id.*

141. *See* Heck v. Humphrey, 512 U.S. 477, 481 (1994) (noting that habeas provides the exclusive remedy for claims contesting the fact or duration of confinement and implying that claims challenging prison conditions and treatment during confinement were to be regarded as presenting claims arising under § 1983); *cf.* Skinner v. Switzer, 562 U.S. 521, 534 (2011) (noting that a § 1983 claim validly sought to compel DNA testing inasmuch as the performance of a test would not necessarily imply the invalidity of the conviction). Extrapolating from such decisions, one might naturally conclude that challenges to federal-prison conditions do not arise as petitions for habeas relief, especially in circumstances in which the claimant no longer satisfies the custody requirement.

142. *See* *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

143. *Id.* at 744.

144. *Id.* at 740.

145. *See id.* at 748.

146. *See id.* at 748–49 (describing the FTCA’s provision barring recovery for injuries inflicted outside the United States as part of a series of statutes that refuse to provide remedies for extraterritorial events and concluding from these omissions that Congress likely means to preclude remedies for injuries that occur abroad).

147. *See, e.g.,* Wilkie v. Robbins, 551 U.S. 537, 550–54 (2007) (viewing the existence of alternative remedies as a crucial element of the *Bivens* calculus).

148. *See Hernandez*, 140 S. Ct. at 749 (identifying the possibility that the government might make payments as a matter of grace as a possibly relevant alternative remedy); *cf.* González v. Vélez, 864 F.3d 45, 55–56 (1st Cir. 2017); Vanderklok v. United States, 868 F.3d 189, 199 (3d Cir. 2017); Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012). *See generally* Alexander A. Reinert, *The Influence of Government Defenders on Affirmative Civil Rights Enforcement*, 86 FORDHAM L. REV. 2181, 2187 n.33 (2018) (“Since *Ziglar*, every Court of Appeals to consider whether to extend *Bivens* to a new context has declined to do so.” (citing *Doe v. Hagenbeck*, 870 F.3d 36, 44 (2d Cir. 2017); then citing *Vanderklok*, 868 F.3d at 199; and then citing *González*, 864 F.3d at 55–56)).

scope of equitable remedies in the days of the divided bench and refused to consider either the nineteenth-century collection of legal remedies or any changes in the effectiveness of those remedies over time.<sup>149</sup> Rather than viewing equity as a flexible doctrine that would remain in touch with the state of remedies as a whole, *Grupo Mexicano* sets up a doctrinal silo that fixes the scope of equitable remediation by reference to the practice of a long-distant day.<sup>150</sup>

The combination of *Ziglar/Hernandez* and *Grupo Mexicano* casts doubt on the ability of the lower courts to preside over a system of remedies in law and equity that will stay in touch with one another. *Ziglar/Hernandez* dictates a specific doctrinal approach to the recognition of new suits for damages consequent to constitutional violations that takes only scant account of the viability of remedial alternatives. *Grupo Mexicano* takes the same approach, seemingly foreclosing asset-freeze orders without any consideration of available alternatives. Recent decisions suggest that *Grupo Mexicano*'s approach may come to control the availability of what has come to be known as *Ex parte Young* relief.

### B. *Armstrong and Ex parte Young*

In the wake of *Ziglar/Hernandez*, the *Ex parte Young* action will play an increasingly important role in constitutional remediation. The *Ex parte Young* doctrine enables individuals to bring suit against state and federal officers to secure injunctive relief against threatened or continuing violations of the Constitution.<sup>151</sup> Alongside habeas relief for challenges to the legality of present custody, the *Ex parte Young* action serves as the primary mode by which individuals vindicate their constitutional rights in litigation with the federal government.<sup>152</sup> But the well-known limits of standing doctrine foreclose the use of *Ex parte Young* actions to contest the legality of some government actions.<sup>153</sup> As we have seen, the *Ziglar/Hernandez* doctrine largely curtails retrospective relief in new contexts, making the *Ex parte Young* action all the more central to the project of confining the federal government within the bounds of the law.

But recent developments suggest that the *Ex parte Young* action may be vulnerable to the mode of equitable analysis on display in *Grupo Mexicano*. The

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149. See *supra* Part I.

150. *Id.*

151. See generally *Ex parte Young*, 209 U.S. 123 (1908) (authorizing suit to enjoin a state official from taking action that threatened to violate rights to substantive due process). On the extension of the remedy to federal actors, see generally *Houston v. Ormes*, 252 U.S. 469 (1920); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). See also *United States v. Lee*, 106 U.S. 196, 223 (1882) (allowing an ejectment action against a federal official to try title to land that the plaintiff claimed had been wrongly occupied by national forces).

152. See JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION § 7.4.3 (3d ed. 2017).

153. See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that the plaintiff, who suffered an injury when placed in a chokehold by officers, lacked standing to sue to enjoin the practice of using chokeholds).

Court's most recent treatment of the origins of the action give reason for concern. In *Armstrong v. Exceptional Child Center, Inc.*, the Court refused to allow an *Ex parte Young* action to test state compliance with the federal standards governing a Medicare reimbursement program.<sup>154</sup> Particularly concerning, the Court identified the source of the individual's right to sue in a series of nineteenth-century precedents that were said to comprise a body of federal equity.<sup>155</sup> In an opinion by Justice Scalia, the author of the majority opinion in *Grupo Mexicano*, the Court found that any right to sue in federal equity had been displaced by the more particular remedial scheme Congress had put in place to address such violations.<sup>156</sup>

To be sure, the Court was not assessing the right to sue in the context of an action for an alleged constitutional violation.<sup>157</sup> And the Court's emphasis on the preemptive force of alternative remedies under the applicable statute would not apply of its own force to suits brought to vindicate constitutional rights.<sup>158</sup> But the Court's account of the nineteenth-century origins of the right to sue for injunctive relief in federal equity bears more than a passing resemblance to its reliance in other settings on the rules of equity in the days of the divided bench.<sup>159</sup> By framing access to the *Ex parte Young* remedy in terms of the historical practice, the Court risks the introduction of distortions into its doctrine.

For starters, the rights at issue in the nineteenth century were largely defined by reference to the common law. If one examines the decisions on which the Court relied, one can see the common law underpinnings of all of the claims. In *Osborn v. Bank of the United States*,<sup>160</sup> for example, the Court's decision to allow the injunction against officers of the state of Ohio rested on the conclusion that an officer who attempted, without proper justification, to collect a state tax would be subject to trespass liability at common law.<sup>161</sup> The decision

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154. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

155. *Id.* at 326–27.

156. *Id.* at 331–32.

157. *Id.*

158. *See id.*

159. *Compare id.*, with sources cited *supra* note 151. One can also find in *Exceptional Child* some support for the proposition that *Ex parte Young* relief depends less on the formal content of old equity practice than on a tradition of government-accountability litigation that has its roots in the common law. *See Exceptional Child*, 575 U.S. at 327 (explaining that the “ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England”). The tradition to which the Court pointed was rooted in the common law practice of King's Bench. *Id.*

160. 22 U.S. (9 Wheat.) 738 (1824).

161. *Id.* at 839 (describing Ohio's argument “that, though the law be void, no case is made out against the defendants” and rejecting that contention in light of the unquestioned viability of the common lawsuit for trespass).

to uphold the lower court's injunction against the trespass rested on the perception that remedies at law were inadequate to meet the enormity of the threat posed by a state tax that sought to destroy the bank.<sup>162</sup>

Similar justifications were offered in support of equitable relief in the other cases on which the *Ex parte Young* Court relied. Thus, in *Carroll v. Safford*<sup>163</sup> the Court embraced the following argument of counsel:

The most important source of jurisdiction of an equity court is that which is concurrent with courts of law. Rights in each court are the same, but a party is at liberty to ask the aid of a court of equity to protect him in his legal rights on account of the better remedy which results from the modes of administering relief in equity; and equity will interfere in all cases where the remedy at law is not plain, adequate, and complete.<sup>164</sup>

On this view, then, the right to sue in equity depended on a showing that the claim was actionable at law and that legal remedies were inadequate.

The remedy in *Ex parte Young* does not similarly rest on the traditional use of equity to prevent injuries cognizable at law. The threatened government activity at issue in *Ex parte Young*, invocation of judicial power to seek enforcement of Minnesota state law in accordance with its terms, did not, in itself, invade a protected common law right (however much the statute in question may have violated rights the *Lochner* Court found in the Constitution). The Minnesota attorney general, charged with carrying the statute into operation, was duty bound to enforce the law—at least until foreclosed from doing so by a federal injunction. But unlike the taking of the bank's specie in *Osborn*, the attorney general's initiation of a Minnesota state-court enforcement proceeding would submit the issue of law to the courts for determination; it did not violate common law rights of person or property. Challenges to the legality of such proceedings were ordinarily presented as defenses to criminal liability. Suits of the kind authorized in *Ex parte Young* to invalidate a state law and enjoin state actions to enforce the statute thus represent a departure from the practice of equitable remediation at the time of the founding.<sup>165</sup>

162. *Id.* at 840–43.

163. 44 U.S. (3 How.) 441 (1845).

164. *Id.* at 453–54, 463 (confirming the viability of a bill in equity to test the legality of a state property tax and adopting an argument of the plaintiff's counsel that emphasized the identity of rights in law and equity and the need for equitable intervention where remedies at law were not “plain, adequate, and complete”). *Cf.* *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (concluding that injunctive relief was proper to test the legality of the Postmaster General's decision to bar the plaintiffs from the use of the mails and noting that, under the bill of complainants, the “unauthorized” action of the officer “violates the property rights of the person whose letters are withheld”).

165. *See* Pfander & Dwinell, *supra* note 25, at 212–14 (arguing that the historical underpinnings of the antisuit injunction does not fully account for the relief granted in *Ex parte Young*). In separate work, one of us has traced the origins of *Ex parte Young* relief to the common law writs of mandamus, certiorari, and prohibition. *See generally* Pfander & Wentzel, *supra* note 5. Such an origin story helps to account for many of the otherwise puzzling features of the decision: its refusal to accord sovereign immunity to the state in a suit

The right to sue under *Ex parte Young* thus remains vulnerable to a jurisprudence that defines federal power by reference to equity as it was administered during the days of the divided bench. To be sure, § 1983 now provides a statutory foundation for much of what the Court has done under the aegis of *Ex parte Young* to authorize suits against state officers.<sup>166</sup> But as the *Ziglar* Court was at pains to observe, Congress has yet to provide an analog to § 1983 that would authorize suits for violations committed under color of *federal* law.<sup>167</sup> Like the *Bivens* action, *Ex parte Young*'s federal analog lacks statutory support and may thus prove vulnerable to a jurisprudence that focuses, *Grupo Mexicano*-style, on early nineteenth-century conceptions of the scope of equitable relief.

Two problems come to mind. One stems from recent efforts to cabin the scope of *Ex parte Young* by portraying the decision as continuous with traditional approaches to equitable remediation. On that view, *Ex parte Young* did not represent a decisive break with the past and supports only the issuance of antisuit injunctions that would negate or nullify a state law.<sup>168</sup> So limited a view of the scope of equitable relief could cast doubt on much that has been done in the name of *Ex parte Young*, including the wide-ranging structural decrees that federal courts issued to address system-wide violations in institutional reform litigation.<sup>169</sup> Those inclined to defend the *Grupo Mexicano* Court's new history-inflected equity jurisprudence would presumably draw similar conclusions as to structural remedies.<sup>170</sup>

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against state officials that clearly meant to bind the state; its willingness to decree in the absence of any tortious invasion; its willingness to recognize a right to sue in the absence of any governing statute; and perhaps the willingness of courts, acting in the name of *Ex parte Young*, to issue orders that confer protective relief on nonparties. See generally *id.* But while it grounds *Ex parte Young* in a body of legal authority with deep roots in Anglo-American history, the common law account underscores the vulnerability of *Ex parte Young* doctrine to a methodology that confines legitimate equitable relief to the forms of interposition common during the days of the divided bench.

166. See generally *Monroe v. Pape*, 365 U.S. 167 (1961).

167. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

168. See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008) (arguing that *Ex parte Young* does not recognize an implied right of action but relies on an established and limited corollary to the antisuit injunction); cf. Pfander & Dwinell, *supra* note 25, at 212–14 (questioning Harrison's account); Pfander & Wentzel, *supra* note 5 (same).

169. For a defense of the continuing importance of structural-reform litigation and the equitable remedies that accompany it, see generally John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007).

170. Thus, Sam Bray's defense of the *Grupo Mexicano* Court's use of the days of the divided bench as an appropriate touchstone for defining the scope of remedial power today could pose a threat to remedial innovations of the sort associated with structural-reform litigation in the twentieth century. See Bray, *supra* note 7, at 1014–15. But in other work, Bray identifies "equitable managerial devices" as one of the defining features of the system of equitable remediation. See Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 564 (2016). Such devices provide a possible foundation for a history-inflected approach to structural remedies. Professor Bray has reminded us that Justice Scalia's formulation contains some room for growth in its emphasis on the application of "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). A

A second problem flows from the threat posed by the doctrinal separation between suits for damages and suits for injunctive relief under *Ex parte Young*. As we observed earlier, *Ziglar/Hernandez* creates a stand-alone constitutional tort jurisprudence that takes little account of the existence of alternative remedies. Such a doctrinal structure will prevent the federal courts from deploying the constitutional-tort remedy with the flexibility necessary to fill gaps in the system of remedies. Use of a *Grupo Mexicano*-like approach on the equity side, with the scope of injunctive relief defined by reference to the practice of the old days, will further constrict the remedial flexibility of the system as a whole. Instead of thinking of remedies at law and in equity as mutually complementary, the Court has increasingly come to think of them as stand-alone bodies of law.

Such an approach departs from the system-wide focus that has lain at the center of thinking about constitutional remedies for much of the last generation. Given voice in the co-authored work of Richard Fallon and Daniel Meltzer,<sup>171</sup> the system-wide approach focuses less on the existence of a remedy for each individual claim of constitutional violation and more on the adequacy of remedies as a whole. As the authors explain, the project of constitutional remediation seeks to keep the government mostly within the bounds of the law most of the time.<sup>172</sup> Such a project necessitates a doctrinal approach that evaluates the adequacy of remedial alternatives as it considers whether to fashion a remedy in the particular case. That approach was seemingly adopted in *Wilkie v. Robins*<sup>173</sup> and seemingly abandoned in *Ziglar* and *Hernandez*.<sup>174</sup>

## CONCLUSION

*Grupo Mexicano* fixed the content of equitable remedies by reference to the law of equity as it appeared in the early republic, shortly after Congress and the Court incorporated the practice of the English High Court of Chancery as the measure of equitable remedies in federal courts. Consulting that body of law

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focus on principles, rather than specific remedial doctrines, would allow for evolution over time. Yet the *Grupo Mexicano* decision also relies on a perception that certain significant changes, even if supported by equitable principles, might sweep so far as to lie beyond the power of the judiciary. *Id.* at 332 (treating the *Mareva* injunction as “a nuclear weapon” that the judiciary lacks the power to fashion).

171. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

172. *Id.* at 1789 (identifying two functions performed by constitutional remedies: effective remediation to individual victims and ensuring governmental faithfulness to law; describing the latter as, “if not the more fundamental, at least the more unyielding” (footnote omitted)).

173. See 551 U.S. 537, 550 (2007) (identifying a two-step analysis in which the first question was “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages”).

174. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (failing to consider alternative remedies as the first step in the analysis but instead folding the adequacy of alternative remedies into an all-things-considered evaluation of special factors); *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020) (viewing gaps in the system as an indication that Congress meant to leave the victims of wrongful conduct without any remedy).

from the time of the “divided bench,” the Court found no sign of pre-judgment creditors’ remedies. Of course, its conclusion on that score was wrong: the Court failed to consider that equity’s refusal to intervene in the ordinary course on behalf of pre-judgment creditors reflected the perceived adequacy of in rem remedies of foreign attachment and garnishment. Worse, the Court overlooked the fact that it had supplied such a pre-judgment asset-freeze remedy in 1792 (the very same year in which the Court incorporated rules of practice from the English court of chancery as the guideposts for equitable practice in the federal courts). One might best summarize the old law, contrary to the *Grupo Mexicano* Court, as recognizing the validity of equitable intervention when the usual legal tools of foreign attachment and garnishment were unavailable to protect the pre-judgment creditor.

But even assuming that the Court had gotten the history of equitable remedies closer to right, changes over the ensuing decades in the law governing the efficacy of pre-judgment remedies would surely necessitate some reconsideration of the propriety of equitable intervention. As we have seen, changes in the nature of due process protections have dramatically reshaped practice on foreign attachment and garnishment, pressing the law to proceed on the basis of service of process, adequate notice, minimum contacts, and adversarial contestation, rather than on the basis of ex parte submissions. The switch from nineteenth-century reliance on ex parte in rem proceedings to the twenty-first century’s preference for contested in personam proceedings seems tailor-made for the effective deployment of equitable remedies. Equity, after all, proceeds on an in personam basis, with full notice and adversarial contestation.<sup>175</sup> Equity authorizes and limits the use of temporary restraining orders and preliminary injunctions, assuring measured consideration of exigent circumstances and the adequacy of remedial alternatives. No wonder, then, that courts of equity around the world have embraced the *Mareva* injunction.<sup>176</sup>

However ill-conceived its holding as a rule of equity jurisprudence, *Grupo Mexicano*’s method poses a still greater threat to the Court’s ability to maintain a vibrant body of remedial law. As the history of in rem proceedings makes clear, remedies evolve over time, and the mix of legal and equitable remedies must evolve too. At one time, the Court clearly preferred to adjudicate claims

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175. Equity’s reluctance to freeze property for the benefit of pre-judgment creditors may have partly reflected its long-standing commitment to the use of in personam process. Courts of equity do not proceed in rem to control the disposition of property; they control the actions of the parties before them. See, e.g., *Fall v. Eastin*, 215 U.S. 1 (1909) (refusing to accord full faith and credit to a Washington state court order that purported to transfer title to land in Nebraska but recognizing the power of equity to compel parties before the court to take action on pain of contempt that might change the title to land elsewhere).

176. See Capper, *supra* note 12, at 2162 (“The only major common law jurisdiction where the *Mareva* injunction has not flourished is the United States.”); Collins, *The Territorial Reach of Mareva Injunctions*, *supra* note 12, at 262 (“The *Mareva* jurisdiction brought the English common law (and those jurisdictions which follow it) into line with the practice of civil law countries . . . and provided a remedy where one should always have been available.”). In the end, though, one can reject the *method* adopted in *Grupo Mexicano* without taking a view on the merits of the *Mareva* injunction.

of government wrongdoing in the context of suits for money; such matters were easy to manage, and they did not threaten to stop the government in its tracks or interfere with executive activities in quite the same way as coercive suits for injunctive and habeas relief. Today, that remedial preference has flipped; the *Ziglar/Hernandez* doctrine reveals the modern Court's hostility to money claims and its preference for coercive (or at least declaratory) forms of adjudication.

Yet the method on display in *Grupo Mexicano* and echoed to an uncertain degree in *Exceptional Child* deprives the Court of remedial flexibility. A passive look back at the shape of equitable remedies in the days of the divided bench may deprive the federal courts of many of the modern forms of equitable relief that took root in the twentieth century. More troubling still, it may limit courts' ability to adjust equitable remedies in light of *Ziglar's* decision to curtail money claims. In the end, courts applying *Grupo Mexicano's* method cannot take account of modern developments, and courts applying *Ziglar/Hernandez* cannot take adequate account of the existence of alternative remedies. By severing law and equity and thereby depriving constitutional remedies of equity's hallmark flexibility, the Court has laid the foundation for decisions that will put Congress more squarely in charge of assuring remedial adequacy in the future.

Such static, backward-looking approaches to remedial adequacy had no place in Judge Johnson's jurisprudence. Times had changed, demanding a new, more active judicial approach to the problems of government compliance with the rule of law:

In recent years, there has been a substantial expansion in litigation concerning the day-to-day functioning of government. Part of the reason for this expansion is the increasingly prominent role government has come to play in our society. One of the most important, if not the most important, duties of the courts is to secure the integrity of the relationship of private citizens to the government. In the past few decades, as government has emerged as a major source of wealth and control, and as more and more people have become dependent on the government's wealth and subject to its control, this relationship has become more important and its integrity has become subject to increasing strain.<sup>177</sup>

While Judge Johnson likened the role of the structural injunction to such historically recognized forms of judicial management as the equity receivership and the administration of bankruptcy estates,<sup>178</sup> he sought legitimacy in the demands of justice rather than in examples from the past. It's a lesson from which we can continue to learn.

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177. Johnson, *Institutional Litigation*, *supra* note 3, at 272.

178. *Id.* at 274.