

FUNCTIONAL FEDERAL EQUITY

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Throughout history, English and American courts have adapted traditional equitable doctrines and remedies to new social, economic, and technological circumstances. This traditional approach to equity traces to England's High Court of Chancery in the seventeenth century, and federal courts in the United States have applied it since the founding, fashioning new forms of equitable relief to break labor strikes, desegregate schools, redraw electoral maps, and prevent the enforcement of unconstitutional laws.

Yet despite its pedigree, the Supreme Court has abandoned this traditional approach to equity over the past two decades. Today, the Court limits federal courts to the doctrines and remedies that were available in historical courts of equity—either in 1789, at the time of the founding, or before 1938, when the Federal Rules of Civil Procedure merged law and equity in federal court. This new approach freezes equity in time, forbidding judge-driven change and leaving all future modifications to Congress.

This Article proposes an alternative to the Supreme Court's approach, turning not to equity's history but rather to its function. The traditional approach to equity that prevailed until the middle of the twentieth century is hard to square with modern-day skepticism of judge-made law. But as recent scholarship shows, equity still has a role to play in today's legal systems, where it can counter bad-faith attempts to exploit the law's generality and prospectivity. A better account of the federal equity power would permit federal courts to update traditional equitable doctrines and remedies, but only where needed to address these kinds of complex problems. Accordingly, while the federal courts should not treat their equity powers as an all-purpose remedial authority, they should use them to address problems like Texas's S.B. 8, which the state designed specifically to circumvent the Constitution's then-in-force protections for abortion.

INTRODUCTION

How far may federal courts extend federal equity? Until recently, there was no clear answer to this question. Throughout history, the Supreme Court has adapted equity's traditional doctrines and remedies to address new problems like labor strikes, segregated schools, and overcrowded prisons.¹ Even today, federal courts continue to use equity creatively, with one district court recently enjoining a federal criminal investigation into former President Trump's alleged mishandling of classified documents.² But what limits attend this power to fashion new forms of equitable relief?

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1. See *In re Debs*, 158 U.S. 564, 587–92, 600 (1895); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955); *Brown v. Plata*, 563 U.S. 493, 542–45 (2011); see also, e.g., *Morgan v. McDonough*, 540 F.2d 527, 535 (1st Cir. 1976) (affirming an order placing Boston's school board into receivership after it refused to end segregation). For an overview of equity's interplay with constitutional rights in the United States, see PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* (1990).

2. *Trump v. United States*, No. 22-81294-CIV, 2022 WL 4015755, at *1 (S.D. Fla. Sept. 5, 2022), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022).

About two decades ago, the Supreme Court gave a surprising answer to this question. Drawing implicitly on originalist themes, the Court held that federal courts may afford only relief that was available in England's High Court of Chancery in 1789, when the federal courts first acquired their equity powers.³ The Court later moderated this approach, looking instead to English and American equity practice more generally before 1938, when the Federal Rules of Civil Procedure merged law and equity in federal court.⁴ But even so, the Court's pivot marks a striking departure from past practice. By requiring specific historical antecedents for relief not expressly authorized by Congress,⁵ the Court's new approach all but forecloses the judge-driven change that was once equity's hallmark.

Scholarly reactions to the Court's historical turn have ranged from cautious endorsement to scathing critique. Early on, scholars showed that the Court had misread much of the relevant history, erring in cases about preliminary injunctive relief and the equitable remedies available under the Employee Retirement Income Security Act (ERISA).⁶ Samuel Bray countered with the leading defense of the Court's approach, arguing that while it may not be "good history," it is still "good jurisprudence."⁷ Others questioned that conclusion, asking whether the Court's new approach properly accounts for the traditional relationship between equitable and legal remedies,⁸ equity's role in enforcing public-law rights,⁹ and even the original meaning of Article III.¹⁰ And today, in discussing issues like universal injunctions and the scope of *Ex parte Young*, scholars continue to debate history's role in delimiting equity's boundaries.¹¹

3. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999).

4. *Compare id.* at 322, with *Liu v. SEC*, 140 S. Ct. 1936 (2020), and *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016), and *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013), and *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006), and *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

5. *Grupo Mexicano*, 527 U.S. at 322; *see also, e.g.*, *Comm. on the Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d 121, 123–32 (D.C. Cir. 2020) (refusing to enjoin former President Trump's White House counsel to answer a congressional subpoena because the precedent for such injunctions dates only to the 1970s and thus "comes (at least) thirty years too late").

6. *See* 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 (2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); 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 (2000).

7. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1008–23 (2015); *see also* John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1923 (2022) (rejecting strict adherence to founding-era practice but nevertheless characterizing equity as an "external" body of law that federal courts can alter only indirectly).

8. *See* James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 728–30 (2020).

9. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, (2020); Mila Sohoni, *The Last History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 928 (2020).

10. Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1222–23 (2023).

11. *See* Pfander & Wentzel, *supra* note 9, at 1355–59; Sohoni, *supra* note 9 at 928; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425 (2017); *see also, e.g.*, Michael T.

Though this literature largely criticizes the Supreme Court's new historical approach, it does surprisingly little to offer a satisfactory alternative. Early on, some judges and scholars characterized equity as an all-purpose remedial power that permits any relief not expressly prohibited by statute.¹² Perhaps sensing the Court's unwillingness to embrace that approach,¹³ other scholars have tread more carefully, suggesting that federal courts may change to equity's existing doctrines and remedies but only incrementally.¹⁴ But this more limited account cannot explain the many cases in which the Court has approved decidedly major extensions, often to address difficult and novel problems.¹⁵

This Article offers a more muscular approach. Drawing on Henry Smith's recent work on equity's function, it contends that federal courts have a limited power to change equitable doctrines and remedies in response to certain types of "complex" problems.¹⁶ In Smith's vocabulary, a problem is not "complex" merely because it is difficult or has many moving pieces; rather, it is complex only if the interrelationships *between* its moving pieces make it difficult to govern in advance with simple, predictable rules.¹⁷ According to Smith, equity is uniquely suited to resolve problems like these because of its modular structure: it provides a second-order set of flexible, context-sensitive standards to sit atop the law's simple, general rules, intervening nimbly when those first-order rules break down but otherwise leaving them largely intact.¹⁸

Accepting Smith's account as a plausible description of federal equity's function, one way to limit the federal equity power would be to hold that courts have more leeway to depart from past practice to address complex problems. Under this approach, in noncomplex cases, courts would proceed as usual and withhold relief absent on-point precedent or statutory authority.¹⁹ But in complex cases, courts would construe Congress's grant of equity power as an

Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 224 (2018) (arguing against federal equity in diversity cases); Josh Blackman & Seth Barrett Tillman, *The Unresolved Threshold Issues in the Emoluments Clause Litigation: The President Has Three Bodies and There Is No Cause of Action for Ultra Vires Conduct*, 20 GEO. J.L. & PUB. POL'Y 163, 210–22 (2022) (arguing against equitable relief in the Emoluments Clause litigation against former President Trump).

12. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part) (arguing that unless a statute says otherwise, federal courts should use their equity powers to "protect all rights and do justice to all concerned" (quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 805, 807 (1869))); *see also, e.g.*, Resnick, *supra* note 6, at 244 (discussing the concept of "[r]emedial creativity" after the federal merger of law and equity).

13. *See Grupo Mexicano*, 527 U.S. at 322 (contending that Justice Ginsburg's dissent "invoke[d] a 'default rule' . . . not of flexibility but of omnipotence").

14. *See Bray*, *supra* note 7, at 1023 (advocating "modest" changes); Gallogly, *supra* note 10, at 1313–14 (advocating "accretive" but not "avulsive" change); *see also* Harrison, *supra* note 7, at 1933–39 (reverse-engineering limits on federal equity by looking to landmark cases).

15. *See infra* notes 245–250 and accompanying text.

16. *See generally* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

17. *See* Smith, *supra* note 16, at 1055.

18. *See id.* at 1055–56, 1100–12.

19. *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015) (holding that no federal equitable remedy lay to enjoin Idaho to comply with the federal Medicaid Act, which gave other remedies).

implicit instruction to refashion equity's existing doctrines and remedies, subject always to Congress's later revision.

Unlike its rivals, this account preserves the federal courts' powers to extend equity in response to difficult problems. And for this reason, it also better tracks how the federal courts have used their equity powers throughout history. For example, one type of complexity Smith identifies is "opportunism," or an attempt to exploit unforeseen vulnerability to circumvent an existing legal rule.²⁰ This was precisely the issue in *Ex parte Young*, when the Supreme Court extended the equitable remedy of injunction to thwart Minnesota's attempt to evade the mechanisms then in place for judicial review of unconstitutional state statutes.²¹ Another type of complexity that Smith identifies is "polycentricity," which occurs when a case has too many interdependent parties, claims, or issues to be governable with *ex ante* rules.²² When faced with the polycentric problem of desegregating Southern schools—a task that involved many school districts across many states—the Supreme Court in the *Brown v. Board of Education* litigation directed the lower courts to apply their equity powers.²³ The Court has also used the federal equity power to resolve conflicting claims of facially valid rights, a third type of complexity that Smith identifies.²⁴ Parallels like these suggest that functionalism has been a lodestar for federal equity all along.

The remainder of this Article proceeds as follows. Part I gives a brief history of equity, showing how it evolved from an unconstrained, one-man court in medieval England to an undertheorized but indispensable source of judicial power in the United States. England's High Court of Chancery began to follow precedent in the late seventeenth century,²⁵ and this precedent-based approach proliferated in the United States after the American Revolution,²⁶ with early authorities directing the federal courts to modify traditional English

20. See Smith, *supra* note 16, at 1073–76.

21. *Ex parte Young*, 209 U.S. 123, 163–65, 168 (1908); see also *infra* notes 245–250 and accompanying text (arguing that the Court failed to address a similar opportunism problem under its historical approach in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021)).

22. See Smith, *supra* note 16, at 1071–73.

23. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955). That decision also laid the foundation for decades of delay by Southern judges, directing lower courts to accomplish desegregation "with all deliberate speed." *Id.*; see also, e.g., Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1566–75 (2021); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–63 (2004). Although that particular instruction was by no means required by principles of equity, it does show how equity can be conscripted to regressive ends, as it often was throughout U.S. history. See *infra* notes 87–100, 110–118 and accompanying text.

24. See, e.g., *Joy v. City of St. Louis*, 138 U.S. 1, 49–51 (1891) (extending the equitable remedy of specific performance and explaining that equity performs one of its "most beneficent functions" when it resolves conflicting claims of public and private rights); see also Smith, *supra* note 16, at 1076–81.

25. See *infra* Subpart I.A.; see also JOHN H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 114–19 (5th ed. 2019); DENNIS R. KLINCK, CONSCIENCE, EQUITY AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 257–58 (2010); HOFFER, *supra* note 1, at 11.

26. See *infra* Subpart I.B.1.

practice where “expedient.”²⁷ Then, in the twentieth century, two trends began to erode equity’s foundations: first, equity’s merger with law, which undermined its separate identity; and second, the rise of legal realism, which bred skepticism of equity’s judge-made doctrines and remedies.²⁸ Nevertheless, federal equity’s practical importance soared during this period as its remedies became a primary vehicle for court-driven social reform.²⁹ By the 1990s, then, federal equity found itself in a precarious position: just as its innovations had become central to the enforcement of constitutional rights, the source of the courts’ authority to make those innovations was obscured.

Part II chronicles (and critiques) the Supreme Court’s response to this conundrum. In 1999, in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, the Court first rejected a new form of equitable relief as inconsistent with the practice of England’s Chancery Court in 1789.³⁰ That decision applied an originalist methodology and voiced concern about the seemingly unlimited scope of judicial lawmaking under a more flexible approach.³¹ Later, the Court later abandoned its originalist approach, and it now looks more broadly to Anglo-American equity practice before 1938.³² But the perceived problem of judicial overreach remains a key motivating concern.

Part III proposes functional federal equity as an alternative. It begins by pinpointing the federal equity power’s sources in both the Judiciary Act of 1789 and Article III of the Constitution.³³ Then, it develops a functional account of federal equity that uses complexity as the trigger for equitable intervention.³⁴ Part IV then applies functional federal equity to two modern problems: the private enforcement of public laws and universal injunctions.

27. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792) (specifying the “forms and modes of proceeding”—that is, procedures—in equity); see also RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES (Jan. Term, 1842), reprinted in 42 U.S. (1 How.) xxxix, lxix (1843) [hereinafter 1842 Equity Rules] (instructing that “the . . . practice of the High Court of Chancery in England” should provide “just analogies”—but not “positive rules”—to regulate federal equity); *Gordon v. Washington*, 295 U.S. 30, 36 (1935) (noting that federal equity consisted of “the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts” (emphasis added)).

28. See *infra* Subpart I.B.2.

29. See *infra* Subpart I.B.2; see also *supra* note 1.

30. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319–23 (1999) (rejecting asset-freezing injunctions).

31. *Grupo Mexicano*, 527 U.S. at 321–22.

32. See, e.g., *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016) (looking to “the days of the divided bench (meaning, the period before 1938 when courts of law and equity were separate)”; see also *Liu v. SEC*, 140 S. Ct. 1936 (2020); *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002)).

33. See *infra* Subpart III.A.

34. See *infra* Subparts III.B–C; see also *Smith*, *supra* note 16.

I. A BRIEF HISTORY OF EQUITY

A. *English Origins*

Equity was not always a part of English law. Before the mid-fourteenth century, judicial business was carried out by the king's justices,³⁵ who heard lawsuits throughout England and administered the kingdom's common law.³⁶ The common law was key to English politics during this period, with the Magna Carta declaring in 1215 that the king could deprive no subject of life, liberty, or property without due process of law—that is, pursuant to the common law.³⁷

Though important in theory, the common law was often difficult in practice. Under the so-called writ system, a plaintiff initiated a proceeding at common law by purchasing a writ from the king's chancellor.³⁸ Each writ corresponded to a particular form of action, which in turn defined both the substance of the plaintiff's claim and the process by which it would be proven. After the plaintiff purchased his writ, he could not proceed under a different form of action, and if his case were later thrown out because he chose the wrong writ, he would have to purchase a new writ and start all over again.³⁹

There were other pitfalls as well. The common law courts applied strict evidentiary rules, holding (for example) that a written promise to pay money was irrefutable evidence of a debt unless cancelled by a later writing—even if the debtor could prove he had already paid.⁴⁰ Procedures were also limited, and common law courts generally would not allow depositions, discovery, or joinder of multiple parties in a single suit.⁴¹ Finally, usually only money damages were available, and the law courts had no power to prohibit or require specific acts.⁴²

In light of these obstacles, would-be plaintiffs sometimes simply petitioned the king for justice directly.⁴³ In the fourteenth century, the king began to refer these petitions to his chancellor, a member of his royal council, and by the fifteenth century, the chancellor began to receive the petitions himself, sitting as the High Court of Chancery.⁴⁴ From then on, the Chancery Court functioned as an auxiliary to the law courts, and its procedures were liberal: there were no

35. BAKER, *supra* note 25, at 17–25, 111.

36. *Id.* at 17–20.

37. *See id.* at 105 (discussing Magna Carta, ch. 39 (1215)).

38. *Id.* at 60–63, 109–10.

39. *See id.* at 63.

40. *Id.* at 110; 6 JOHN H. BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND 41–42 (2003). Other examples included the common law's refusal to enforce an unwritten contract and to recognize rights associated with property conveyed in trust. BAKER, *supra* note 25, at 110–11.

41. HOFFER, *supra* note 1, at 13–14; *see also* BAKER, *supra* note 25, at 111–12; Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 494–95 (2022).

42. SARAH WORTHINGTON, EQUITY 33–34 (2d ed. 2006); HOFFER, *supra* note 1, at 15.

43. BAKER, *supra* note 25, at 106.

44. *Id.* at 106, 109–10.

juries, writs, or forms of action, and the chancellor could consider written evidence, join multiple actions together, and issue injunctions.⁴⁵

Early on, the chancellor decided cases according to his “conscience.”⁴⁶ His powers had few formal limits during this period, although two jurisdictional constraints helped prevent conflict with the law courts. First, the chancellor’s decrees were in personam, meaning that they operated only on the parties.⁴⁷ They did not command the law courts, set aside legal judgments, or alter the common law itself. Second, the chancellor would hear a case only where, in his view, there was no “adequate” remedy at law—a shifting concept that later came to define the outer boundaries of the Chancery Court’s jurisdiction.⁴⁸

As the centuries wore on, several developments hardened equity into a more predictable system of rules. First, the Chancery Court’s critics complained of the chancellor’s seemingly unbounded discretion.⁴⁹ Second, the court’s caseload increased dramatically during the sixteenth and seventeenth centuries, leading it to develop de facto approaches to recurring issues like trusts and mortgages.⁵⁰ Finally, after 1660, the court’s decisions were regularly reported.⁵¹

As a result of these forces, the Chancery Court began to follow precedent in the late seventeenth century.⁵² One scholar identifies *Thornborough v. Baker* as an early example.⁵³ There, a borrower mortgaged certain real property to secure a loan, but both the borrower and the lender died before the mortgage was repaid.⁵⁴ Because the borrower’s heirs did not redeem the mortgage within the time specified by the security agreement, they could no longer redeem the

45. *Id.* at 111–12; HOFFER, *supra* note 1, at 13–14; David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 554 (1986).

46. BAKER, *supra* note 25, at 111. *See generally* KLINCK, *supra* note 25.

47. BAKER, *supra* note 25, at 111–12; BAKER, *supra* note 40, at 42; 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 134–135 (5th ed. 1941). Thus, although the chancellor might restrain a person from enforcing the judgment of a court of law, he would not invalidate the judgment itself or the common law rule that produced it. *See* BAKER, *supra* note 25, at 112; SNELL’S EQUITY 127–28 (John McGhee ed., 32d ed. 2010).

48. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 30–32 (13th ed. 1886).

49. BAKER, *supra* note 25, at 118; *see* JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 49 (2d ed. 1856) (discussing an English scholar arguing in the seventeenth century that, if equity proceeds the chancellor’s “Conscience,” one may as well “make the Standard for the measure, we call a Foot, a Chancellor’s Foot”). For example, in 1616, a conflict erupted between the chancellor and the chief justice of England’s highest common law court, the King’s Bench. *See* Mark Fortier, *Equity and Ideas: Coke, Ellesmere, and James I*, 51 RENAISSANCE Q. 1255 (1998). Despite a statute that arguably prohibited the practice, the chancellor began to hear disputes that had already been decided by the law courts, imprisoning any defendant who refused to answer. In response, the chief justice released the imprisoned defendants by habeas corpus and encouraged them to sue their counterparties at law. King James I ultimately sided with the chancellor and dismissed the chief justice from office. *Id.* at 1255, 1262–65; *see also* BAKER, *supra* note 25, at 116–18.

50. BAKER, *supra* note 25, at 113–14, 118–19; BAKER, *supra* note 40, at 190.

51. BAKER, *supra* note 25, at 118–19.

52. *See id.*; HOFFER, *supra* note 1, at 11; KLINCK, *supra* note 25, at 255–58; SNELL’S EQUITY, *supra* note 47, at 8.

53. *Thornborough v. Baker* (1675) 36 Eng. Rep. 1000, 3 Swans. 628; *see* KLINCK, *supra* note 25, at 257–58.

54. *Thornborough*, 36 Eng. Rep. at 1000–01, 3 Swans. at 628.

mortgage at law, so they sued in the Chancery Court for equitable redemption. The question was whether the money paid to redeem the mortgage should go to the lender's heir (as real property) or to his estate (as personal property).

Lord Chancellor Nottingham ruled for the estate. Although the estate had more than enough assets to pay the lender's debts, he explained, the estate's financial condition was "not the measure of justice in this case."⁵⁵ Rather, because the lender's "principal right" was "to the money, and his right to the land is only as a security for the money," the forfeited land was more like personal property and should be treated accordingly.⁵⁶ Lord Nottingham then turned to precedent. He relied on one case, calling its decision to award a redemption payment to the decedent's executor "right and just."⁵⁷ Others he disapproved, explaining that they wrongly considered the extent of the estate's assets in ruling for the heir.⁵⁸ And another he distinguished on the ground that it involved not a security interest but rather a lessee's contractual right to repurchase the property from the lessor's heir.⁵⁹ Published in 1675, *Thornborough* already showed all the hallmarks of precedent-based reasoning.

A brief sketch of the Chancery Court's jurisdiction shows the shape equity took as it hardened during this early modern period. First, the Chancery Court had *exclusive* jurisdiction over certain areas of substantive law, like trusts and mortgages.⁶⁰ The court's exclusive jurisdiction also included certain remedies for the violation of legal rights—like specific performance and rescission of contracts—that were unavailable in the common law courts.⁶¹ Second, the court had *concurrent* jurisdiction over cases where the right and the remedy were both legal but where the common law's procedures were inadequate.⁶² For example, the court would hear a purely legal action involving multiple plaintiffs or defendants because the common law would not allow joinder.⁶³ Importantly, the court could issue a so-called "common injunction" to restrain a person from filing an action at law where the underlying dispute fell within the court's exclusive or concurrent jurisdiction.⁶⁴ Finally, the court had *auxiliary* jurisdiction to order certain procedural relief, like depositions and discovery, for use in parallel legal proceedings.⁶⁵

55. *Id.* at 1001, 3 Swans. at 630.

56. *Id.*

57. *Id.* at 1002, 3 Swans. at 633–34.

58. *Id.* at 1002, 3 Swans. at 632–33 (critiquing this "argument of compassion").

59. *Id.* at 1001–02, 3 Swans. at 631.

60. POMEROY, *supra* note 47, §§ 137–138, 187, 189.

61. See W. H. BRYSON, CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550–1600, at xxii–xxxii (2001).

62. POMEROY, *supra* note 47, § 173.

63. *Id.* §§ 243–245, 267–269a, 273–274.

64. *Id.* §§ 1360–1365

65. *Id.* § 190.

By the nineteenth century, the Chancery Court came to be associated with expense and delay,⁶⁶ and calls for reform mounted. Parliament merged the Chancery Court with the common law courts in 1875, creating unified courts that recognized doctrines, procedures, and remedies from both systems.⁶⁷ But even after merger, U.K. courts continued to fashion new equitable doctrines and remedies throughout the nineteenth and twentieth centuries.⁶⁸ They never developed the static view of equity that the U.S. Supreme Court later would.

B. *Federal Equity Practice*

1. *Before 1938*

Equity practice was even more confused in the early United States than in eighteenth-century England. During the colonial period, equity's reception was mixed, with some colonies having separate courts of equity, some having unitary courts with equity powers, and others reserving equity powers to the colonial legislature.⁶⁹ This pattern continued in the states after the Revolution.⁷⁰ Specific equitable practices also varied widely from state to state, as state legislatures set specific statutory rules for traditionally equitable matters.⁷¹

In the federal system, the Constitution extended the judicial power to cases “in . . . Equity.”⁷² Aside from some brief discussion of the decision to vest law and equity jurisdiction in the same courts, there was little debate over equity at the Constitutional Convention of 1787.⁷³ But there was discussion in the ratification debates, with the Federalists in favor and the Anti-Federalists opposed. Defending equity, Alexander Hamilton stressed its exceptional nature: “The great and primary use of a court of equity, is to give relief *in extraordinary cases*, which are *exceptions* to general rules.”⁷⁴ Anticipating the Anti-Federalist response, he added in a footnote: “It is true that the principles by which that relief is governed are now reduced to a regular system; but it is not

66. BAKER, *supra* note 25, at 120–22; *see also* CHARLES DICKENS, BLEAK HOUSE (1852).

67. BAKER, *supra* note 25, at 123.

68. *Id.* at 216; *see* *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers* [1980] 1 All ER 213 (discussing a preliminary injunction restraining removal of assets outside the United Kingdom).

69. HOFFER, *supra* note 1, at 49–52; *see also* Stanley Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 PERSPECTIVES IN AMERICAN HISTORY 257–84 (Donald Fleming & Bernard Bailyn eds., 1971).

70. *See* HOFFER, *supra* note 1, at 86–94; *see also* POMEROY, *supra* note 47, §§ 283–287.

71. *See* Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 267–68 (2010).

72. U.S. CONST. art. III, § 2, cl. 1.

73. HOFFER, *supra* note 1, at 95, 100–02; *see also* James Madison, *Notes on the Constitutional Convention of 1787* (August 27, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428 (Max Farrand ed., 1911).

74. THE FEDERALIST NO. 83, at 438 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

the less true that they are in the main applicable to *special* circumstances, which form exceptions to general rules.”⁷⁵

Acting on the Constitution’s grant of judicial power over cases “in equity,” the First Congress gave the lower federal courts “original cognizance” of civil suits “in equity” in the Judiciary Act of 1789.⁷⁶ Later that year, Congress provided (somewhat confusingly) that the “forms and modes of proceedings” in equity—that is, equity’s procedures—would be “according to the course of the civil law.”⁷⁷ When that provision expired in 1792, Congress directed the courts to apply “the principles, rules and usages” of “courts of equity,”⁷⁸ meaning England’s Chancery Court. But Congress preserved the federal courts’ power to modify equity’s procedures, authorizing “such alterations and additions” as those courts “shall in their discretion deem expedient.”⁷⁹

Congress also authorized the Supreme Court to make procedural rules for equity proceedings. In equity rules promulgated in 1842, the Court directed the lower courts to follow the “practice of the High Court of Chancery in England” on matters where the rules were silent, although only insofar as that practice “may reasonably be applied consistently with the local circumstances and local convenience of the district, where the court is held.”⁸⁰ The rules were clear that English practice was to be treated “*not* as positive rules, but as furnishing just analogies to regulate the practice” of the federal courts.⁸¹ The Supreme Court followed a similar approach for its own equity practice, explaining in 1791 that English Chancery practice would “afford[] outlines for the practice of this court,” subject to “such alterations therein as circumstances may render necessary.”⁸²

Following the model established by Congress for matters of procedure, the Supreme Court regularly extended equity’s substantive doctrines and remedies. For example, in a pair of decisions in the 1890s, the Court affirmed decrees requiring specific performance of a railroad’s agreement to lease segments of

75. *Id.*

76. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The Act also codified the traditional English limitation on equity jurisdiction, providing that an equity suit “shall not be sustained . . . where plain, adequate and complete remedy may be had at law.” *Id.* § 16, 1 Stat. at 82.

77. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94.

78. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

79. *Id.*

80. 1842 Equity Rules, *supra* note 27, at lxix. The Court also promulgated equity rules in 1822 and 1912. The 1822 version of Rule 90 did not expressly caution against applying English practice as “positive rules,” but it did authorize the lower courts to “make further rules and regulations, . . . in their discretion.” RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES (Feb. Term, 1822), *reprinted in* 20 U.S. (7 Wheat.) v, xiii (1822). Similarly, the 1912 rules abandoned the reference to English practice altogether but preserved the lower courts’ residual rulemaking power. *See* RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES (Oct. Term, 1912), *reprinted in* 226 U.S. 649, 673 (1913).

81. 1842 Equity Rules, *supra* note 27, at lxix (emphasis added).

82. Order of August 8, 1791, 5 U.S. (1 Cranch) xv, xvi.

its track to a competitor.⁸³ In both cases, the defendant–railroad objected that the agreement required it to manage the movement of the competitor’s trains and that specific performance traditionally was not available for “continuous acts involving skill, judgment, and technical knowledge.”⁸⁴ But the Court rejected that argument, pointing to its authority to expand equitable remedies beyond traditional bounds:

It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. . . . “[N]ew [remedies] may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition.”⁸⁵

In other words, as the Court later explained: “From the beginning, the phrase ‘suits in equity’ [in § 11 of the Judiciary Act] has been understood to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789, *as they have been developed in the federal courts.*”⁸⁶

The Court also expanded equity’s reach in public law cases during this period. In these cases, equity began to play a role in national politics, but it would never attain a consistent partisan valence and would instead be used for both conservative and progressive ends. For example, in 1895, the Court approved an injunction sought by the United States against a labor strike, relying only on the federal government’s constitutional power over interstate commerce.⁸⁷ After that decision, so-called “antilabor” injunctions became widespread—and controversial—until Congress prohibited them in 1932.⁸⁸

Another pivotal example from this period is *Ex parte Young*.⁸⁹ That case arose out of an equity suit by the owners of a railroad to restrain Minnesota’s

83. *Union Pac. Ry. Co. v. Chi., Rock Island, & Pac. Ry. Co.*, 163 U.S. 564, 603–04 (1896); *see also* *Joy v. City of St. Louis*, 138 U.S. 1, 49–51 (1891) (similar).

84. *Union Pac.*, 163 U.S. at 600; *see also* *Joy*, 138 U.S. at 45–49.

85. *Union Pac.*, 163 U.S. at 600–01 (quoting POMEROY, *supra* note 47, § 111); *see also* *Gordon v. Washington*, 295 U.S. 30, 37–39 (1935) (explaining that the Court had previously extended the remedy of receivership to allow for the liquidation of an insolvent corporation’s assets); *see also* *Neves v. Scott*, 50 U.S. (9 How.) 196, 201–10 (1850) (analyzing conflicting precedents and concluding that the husband’s brother and nephew could enforce an executory trust created by a marriage settlement agreement); *see also* *Collins*, *supra* note 71, at 338 (“[I]n the early national period, federal courts routinely applied federal and English judge-made equity principles.”).

86. *Gordon*, 295 U.S. at 36 (emphasis added); *see also* *Seymour v. Freer*, 75 U.S. (8 Wall.) 202, 218 (1868) (characterizing federal equity as “flexible and comprehensive”); *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 432 (1868) (explaining that federal equity “adapts . . . to the necessities of each case”); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944).

87. *See In re Debs*, 158 U.S. 564, 587–92, 600 (1895); *see also* Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699, 703–04 (2022) (reading *Debs* as articulating limits on the federal equity power).

88. *See* FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 1–46 (1930); Norris–LaGuardia Act § 1, 29 U.S.C. § 101.

89. *Ex parte Young*, 209 U.S. 123 (1908).

attorney general from enforcing an allegedly unconstitutional rate statute.⁹⁰ At the time, the primary mode of challenging a statute's constitutionality was to violate it and raise the Constitution as a defense in an enforcement proceeding.⁹¹ To discourage the railroads from "testing" the statute in this way, Minnesota threatened massive civil and criminal penalties—including up to five years' imprisonment—for even a single violation.⁹²

Unable to find an employee willing to take that risk, the railroad owners turned to equity. In a bill filed on the equity side of a lower federal court, the owners sought and ultimately received a novel remedy: a preliminary injunction prohibiting the attorney general from enforcing the statute.⁹³ But the attorney general disobeyed the injunction, filing a mandamus action against the railroads in state court, and the federal court held him in contempt.⁹⁴

On a writ of habeas corpus, the Supreme Court upheld the lower federal court's injunction.⁹⁵ Rejecting the state's argument that an adequate remedy was available at law, the Court explained that the ordinary method of "testing" a statute's validity was inadequate here because of the penalties that Minnesota had imposed.⁹⁶ The railroad would be hard-pressed to find an employee willing to violate the statute even once, the Court explained, and even if it did, the attorney general might not bring suit for only one (or even a few) violations.⁹⁷ Moreover, even if the railroad could bait the attorney general into a test suit, it would presumably comply with the statute while that suit was pending, leading to an irreversible loss of revenue.⁹⁸ Accordingly, the Court fashioned a new form of injunctive relief to prohibit officials from enforcing unconstitutional state laws, even absent a showing of tortious harm by the plaintiff.⁹⁹

Again, *Ex parte Young* shows equity's mixed partisan valence. On the one hand, the decision shows equity intervening on behalf of the nation's largest business interests to enforce *Lochner*-era principles of substantive due process.¹⁰⁰ But on the other hand, its injunction would continue to expand over

90. *Id.* at 129–31.

91. *See id.* at 163.

92. *Id.* at 127–29 (explaining that the statute would penalize each violation by any railroad employee with a \$5,000 fine and up to five years' imprisonment).

93. *Id.* at 126–34.

94. *Id.* at 133–34.

95. *Id.* at 161–65. The Court also held that the rate statute was unconstitutional, *id.* at 145–48, and that the attorney general could not claim Minnesota's sovereign immunity, *id.* at 149–61.

96. *Id.* at 163–64.

97. *Id.*

98. *Id.* at 163–65.

99. The Court had previously recognized a federal court's power to enjoin an unconstitutional official act that also threatened tortious harm. *See Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 838–46 (1824).

100. Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon, in FEDERAL COURTS STORIES* 247, 248–56 (Vicki C. Jackson & Judith Resnick eds., 2010).

the next century, eventually becoming one of the federal courts' most important tools for enforcing all constitutional limitations on government action.¹⁰¹

2. *After 1938*

When the Federal Rules of Civil Procedure took effect on September 16, 1938, they formally abolished the procedural distinctions between actions at law and suits in equity. Now, there was only “one form of action—the civil action,”¹⁰² and parties could seek legal and equitable relief in the same case.¹⁰³

Merger did not change equity's substance,¹⁰⁴ but other developments in 1938 did. The Federal Rules codified most of the procedures that were previously available only in equity, like joinder, depositions, and discovery.¹⁰⁵ And *Erie Railroad Co. v. Tompkins*, which disapproved of “federal general common law,” was later held to apply in equity too, meaning that state law governed equitable matters of substance, like trusts and mortgages, in diversity cases.¹⁰⁶ But the Court later suggested that *Erie* did not apply to equitable remedies,¹⁰⁷ and federal courts continue to apply a body of federal equitable remedies in both diversity and federal question cases today.¹⁰⁸

As a result of these changes, the bulk of federal equity after 1938 addressed remedial issues, although some equitable doctrines persisted.¹⁰⁹ But the Federal Rules did not explain how the unified courts would manage this residual body of equity jurisprudence. The Rules expressly displaced the old equity rules, which expressly sanctioned judge-driven change in equity, and Congress later repealed most of the early statutes dealing with equity practice when it enacted

101. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (holding that *Ex parte Young* applies to preempted state statutes); see also Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 947–48 (2019) (describing *Young's* expansion).

102. FED. R. CIV. P. 2.

103. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508 (1959).

104. Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072) (providing that merger did not “abridge, enlarge or modify” substantive rights).

105. See FED. R. CIV. P. 19–24, 26–37.

106. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 205 (1938). To be more specific, *Ruhlin* held that state *decisional* law governed in federal diversity cases. Even before *Erie*, federal courts had generally applied state statutory law to matters of substance in equity. See *Mason v. United States*, 260 U.S. 545, 557 (1923); see also John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 182, 192, 212 (1999).

107. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 106–07 (1945). Whether this rule holds in light of the Court's later cases is an open question. See 19 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 4513 (3d ed. 2002). Compare Cross, *supra* note 106, and Caprice L. Roberts, *Remedies, Equity & Erie*, 52 AKRON L. REV. 493, 498 (2018) (defending the rule), with Morley, *supra* note 11, at 224 (critiquing it).

108. See, e.g., *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999) (assuming but not deciding that federal law governs preliminary injunctive relief in diversity actions).

109. See, e.g., *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017) (addressing the application of laches to claims under the Patent Act); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014) (same, for the Copyright Act).

the Judicial Code of 1948.¹¹⁰ As a result, in the decades after merger, the source of the federal courts' authority to modify equity became increasingly unclear.¹¹¹

And yet federal equity continued to evolve. During the 1950s, 60s, and 70s, equity formed the centerpiece of some of the federal judiciary's most ambitious undertakings—although again, its net partisan valence is difficult to pin down. For example, in its second decision in the *Brown v. Board of Education* litigation (*Brown II*), the Supreme Court directed lower courts to use their equity powers to desegregate public schools.¹¹² While this decision provided the lower courts with a set of tools to accomplish desegregation,¹¹³ it simultaneously directed them to apply those tools with “all deliberate speed,” an instruction that scholars have argued essentially nullified its holding on the merits.¹¹⁴

Nevertheless, in the decades after *Brown II*, federal courts continued to use their equity powers to reform schools, prisons, mental health facilities, and public housing.¹¹⁵ In these cases, the Court articulated a broad vision of equity, explaining that its “essence” was “the power of the Chancellor . . . to mould each decree to the necessities of the particular case.”¹¹⁶ The Court also sometimes refused to extend equitable relief during this period, but it did so for reasons of policy, not history. In *Younger v. Harris*, for example, the Court refused to enjoin an unconstitutional state criminal prosecution,¹¹⁷ noting the historical English rule against enjoining criminal proceedings but ultimately resting its decision on a modern concept of “Our Federalism” instead.¹¹⁸

110. Act of June 25, 1948, Pub. L. 80-77, ch. 646, 62 Stat. 869, 993, 996 (1948) (recodifying Title 28 and repealing § 11 of the Judiciary Act of 1789 and § 2 of the Process Act of 1792).

111. See Bray, *supra* note 7, at 1003–04 (noting that it was “unclear [during this period] exactly how committed the [Supreme] Court was to traditional equity”).

112. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

113. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (upholding a remedial education program ordered by the district court); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–31 (1971) (affirming a bussing plan ordered by the district court); *Morgan v. McDonough*, 540 F.2d 527, 535 (1st Cir. 1976) (affirming an order placing Boston's school board into a federal receivership); HOFFER, *supra* note 1, at 194–95 (describing the *Morgan* litigation).

114. *Id.* at 301; see also Grove, *supra* note 23; Klarman, *supra* note 23.

115. See *Hutto v. Finney*, 437 U.S. 678 (1978) (affirming remedial orders relating to prison conditions); *Hills v. Gautreaux*, 425 U.S. 284, 286, 306 (1976) (affirming an order remediating discrimination in public housing); *Wyatt v. Aderholt*, 503 F.2d 1305, 1316 (5th Cir. 1974) (affirming injunctive relief against a mental institution); see also Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

116. *Swann*, 402 U.S. at 15–16 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)).

117. *Younger v. Harris*, 401 U.S. 37 (1971).

118. See *id.* at 38–40, 43–44 (explaining that the old rule “may originally have grown out of circumstances peculiar to the English judicial system” and that the idea “of ‘comity,’ that is, a proper respect for state functions” was an “even more vital consideration”); see also Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2083–86 (2022) (arguing that the *Younger* Court was concerned primarily with federalism and not equity's traditions); Courtney E. Lollar, *Reviving Criminal Equity*, 71 ALA. L. REV. 311 (2019) (arguing that equity should play a more robust role in remediating rights violations in criminal cases).

As the Supreme Court began to slow its pace of recognizing new rights in the 1980s, 90s, and aughts, it also slowed its pace of extending equitable relief. But it did not stop entirely. In 2006 and 2008, the Court fashioned the now-familiar four-factor balancing test for preliminary and permanent injunctive relief.¹¹⁹ And in 2011, the Court upheld an injunction directing a California state prison to release tens of thousands of inmates as a remedy for overcrowding.¹²⁰

By the turn of the twenty-first century, then, federal equity found itself at the edge a precipice. On the one hand, its doctrines and remedies had become the key to administering a generation's worth of constitutional decisions. Yet at the same time, merger and the rise of legal realism had eroded its doctrinal and theoretical basis.¹²¹ Would the Supreme Court preserve the remedial engine of its late-twentieth-century rights jurisprudence? Or would it abandon equity's dynamism as a relic—not of medieval English jurisprudence, but of a bygone era of federal judicial engagement with constitutional rights?

II. THE SUPREME COURT'S TURN TO HISTORY

Since the late 1990s, the Supreme Court has turned away from equity's traditional, precedent-driven method and towards a new, historically inflected approach. At first, the Court dabbled in “equitable originalism,” which looks to the remedies available in England's Chancery Court in 1789.¹²² Later, the Court moderated its approach, looking instead to the general practice of equity courts in England and the United States before federal equity's merger with law in 1938.¹²³ But regardless of the timeframe, the Court's new approach freezes equity in time, allowing only Congress to modify its doctrines and remedies.

A. *Equitable Originalism*

The story of the Court's historical turn begins in 1999 with *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, a diversity case in which a group of

119. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although that test draws on traditional equitable principles, those principles had not historically been formulated as factors in a single balancing test applicable to all injunctions. See *Bray*, *supra* note 7, at 1023–30 (citing these cases as examples of a “stylized” or “artificial” judicial history of equity); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 539 (1978) (crediting Charles Wright & Arthur Miller for the idea of a balancing test (citing 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2947–2948 (1973))). The test therefore represents a clear extension of federal equity—even though the Court, which by then was in the throes of the historical turn, refused to acknowledge it as such. See *eBay*, 547 U.S. at 390 (characterizing its test as “historically employed by courts of equity”).

120. *Brown v. Plata*, 563 U.S. 493, 545 (2011).

121. See *Smith*, *supra* note 16, at 1062–63, 1135 (noting the rising tension between legal realism and equity as the merger progressed in federal and state courts after 1848).

122. See Pfander & Wentzel, *supra* note 9, at 1269.

123. See *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (explaining that equitable relief refers to “those categories of relief that were typically available in equity” (emphasis omitted) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993))).

U.S. investment funds sued a Mexican holding company for breach of contract.¹²⁴ The investment funds asked the district court to preliminarily enjoin the holding company from transferring assets outside of the United States, and the district court agreed.¹²⁵ On an interlocutory appeal, the holding company argued that the preliminary injunction exceeded the district court's equitable powers, but the Second Circuit disagreed and affirmed the injunction.¹²⁶

The Supreme Court granted certiorari and vacated the injunction. In an opinion by Justice Scalia, the Court explained that the federal equity power is “an authority to administer in equity suits the principles of the system of judicial remedies which . . . was being administered by the English Court of Chancery” in 1789, “at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.”¹²⁷ Drawing implicitly on originalist logic, the Court explained that federal courts could not “create remedies previously unknown to equity jurisprudence” and that any “departure from past practice” was for Congress to prescribe.¹²⁸ The Court then held that the district court lacked authority to preliminarily enjoin the company from transferring its assets because such relief was not “traditionally accorded by courts of equity.”¹²⁹

Dissenting, Justice Ginsburg criticized the Court's “unjustifiably static” view of equity.¹³⁰ She argued that the Court's precedents had “defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England,” not “the specific practices and remedies of the pre-Revolutionary Chancellor.”¹³¹ In Justice Ginsburg's view, those principles dictated that—absent a contrary statute—federal courts should observe equity's “grand aims” and “protect all rights and do justice to all concerned.”¹³²

Grupo Mexicano was the first case in which the Supreme Court rejected a federal equitable remedy because of its supposed inconsistency with founding-era English equity practice.¹³³ The Court cited a string of cases from the 1930s

124. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 310–12 (1999).

125. *Id.* at 312.

126. *Id.* at 312–13.

127. *Id.* at 318 (first quoting *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939); then quoting 1 ARMISTEAD M. DOBIE, *HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE* 660 (1928)). As explained below, the Court badly mischaracterizes these cases. *See infra* Subpart II.A.

128. *Grupo Mexicano*, 527 U.S. at 322, 332.

129. *Id.* at 319. For the argument that nineteenth-century courts of equity refused asset-freezing injunctions only because prejudgment attachment—a remedy personal jurisdiction doctrine now curtails—was then widely available from courts of law, see Pfander & Formo, *supra* note 8, at 730–43.

130. *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part).

131. *Id.*

132. *Id.* at 342 (quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 805, 807 (1869)).

133. As Justice Ginsburg pointed out in her dissent, English courts *had* since authorized asset-freezing injunctions. *Id.* at 339 (Ginsburg, J., concurring in part and dissenting in part) (citing *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers* [1980] 1 All ER 213). But because they did so only in 1975, the Court concluded that asset-freezing injunctions were insufficiently traditional. *See id.* at 327–29 (majority opinion).

and 1940s,¹³⁴ but those cases stand largely for the separate proposition that state equity practice does not apply in federal court.¹³⁵ None disapproved of a federal equitable remedy for being unknown to English equity practice in 1789.

Today's equitable originalists repeat this error, characterizing as traditional an approach to equity that actually first surfaced in 1999. Consider the following passage from *Boyle v. Zacharie*, a case that Justice Thomas cites in two separate opinions that apply *Grupo Mexicano's* originalist approach:

[T]he settled doctrine of this court is, that the remedies in equity are to be administered, *not according to the state practice*, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, *and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe.*¹³⁶

Justice Thomas cites this case for the proposition that federal equity is governed by “the practice of courts of equity” in the parent country—i.e., England.¹³⁷ But Justice Thomas omits the two italicized clauses, the first of which distinguishes federal equity from state equity, and the second of which explicitly recognizes the federal courts’ power to depart from traditional English forms.

Equitable originalists also misuse history in other ways. For example, citing William Blackstone and Alexander Hamilton, Justice Thomas argues that English equity practice had hardened into a “regular science” by 1789, when the First Judiciary Act was enacted.¹³⁸ But neither Blackstone nor Hamilton had

134. *Grupo Mexicano*, 527 U.S. at 318–19 (describing the federal equity power as “an authority to administer” the system of principles and judicial remedies “administered by the English Court of Chancery at the time of the separation of the two countries” (quoting *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939))); *see also, e.g.*, *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949) (quoting the same passage from *Atlas*); *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 101–08 (1945) (“The suits in equity of which the federal courts have had ‘cognizance’ ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery.”).

135. *See Atlas*, 306 U.S. at 568–71 (noting that the federal court had equity jurisdiction even though the plaintiff might have had an adequate remedy at law in Oklahoma state court); *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868) (“The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to *neither limitation or restraint by State legislation*, and is *uniform* throughout the different States of the Union.” (emphasis added)); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832) (“[T]he acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings . . . are of no force in relation to the courts of the United States.”); *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222–23 (1818) (“[T]he remedies in the courts of the United States, are to be . . . in equity, *not according to the practice of the state courts*, but according to the principles of . . . equity, as distinguished and defined in that country from which we derive our knowledge of those principles [i.e., England].” (emphasis added)).

136. *Boyle*, 31 U.S. at 654 (emphasis added).

137. *Liu v. SEC*, 140 S. Ct. 1936, 1951 (2020) (Thomas, J., dissenting) (quoting *Boyle*, 31 U.S. at 654); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (quoting *Boyle*, 31 U.S. at 654).

138. *Trump*, 138 S. Ct. at 2426 (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES at *440–41).

a static view of equity.¹³⁹ Rather, they simply recognized that, by the eighteenth century, England’s Chancery Court followed precedent.¹⁴⁰

Indeed, as Owen Gallogly has shown, the relevant founding-era evidence points the other way.¹⁴¹ According to “original meaning” originalism, the dominant school of originalist thought today, a legal text has the meaning that a reasonable person would have given it at the time of its publication.¹⁴² Here, the historical evidence suggests that an informed reader in 1789 would have understood the term “equity”—whether in Article III of the Constitution or the Judiciary Act of 1789—as referring to the traditional, precedent-based equity practice inherited from England’s Chancery Court.¹⁴³

The other justification equitable originalists offer is judicial restraint. *Grupo Mexicano* cited the “role of equity in our ‘government of laws, not of men’” and suggested that Justice Ginsburg’s dissent “invoke[d] a ‘default rule’ . . . not of flexibility but of omnipotence.”¹⁴⁴ And later Justice Thomas, doubting the propriety of universal injunctions, disclaimed what he called a “freewheeling power to fashion new forms of equitable remedies.”¹⁴⁵ Statements like these may be *Grupo Mexicano*’s most important legacy. The Court has never again applied the decision’s originalist approach in a majority opinion, although it has also never overruled the decision, and its approach remains influential in some quarters.¹⁴⁶ But *Grupo Mexicano*’s skepticism of equity as a source of judicial lawmaking endures, animating the Court’s equity jurisprudence even today.

139. See *supra* notes 74–75 (discussing Hamilton’s views of federal equity)

140. See *supra* Subpart II.A; see also BAKER, *supra* note 25, at 119; HOFFER, *supra* note 1, at 11; 3 WILLIAM BLACKSTONE, COMMENTARIES *440–41 (noting that equitable remedies are determined as readily “in a court of equity as in a court of law,” where they were not static (emphasis added)). English courts have never embraced the Supreme Court’s historical approach—a fact that is proven by their decision in 1975 to embrace the very preliminary injunctive relief that *Grupo Mexicano* would later disapprove. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 327–29 (1999).

141. See generally Gallogly, *supra* note 10.

142. See, e.g., ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 17 (new ed. 2018).

143. See Gallogly, *supra* note 10, at 1281–90, 1310–14. Similarly, for “original law” originalists, nothing in the founding-era sources suggests that *Grupo Mexicano*’s originalism was the “Founders’ law.” See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 838 (2015) (“Our law is . . . the Founders’ law, as it’s been lawfully changed.”); see also Bray, *supra* note 7, at 1004 (calling equitable traditionalism a “novel but more evolutionary development[]” wrought by the Court’s “new” equity cases).

144. *Grupo Mexicano*, 527 U.S. at 321–22 (first quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 12 (1836); then quoting *Grupo Mexicano*, 527 U.S. at 342 (Ginsburg, J., concurring in part and dissenting in part)); see also Bray, *supra* note 7, at 1019 (arguing that Justice Ginsburg’s approach had “no limiting” principle).

145. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

146. Justice Scalia used *Grupo Mexicano*’s approach to oppose structural injunctions, see *Brown v. Plata*, 563 U.S. 493, 554–55 (2011) (Scalia, J., dissenting), and Justice Thomas has used it to argue against universal injunctions, see *Trump*, 138 S. Ct. at 2424–29 (Thomas, J., concurring); disgorgement in agency enforcement actions, *Liu v. SEC*, 140 S. Ct. 1936, 1951–53 (2020) (Thomas, J., dissenting); and extending *Ex parte Young*, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part and dissenting in part). Some scholars and lower courts also rely on the decision today. See Morley, *supra* note 11, at 224 &

B. *Equitable Traditionalism*

1. “Equitable Relief” in Modern Statutes

Just three years after *Grupo Mexicano*, the Court began to experiment with a modified version of its historical approach. *Great-West Life & Annuity Insurance Co. v. Knudson*¹⁴⁷ involved two provisions of the Employee Retirement Income Security Act of 1974 (ERISA) that authorize federal courts to “enjoin” a violation of a covered insurance plan’s terms and to provide “other appropriate equitable relief.”¹⁴⁸ Eric and Janette Knudson were participants in a health insurance plan who had previously settled a tort suit arising out of a car crash.¹⁴⁹ Great-West, the insurer, sued to recover payments it had made for Janette’s medical expenses, seeking either restitution (as a form of “equitable relief”) or an injunction directing the Knudsons to pay.¹⁵⁰ The district court entered summary judgment for the Knudsons, and the Ninth Circuit affirmed, concluding that ERISA did not authorize Great-West’s proposed remedies.¹⁵¹

The Supreme Court granted certiorari and affirmed. Once again, Justice Scalia wrote for the Court, but this time, his opinion made no mention of founding-era English chancery practice.¹⁵² Instead, the Court simply said that the statutory term “equitable relief” refers to “those categories of relief that were *typically* available in equity” in “the days of the divided bench”¹⁵³ and that the statute’s reference to injunctive relief carries “the limitations . . . that equity typically imposes.”¹⁵⁴ The Court then concluded that Great-West’s requested remedy was not an “injunction” because it ultimately directed the Knudsons to pay money damages, a traditionally legal remedy.¹⁵⁵ Justice Ginsburg dissented

n.30 (opposing the use of federal equity power in diversity cases); Blackman & Tillman, *supra* note 11, at 210–22 (applying *Grupo Mexicano* to Emoluments Clause litigation); Comm. on the Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121, 123–24 (D.C. Cir. 2020); CASA de Md., Inc. v. Trump, 971 F.3d 220, 257 (4th Cir. 2020); Rodgers v. Bryant, 942 F.3d 451, 460 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part).

147. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

148. *Id.* at 209–10 (quoting 29 U.S.C. § 1132(a)(3)).

149. *Id.* at 207.

150. *Id.* at 207–09.

151. *Id.* at 208–09.

152. Perhaps this was because of *Mertens v. Hewitt Associates*, a prior case establishing that ERISA’s reference to “equitable relief” meant “relief that [was] *typically* available in equity,” if not “*exclusively* so.” 508 U.S. 248, 256 (1993). But *Mertens* was decided before *Grupo Mexicano*, so it would not have been much of a stretch to graft the latter’s approach onto the former.

153. *Knudson*, 534 U.S. at 210–12 (quoting *Mertens*, 508 U.S. at 256).

154. *Id.* at 211 n.1.

155. *Id.* at 210–12. And although it resembled restitution, it was not *equitable* restitution because it required a money payment (as opposed to the return of specific property); thus, it was not “equitable relief.” *Id.* at 212–18. Justice Ginsburg dissented on this point, arguing that restitution was “*typically* available in equity.” *Id.* at 231 (Ginsburg, J., dissenting) (quoting *Mertens*, 508 U.S. at 256).

again, arguing that Congress had not meant to import “ancient classification[s]” like these into ERISA’s remedial scheme.¹⁵⁶

Knudson marked the beginning of a subtle shift. Instead of looking to eighteenth-century English equity practice, the Court looked to equity practice more generally “[i]n the days of the divided bench”—that is, before the federal merger of law and equity in 1938.¹⁵⁷ After *Knudson*, the Court continued to apply this equitable traditionalism to determine the federal courts’ remedial authority under ERISA, and it later expanded its approach to similar language in the Securities Exchange Act of 1934.¹⁵⁸ Technically, these cases were consistent with *Grupo Mexicano* because they construed specific statutory language and not the general equity power under the Judiciary Act of 1789, which had been at issue in that decision.¹⁵⁹ But that power is precisely where the Court went next.

2. *The General Federal Equity Power*

Today, the Supreme Court applies the equitable traditionalism first developed in *Knudson* to the federal courts’ general equity powers under the Judiciary Act of 1789. The best evidence of this is *Whole Woman’s Health v. Jackson*,¹⁶⁰ the recent challenge to S.B. 8, the Texas law banning abortions after about six weeks of pregnancy.¹⁶¹ Enacted before the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶² S.B. 8 was written at a time when a federal court could have enjoined its enforcement by state officials under *Ex parte Young*.¹⁶³ To avoid that result, Texas’s legislature

156. *Id.* at 229 (Ginsburg, J., dissenting).

157. *Id.* at 212 (majority opinion). Although *Knudson* did not say as much, the Court later identified 1938 as the cutoff point for the analysis. *See Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016) (explaining that “the days of the divided bench” means “the period before 1938 when courts of law and equity were separate”).

158. *See Liu v. SEC*, 140 S. Ct. 1936, 1942 (2021) (asking whether an SEC disgorgement order “falls into ‘those categories of relief that were typically available in equity’” (quoting *Mertens*, 508 U.S. at 256)); *Montanile*, 577 U.S. at 142 (asking “what equitable relief was typically available in premerger equity courts” (emphasis added)); *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 94–95 (2013) (looking to “the days of ‘the divided bench,’ before law and equity merged” (quoting *Mertens*, 508 U.S. at 256)); *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011) (looking to “categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity” (first emphasis added) (internal quotation marks omitted) (quoting *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361 (2006))); *Sereboff*, 547 U.S. at 363 (“Our case law from the days of the divided bench confirms that Mid Atlantic’s claim is equitable.” (emphasis added)). In *Amara*, the Court suggested that the reference to “appropriate equitable relief” might include remedies that “closely resemble[] . . . traditional equitable remedies,” 563 U.S. at 438–45, but the Court later disavowed that suggestion, *see Montanile*, 577 U.S. at 148 n.3.

159. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 302, 326 (1999) (distinguishing a prior case that “involved not the Court’s general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing issuance of tax injunctions”).

160. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 530 (2021).

161. *Id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

162. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

163. *Ex parte Young*, 209 U.S. 123 (1908).

made the statute enforceable only by private plaintiffs and incentivized suits with a minimum statutory damages award of \$10,000 per violation.¹⁶⁴

A group of abortion providers sued, seeking *Young*-style injunctions against a Texas state judge and court clerk, Texas's attorney general, and other officials charged with enforcing the state's medical licensing laws.¹⁶⁵ The defendants moved to dismiss, arguing that *Young* did not authorize relief against them and that *Grupo Mexicano* foreclosed its extension.¹⁶⁶ The district court denied the motions, and the Supreme Court granted certiorari before judgment.¹⁶⁷

In an opinion by Justice Gorsuch, the Court reversed and remanded with instructions to dismiss the action as to all defendants except the licensing officials. The Court set aside the question of S.B. 8's constitutionality, holding instead that none of the defendants (again, except the licensing officials) were proper under *Ex parte Young*.¹⁶⁸ Each of its three key holdings reflected a traditionalist approach. First, in refusing to extend *Young* to cover state court judges and clerks, the Court explained that *Young* is "grounded in traditional equity practice" and runs only against state *officials*, not state courts or their "machinery."¹⁶⁹ Similarly, in refusing to enjoin the attorney general from enforcing S.B. 8—an injunction that the plaintiffs had hoped to extend to all would-be plaintiffs as the attorney general's "agents"—the Court again explained that "[t]he equitable powers of federal courts are limited by historical practice" and that "under traditional equitable principles, no court may lawfully enjoin the world at large."¹⁷⁰ Finally, even as to the licensing officials, whom all but Justice Thomas thought had some power to enforce S.B. 8 and so *were* proper defendants,¹⁷¹ the Court reiterated its traditionalism, stressing that the suit against those defendants was "supported by tradition."¹⁷²

164. TEX. HEALTH & SAFETY CODE ANN. §§ 171.207, 171.208(a), (b)(2) (West 2021).

165. *Jackson*, 142 S. Ct. at 530. The plaintiffs also sued a private party, whom the Court later dismissed based on his sworn declaration that he did not intend to sue the plaintiffs under S.B. 8. *Id.* at 537.

166. *Id.* at 530; see also Brief for Respondents at 43–44, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (No. 21-463).

167. *Jackson*, 142 S. Ct. at 530–31.

168. *Id.* at 538–39.

169. *Id.* at 532. Because *Ex parte Young* did not involve an injunction directed to a state court judge, its statement that "an injunction against a state court would be a violation of the whole scheme of our government," 209 U.S. 123, 163 (1908), was technically dicta. See also *Jackson*, 142 S. Ct. at 548 (Sotomayor, J., concurring in the judgment and dissenting in part). But it reflects an important policy—federalism—that often underlies the Supreme Court's equity decisions and arguably supports this prong of the Court's holding. See *infra* Subpart V.A (showing how functional federal equity points to a different solution).

170. *Jackson*, 142 S. Ct. at 535 (majority opinion) (first citing *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939); then quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930)).

171. Although eight Justices agreed that the suit could proceed against the licensing defendants, none of the three separate opinions reaching that conclusion garnered a majority. See *id.* at 543–45 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 545–52 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

172. *Id.* at 536 (majority opinion). Even though it ultimately allowed the suit to proceed against the licensing defendants, as Justice Sotomayor warned, the Court's decision "invites other States to refine S.B.

Concurring in part and dissenting in part, Justice Thomas concluded that none of the defendants were proper—not even the licensing officials. Applying *Grupo Mexicano*'s equitable originalism, Justice Thomas wrote that the “negative injunction remedy . . . countenanced in *Ex parte Young* is a ‘standard tool of equity,’” and that those tools “extend[] no further than ‘the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.’”¹⁷³ He then went on to conclude that the licensing officials were not proper defendants under *Ex parte Young* because they lacked the authority to enforce S.B. 8 and, in any case, had not threatened to enforce S.B. 8 against any plaintiff.¹⁷⁴

The Court's decision in *Jackson* solidified its pivot from originalism to traditionalism. The decision does not cite *Grupo Mexicano*, even though the defendants cited it in their briefing and Justice Thomas applied it in his concurrence.¹⁷⁵ Instead, the decision mirrors *Knudson*, citing cases from after 1789 but before 1938 to determine what “traditional” equity allowed.¹⁷⁶ As if to drive the point home, the ten-page opinion repeatedly cites “traditional equitable principles” and uses the words “tradition” and “traditional” no fewer than eleven times.¹⁷⁷ Accordingly, although it does not overrule *Grupo Mexicano* explicitly, *Jackson* is best read as rejecting originalism and endorsing traditionalism for the general federal equity power.

Though less strict than equitable originalism in some ways, the Court's traditionalism remains problematic. Samuel Bray has argued that the Court's approach retains a capacity for “modest updating” of equity's old forms,¹⁷⁸ but one struggles to find a clear example of innovation in the eight years since Bray

8's model.” *Id.* at 546 (Sotomayor, J., concurring in the judgment in part and dissenting in part). And indeed, the entire suit was later dismissed after the Texas Supreme Court clarified that the licensing officials lacked enforcement authority. *Whole Woman's Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam).

173. *Jackson*, 142 S. Ct. at 540 (Thomas, J., concurring in part and dissenting in part) (first quoting John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990 (2008); then quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)).

174. *Id.* at 540–43.

175. *See supra* notes 166, 173–174 and accompanying text.

176. *See Jackson*, 142 S. Ct. at 534–35 (majority opinion) (citing *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d. Cir. 1930)); *see also infra* Subpart IV.A (discussing these authorities).

177. *See id.* at 529–39; *see also* Bray, *supra* note 7 (making a similar observation about an earlier case).

178. *Id.* at 1023 (arguing that the very process of synthesizing disparate historical sources could create “the capacity for change that [is] characteristic of a tradition”).

wrote those words.¹⁷⁹ Accordingly, equitable traditionalism still seems to freeze equity in time—it simply chooses a different historical moment.¹⁸⁰

III. THE CASE FOR FUNCTIONAL FEDERAL EQUITY

This Part makes the case for functional federal equity as an alternative to the Supreme Court’s historical approach. It begins by identifying the federal equity power’s sources and developing a framework for determining its basic properties. Then, this Part combines that framework with recent scholarship on equity’s function to propose a new model of the federal equity power—one that provides meaningful limits but also permits meaningful change.

A. Sources of the Federal Equity Power

Any claim about the nature of the federal equity power must begin with an account of that power’s origins. But this preliminary question is contested, with different scholars advancing different accounts that point, in turn, to different interpretive methodologies.¹⁸¹ To ground this Article’s analysis, this Subpart identifies the Judiciary Act of 1789 as the federal equity power’s primary source and statutory interpretation as the applicable interpretive methodology. It then briefly addresses two other accounts that point in other directions.

The federal equity power begins with Article III of the Constitution. Article III extends the federal judicial power “to all Cases[] in . . . Equity.”¹⁸² It also creates the Supreme Court and delegates to Congress the power to “ordain and

179. See *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Heath Benefit Plan*, 577 U.S. 136, 151–52 (2016) (Ginsburg, J., dissenting) (arguing that the Court’s “bizarre conclusion” that an ERISA plan participant could escape his obligation to reimburse an insurer by “spending [his] settlement funds rapidly on nontraceable items” was attributable to its overreliance on history); *Liu v. SEC*, 140 S. Ct. 1936, 1943–46 (2020) (tracing the history of “profits-based” restitution to the nineteenth century and citing only premerger federal equity cases for limits on disgorgement). Perhaps the closest example is the Court’s four-part test for preliminary and permanent injunctive relief. See *Bray*, *supra* note 7, at 1023–34. But even there, the Court insisted (however implausibly) that it was *applying* the test “historically employed by courts of equity,” not revising it to keep up with the times. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

180. Equitable traditionalism may also have a unique flaw. Under the Rules Enabling Act, no Federal Rules of Civil Procedure may “abridge, enlarge or modify any substantive right.” Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072). But equitable traditionalism appears to read Federal Rule of Civil Procedure 2—the Rule that accomplished merger—as transforming federal equity from a dynamic power (before merger) to a static one (afterwards). If so, then equitable traditionalism may alter federal equity’s substance in violation of the Rules Enabling Act. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014) (holding that despite the merger of law and equity, “the substantive and remedial principles applicable prior to the advent of the federal rules have not changed” (alterations omitted) (quoting 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1043 (3d ed. 2002))); *Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949) (“Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.”).

181. See *infra* notes 196–213 and accompanying text.

182. U.S. CONST. art. III, § 2, cl. 1.

establish” lower federal courts.¹⁸³ Congress first exercised that power in the Judiciary Act of 1789, creating two sets of trial courts with partially overlapping jurisdictions.¹⁸⁴ Section 11 of that Act gave one of those sets of courts—the circuit courts—“original cognizance” of civil suits “in equity.”¹⁸⁵

Although Article III and § 11 of the Judiciary Act both mention “equity,” the Supreme Court has consistently cited § 11 as federal equity’s source.¹⁸⁶ The Court has never clearly said why, but the best explanation probably lies in Congress’s power to create the lower federal courts, which includes a lesser power to give them some but not all of the judicial power described in Article III. Because of this power, the Supreme Court often presumes that lower courts lack aspects of the judicial power that Congress has not given them expressly. For example, lower courts may not hear cases that fall under Article III’s headings of subject-matter jurisdiction unless Congress authorizes them to do so.¹⁸⁷ A similar rule applies to the lower courts’ territorial jurisdiction.¹⁸⁸

On one possible account, Article III’s grant of equity power works the same way: the lower courts’ equity powers lie dormant until Congress activates them, which it did in § 11 of the Judiciary Act of 1789.¹⁸⁹ This account is textually plausible, as Article III’s reference to “Equity” appears in the same clause as its headings of subject-matter jurisdiction.¹⁹⁰ And it has several other advantages. For one, it explains why the Supreme Court consistently cites § 11 as the source

183. U.S. CONST. art. III, § 1.

184. Judiciary Act of 1789, ch. 20, §§ 3–4, 1 Stat. 73, 73–75; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 23 (7th ed. 2015).

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

186. *See, e.g.*, Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999); *see also* *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n. 26 (1949); *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945); *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939); *Gordon v. Washington*, 295 U.S. 30, 36 (1935); *Matthews v. Rodgers*, 284 U.S. 521, 529 (1932). Congress formally repealed § 11 in 1948. *See* Act of June 25, 1948, Pub. L. 80-77, ch. 646, 62 Stat. 869, 996. But that repeal was part of a larger overhaul of Title 28; it was not meant to withdraw the lower federal courts’ equity powers. The new Judicial Code of 1948 referred expressly to the federal courts’ “general equity power[s],” Act of June 25, 1948, Pub. L. 80-773, § 959, 62 Stat. 869, 926–27, and the very next year, the Supreme Court confirmed that “the substantive principles of Courts of Chancery” still applied in federal court. *Stainback*, 336 U.S. at 382 n.26 (citing the Rules Enabling Act of 1934, ch. 651, § 1, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072)).

187. *See* *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850) (recognizing Congress’s power to define subject-matter jurisdiction); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (same); *see also* FALLON ET AL., *supra* note 184, at 22, 28, 779–84 (explaining that the lower federal courts had no federal-question jurisdiction Congress gave it to them in 1875). Article III’s headings of subject-matter jurisdiction apply to the Supreme Court directly, but even the Court hesitates to exercise jurisdiction without express statutory authorization. *See* *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 318 (1810). The theory here is that Congress so often fixes the Supreme Court’s jurisdiction affirmatively under the Exceptions and Regulations Clause that a failure to confer jurisdiction implies an intent to withhold it. *See id.* This implication can be overcome, but only where its application is “repugnant” to “principle[s] of sound construction.” *Id.*

188. *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 603–04 (1878); *see also* Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984) (arguing for due process limits on Congress’s power over territorial jurisdiction).

189. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; *see also* Bamzai & Bray, *supra* note 87, at 705–06 (similarly grounding the federal equity power in § 11 of the Judiciary Act).

190. *See* U.S. CONST. art. III, § 2, cl. 1.

of the federal equity power.¹⁹¹ It also explains why Congress has such broad control over federal equity¹⁹² and why the Supreme Court has long exercised equity powers *without* statutory authorization.¹⁹³ It may even help explain why federal courts have continued to modify equity's doctrines and remedies after *Erie*.¹⁹⁴ If this account is correct, then the interpretive exercise should proceed much as it does for the federal courts' subject-matter jurisdiction: courts should first interpret the statute—here, the Judiciary Act of 1789—and then ask whether the statute, properly construed, complies with Article III.¹⁹⁵

Scholars have offered at least two competing accounts of federal equity's source. First, Owen Gallogly has argued that Article III vests the federal equity power in all federal courts by default, regardless of whether Congress says so

191. See *supra* note 186 and accompanying text.

192. See *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

193. Like its subject-matter jurisdiction, the Supreme Court's equity powers flow from Article III directly. See, e.g., *Order of August 8, 1791*, 5 U.S. (1 Cranch) xv, xvi (adopting rules for equity practice before the Supreme Court in 1791); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–13 (1868) (explaining that the Supreme Court's subject-matter jurisdiction flows directly from Article III). Congress retains substantial authority to modify both. See U.S. CONST. art. III, § 2, cl. 2 (noting that Congress retains the authority to make “Exceptions, and . . . Regulations” to the Court's appellate jurisdiction); see also, e.g., *Armstrong*, 575 U.S. at 328 (“[R]espondents cannot, by invoking *our* [i.e., the Supreme Court's] equitable powers, circumvent Congress's [directions].” (emphasis added)); 28 U.S.C. § 2283 (providing that “[a] court of the United States may not grant an injunction to stay proceedings in a State court” except in certain cases); 28 U.S.C. § 451 (defining a “court of the United States” to include “the Supreme Court of the United States”). The full extent of Congress's power to control the Supreme Court's equity powers lies beyond the scope of this Article. But if that power is grounded in the Exceptions Clause, as the foregoing analogy suggests, it might apply with less force to cases within the Court's original jurisdiction. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803) (holding that Congress has no power to modify the Supreme Court's original jurisdiction).

194. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* abolished “federal general common law,” *id.* at 78, but it did not dispense with judge-made federal law entirely. In particular, it did not abrogate Congress's power to authorize federal courts to make law, either expressly, see, e.g., FED. R. EVID. 501 (authorizing the Supreme Court to prescribe evidentiary privileges), or impliedly, see, e.g., *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (reasoning that Congress expects courts to “give shape” to the Sherman Act's vague language); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (recognizing the need to construe undefined statutory terms in federal statutes); see also *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (explaining that federal courts also retain a limited power to create federal common law without statutory authorization to protect “uniquely federal interests”). On this Article's account, equity survives under the heading of an implied statutory grant of lawmaking power. See *Cross*, *supra* note 106, at 192, 211 (noting that federal equity is judge-made federal law); see also *Morley*, *supra* note 11, at 221, 224 (arguing that federal equity powers only persist as constitutional common law for federal constitutional claims); *Collins*, *supra* note 71, at 253–54 (characterizing federal equity as judge-made in the early nineteenth century).

195. What work does Article III do in this analysis? A full answer to that question is beyond the scope of this Article, but the short answer is probably not much. The Supreme Court never said what limits (if any) Article III places on the federal equity power, but the available evidence suggests that the two grants are likely coextensive. The Constitution and the Judiciary Act of 1789 took effect the same year, and they refer to equity using almost the same language. See U.S. CONST. art. III, § 2, cl. 1 (noting that the judicial power “shall extend” to “Cases[] in . . . Equity”); Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (noting that lower courts have “cognizance” of “suits of a civil nature . . . in equity”). And the Supreme Court's equity powers derive from Article III, not § 11, but the Court has never treated its equity powers differently than the lower courts'. All this suggests that conclusions about § 11 should apply equally to Article III. *But see Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.2 (2018) (Thomas, J., concurring) (suggesting that Article III may impose limits that align roughly with the Court's historical approach); see also *Fallon*, *supra* note 101, at 986 (maintaining that the Constitution requires *Ex parte Young* injunctions, or an adequate substitute, for constitutional claims).

expressly.¹⁹⁶ On this account, Congress may change federal equity, but the power itself originates from Article III,¹⁹⁷ so questions about its nature are primarily ones of constitutional—not statutory—interpretation.¹⁹⁸

Gallogly's reading is plausible too, but it encounters a few difficulties. For one, Congress *did* give the lower courts “cognizance” of cases “in equity” in the Judiciary Act of 1789.¹⁹⁹ This not only suggests that the First Congress thought such authorization necessary, but it also makes Gallogly's account difficult to falsify, as federal courts have always had the statutory authority he contends they do not need.²⁰⁰ Gallogly's account also places Article III's grant of equity powers in tension with its headings of subject-matter jurisdiction, which do require express statutory authorization (at least for the lower courts).²⁰¹ Most importantly, Gallogly's account contradicts the Supreme Court's repeated statements identifying the Judiciary Act as federal equity's source.²⁰² Such a contradiction might be warranted if historical evidence supported Gallogly's reading overwhelmingly—but, as Gallogly acknowledges, the historical record is largely inconclusive on this issue.²⁰³

Second, John Harrison has argued that equity is best understood as a body of unwritten law that is “external” to the courts, as are statutes and other written law.²⁰⁴ According to Harrison, federal courts can modify equity indirectly, by adding to the sum of judicial practice that constitutes it, but not directly, as a

196. See Gallogly, *supra* note 10, at 1265–66, 1278.

197. See *id.* In other words, the equity power works for the lower courts much like it does for the Supreme Court, whose equity powers flow directly from Article III but are subject to congressional revision. See *supra* note 193 and accompanying text.

198. See Gallogly, *supra* note 10.

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

200. Gallogly counters that § 11 was a grant of subject-matter jurisdiction, not equity power, and that the federal courts' inherent equity powers sprang into being when that jurisdictional grant took effect. Gallogly, *supra* note 10, at 1270 & n.290. But if that were right, why would Congress mention equity at all—as it repeatedly did in premerger jurisdictional statutes? See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (conferring a precursor to modern diversity jurisdiction in civil cases “at common law or in equity” (emphasis added)); see also Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470 (similarly giving the circuit courts “original cognizance” of certain civil suits “at common law or in equity . . . arising under the Constitution or laws of the United States” (emphasis added)).

201. See *supra* note 186 and accompanying text.

202. See *supra* note 186 and accompanying text. Gallogly rejects this precedent, arguing that it contradicts the general rule that a statutory grant of “jurisdiction” does not carry with it a grant of authority to generate judge-made law. Gallogly, *supra* note 10, at 1270 & n.290. But that rule is subject to important exceptions, see, e.g., *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 450–57 (1957), and in any case, it deals only with statutory grants of *subject-matter* jurisdiction. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–42 (1981) (holding that the Sherman Act does not authorize a federal common law of remedies for antitrust violations). The Supreme Court has never applied the rule to § 11's grant of equity power—a “jurisdiction” that the Court has always treated as distinct. See *Atlas Life Ins. Co. v. W. I. S.*, 306 U.S. 563, 568 & n.1 (1939) (explaining that, unlike a defect in subject-matter jurisdiction, a defect in equity jurisdiction is waivable); see also *supra* notes 60–65 and accompanying text (describing the “jurisdiction” of premerger equity courts).

203. See Gallogly, *supra* note 10, at 1223, 1258, 1262 (characterizing the historical record as “inconclusive” and providing “modest” but “not overwhelming” support for this account).

204. Harrison, *supra* note 7, at 1914–16, 1922.

legislature does when it amends a statute.²⁰⁵ This suggests that federal courts can initiate minor but not major changes—a line that Harrison attempts to tease out by parsing a set of key Supreme Court decisions.²⁰⁶

Harrison rightly rejects the suggestion that the federal equity power flows directly from Article III.²⁰⁷ But Harrison’s account locates equity wholly outside the federal system, so it cannot explain why federal courts apply equity and not other, similarly “external” bodies of law.²⁰⁸ Harrison rejects the claim that Article III’s reference to “equity” directs federal courts to apply equity’s doctrines and remedies—as he must, or else Article III’s mention of “law” would similarly direct courts to apply English common law.²⁰⁹ Instead, Harrison writes only that federal courts have “assumed” that they possess equity powers “from the beginning” and that their assumption is “correct.”²¹⁰

But why? Usually, when a federal court applies an external body of law, it can trace its authority to do so to a federal statute or constitutional provision. Federal courts apply federal statutes because the Supremacy Clause tells them to do so;²¹¹ they apply state law when sitting in diversity because the Rules of Decision Act tells them to do so;²¹² and they apply the law of foreign nations when federal or state choice-of-law rules tell them to do so.²¹³ But what tells federal courts to apply equity’s doctrines and remedies, if not Article III or the Judiciary Act of 1789? Harrison’s account apparently has no answer, so it cannot explain why federal courts apply the external body of doctrines and remedies that make up equity and not, say, European civil law.

All this suggests that statutory interpretation is the right methodology for answering the question of change in federal equity. But simply identifying that methodology does not immediately yield an easy answer. The traditional tools of statutory interpretation—text, history, and policy—are unhelpful for largely idiosyncratic reasons. The sparse text of Article III and § 11 of the Judiciary Act provides few clues,²¹⁴ and history supports the same judge-driven approach to

205. *Id.* at 1917–18.

206. *See id.* at 1931–39.

207. *See id.* at 1914.

208. Harrison uses this term to refer not to law that originates outside the federal system (like state law) but rather to law that is not created by the federal courts (including federal statutes and constitutional provisions). *Id.* at 1914–18. On Harrison’s account, all law is “external.” *Id.* at 1915.

209. *See id.* at 1919–21; *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”); *Galloway v. United States*, 319 U.S. 372, 388–96 (1943) (similarly explaining that the Seventh Amendment “did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing”).

210. Harrison, *supra* note 7, at 1922.

211. U.S. CONST. art. VI, cl. 2 (labeling these sources the “supreme Law of the Land”).

212. 28 U.S.C. § 1652.

213. *E.g.*, *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 495–96 (6th Cir. 2016).

214. *See supra* notes 182–185 and accompanying text.

equity that drove the Supreme Court to adopt the historical approach.²¹⁵ And there are weighty policy concerns on both sides: proponents of the historical approach cite the need for judicial restraint, and opponents cite the need for effective remediation of rights violations.²¹⁶ For these reasons, a proper construction of the federal equity power will require deeper reflection and, ultimately, a rethinking of equity's role in the federal legal system.

B. *The Functional Account of Equity*

As a jurisprudential concept, “equity” has long eluded a single, uniform definition.²¹⁷ At least two senses of the term emerge from the literature. First, some scholars define “equity” by reference to the doctrines, remedies, and practices of a particular court—often England's High Court of Chancery.²¹⁸ This institutional definition was especially useful before equity's merger with law, when the two systems existed separately. After merger, the definition survived by taking on a historical inflection, denominating as “equitable” any doctrine or remedy whose roots traced to premerger equity courts.²¹⁹

In another sense, “equity” refers not to any particular court, nation, or time period but rather to the relationship between different kinds of legal rules. This idea traces to Aristotle, who first defined “equity” as “a correction of law where it is defective owing to its universality.”²²⁰ England's chancellor echoed this notion in 1615, writing that his “office” was “to soften and mollify” the

215. See *supra* Parts I–II.

216. See, e.g., *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 223 (2002) (Stevens, J., dissenting) (noting “the historic presumption favoring the provision of remedies for violations of federal rights”); *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 342 (1999) (Ginsburg, J., concurring in part and dissenting in part) (citing “grand aims” to “protect all rights and do justice to all concerned” (quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 805, 807 (1869))); *Trump*, 138 S. Ct. at 2425 (Thomas, J., concurring) (denying a “freewheeling power to fashion new forms of equitable remedies”); *Grupo Mexicano*, 527 U.S. at 321–22 (calling Justice Ginsburg's approach to equity “a ‘default rule’ . . . of omnipotence” (citation omitted)).

217. See Samuel L. Bray, *A Student's Guide to the Meanings of “Equity”* (Apr. 21, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821861 (identifying at least three potential definitions of “equity”); see also Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2048 (2020) (calling the term “notoriously ambiguous”).

218. See STORY, *supra* note 48, § 25; see also Bray, *supra* note 217, at 4–8. Similar logic underpins the Supreme Court's equitable traditionalism. See Bray, *supra* note 7, at 1022 (suggesting that while the Court's traditionalist decisions do not “explicitly recognize, much less justify” their focus on premerger sources, one possible justification is that equity was “most systematically expounded” during that period).

219. See F.W. MAITLAND, *EQUITY—ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 1–3* (A.H. Chaytor & W.J. Whittaker eds., 1929); Zechariah Chafee, Jr., *Book Review*, 30 CORNELL L.Q. 405, 408 (1945) (reviewing HAROLD G. HANBURY, *MODERN EQUITY: THE PRINCIPLES OF EQUITY* (3d ed. 1943)).

220. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 99 (David Ross trans., Lesley Brown ed., Oxford Univ. Press 2009) (c. 384 B.C.E.); see also STORY, *supra* note 48, §§ 3–10 (discussing Aristotle's account).

common law.²²¹ Alexander Hamilton expressed the same idea in the *Federalist Papers*,²²² and Justice Breyer reiterated it two centuries later in a dissent in a case about the equitable doctrine of laches.²²³

At least two themes animate these descriptions of equity. First, equity is what Samuel Bray and Paul Miller call “adjectival,” meaning that it operates on other legal rules.²²⁴ “Equity” accounts for and responds to “law,” which in turn takes no account of equity. Second, equity operates primarily to address problems that stem from the law’s generality. No lawmaker can anticipate all of a rule’s possible applications, so if law must be stated generally, it will eventually generate unfair results (or at least unintended ones) in some cases.²²⁵

Recent scholarship has sharpened this functional account of equity. Henry Smith has recast equity as a tool to govern “complex” situations—ones whose interrelated elements make them difficult to govern with a single system of clear, *ex ante* rules.²²⁶ After borrowing this definition from systems theory, Smith identifies three kinds of complexity that arise in law: (1) polycentricity, or cases with interdependent parties, claims, or issues; (2) conflicting claims of facially valid rights; and (3) opportunism, or bad-faith attempts to take unforeseen advantage of existing legal rules.²²⁷

One possible response to problems like these, Smith argues, would be to design more intricate *ex ante* rules that anticipate as many loopholes, conflicts, and other interactions as possible.²²⁸ But that approach would be costly and would inevitably leave some complexity unresolved. Another response might be to adopt vague standards for judges to apply *ex post*, but (again) that approach would forfeit the benefits of clear, general law.²²⁹ A third approach—the one Smith highlights—would be to retain the general *ex ante* rules that govern ordinary cases and to overlay on them a set of flexible, *ex post* standards to

221. Earl of Oxford’s Case (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 6–7 (“Men[’]s Actions are so divers [sic] and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.”). *But see* STORY, *supra* note 48, §§ 11–12 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *430) (criticizing this statement of equity’s function as overbroad).

222. *See supra* notes 74–75 and accompanying text.

223. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 688 (2014) (Breyer, J., dissenting) (“Legal systems contain doctrines that help courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances.”).

224. Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1782–85 (2022); *see also* Smith, *supra* note 16, at 1054–55, 1067–71.

225. *See* Smith, *supra* note 16, at 1068.

226. Smith, *supra* note 16, at 1055.

227. *See id.* at 1056, 1071–81.

228. *See e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–70 (1992) (distinguishing between rules and standards); Blackhawk, *supra* note 217, at 2056–60 (discussing the rules and standards literature as it applies to functional equity); Smith, *supra* note 16, at 1138–39 (same).

229. The principle of legality holds that law should be clear, general, and publicized in advance so that it will be easy for subjects to follow and hard for officials to abuse. *See, e.g.*, LON L. FULLER, *THE MORALITY OF LAW* 38–41 (rev. ed. 1969); JOSEPH RAZ, *THE AUTHORITY OF LAW* 211, 219–24 (2d ed. 2009).

address complexity when it arises.²³⁰ Whether this doctrinal structure is cost-effective will depend on the situation,²³¹ but it can often be more efficient than a single system of legal rules operating alone. A first-order set of general, *ex ante* rules (i.e., law) can promote legality and guide good-faith actors, while a second-order set of flexible *ex post* standards (i.e., equity) lets courts address complex problems in an individualized, backward-looking, context-sensitive way.²³²

Smith's work illustrates equity's potential as a doctrinal modality, not to its operation in any particular legal system.²³³ But by refocusing the functional account of equity on complexity, it suggests a new way to think about the federal equity power. When defined specifically as a function of generality in law, complexity is a relatively determinate tool for marking equity's domain of operation.²³⁴ What if, in giving the federal courts equity powers, Congress authorized them to address complex problems in the areas of law where equity governs—today, that is to say, primarily in the field of remedies?

C. *A Functional Approach to Federal Equity*

If federal equity's function is to address complexity, then federal courts should be freer to modify equity's doctrines and remedies to address complex problems. Conversely, federal courts should hew more closely to precedent where complexity is absent to prevent equity from transforming into an all-purpose remedial power—a view the Supreme Court has rejected.²³⁵

How does this approach work in practice? When faced with a request for equitable relief, a federal court should first ask whether that relief falls fairly within the holdings or reasoning of existing precedent. If so, then the court should give the relief as usual; if not, the court should ask whether the proposed relief targets a complex problem. Again, a problem is complex only if its components are so densely interrelated that it would be too costly to regulate in advance with clear, general rules. To make this assessment, the court might look for signs of polycentricity, conflicting rights, or opportunism.²³⁶ If the

230. *See id.* at 1055–56, 1100–12.

231. *See id.* at 1110–12; *see also id.* at 1090–98 (giving as examples the premerger equitable doctrines of privity, “hot news” misappropriation, good-faith purchase, and trusts).

232. *Id.* at 1106–08 (describing this idea of “acoustic separation”).

233. *Id.* at 1056–57.

234. Moreover, as Smith points out, lawmakers can set up proxies for complexity to trigger equity's second-order standards rather than seeking to define complexity in advance. *See id.* at 1084–90 (pointing to bad faith, disproportionate hardship, and violation of commercial custom as potential triggers).

235. *See generally supra* Part II.

236. *See* Smith, *supra* note 16, at 1071 (acknowledging that this list is not meant to be exclusive). The Court might also look to doctrines that encourage or require federal and state law to be clear, general, and prospective, like the Fifth Amendment's void-for-vagueness doctrine, *see* Johnson v. United States, 576 U.S. 591, 595–96 (2015), and the presumption of nonretroactivity for federal statutes, *see* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 946 (1997). If a legislature could not regulate a problem

court detects a complex problem, it should extend equity's doctrines and remedies only as far as needed to address the problem.²³⁷ Future courts should then treat that extension as precedent, which Congress may revise.²³⁸

Though it may seem novel, this approach actually explains many of the Supreme Court's most important equity decisions. For example, in *Ex parte Young*, the Court approved a new form of injunctive relief to defeat Minnesota's attempt to exploit a gap in the available remedies against unconstitutional state laws—a clear example of opportunism.²³⁹ Half a century later, in *Brown II*, the Court directed the lower courts to focus their equity powers on desegregation, a polycentric problem with many stakeholders and competing interests.²⁴⁰ The Court has often extended its own equity powers to resolve conflicts over water rights between states,²⁴¹ and it has expanded the equitable doctrine of specific performance to resolve conflicts between facially valid public and private interests in cases about railroad rights-of-way.²⁴² In short, complexity has long been implicit in the Court's approach to the federal equity power.

A functional approach places meaningful limits on the federal equity power without eliminating its capacity for judicial change. In this sense, it outperforms the Supreme Court's historical approach, which reins in federal judges but only by freezing equity in time.²⁴³ Nor does it invoke equity's "grand aims"²⁴⁴ or

consistently with those doctrines, it may be complex. *See also, e.g., Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (explaining that the Constitution's Bill of Attainder Clause bars Congress from retroactively defining federal crimes); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (explaining that the rule of lenity ensures that ambiguity in criminal statutes will be construed against Congress); *Wright v. Henkel*, 190 U.S. 40, 59 (1903) (noting the bar on federal common law crimes).

237. *See id.* at 1055–56.

238. *See id.* at 1108–09 (recognizing that the outputs of second-order lawmaking can crystalize into first-order law).

239. *See supra* notes 89–101 and accompanying text (discussing *Ex parte Young*).

240. *See Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955) (instructing lower courts to consider a school's physical condition, transportation, staffing, school districts, and local laws and regulations and citing equity's "facility" for "reconciling public and private needs"); *see also supra* note 115 (listing the many cases that used new forms of equitable relief to enforce constitutional rights in *Brown I*'s wake).

241. *See, e.g., Mississippi v. Tennessee*, 142 S. Ct. 31, 39 (2021) (extending equitable apportionment to cover underground aquifers); *see also Smith, supra* note 16, at 1072 (identifying water disputes as polycentric).

242. *See, e.g., Joy v. City of St. Louis*, 138 U.S. 1, 49–51 (1891) (affirming an equitable decree giving a railroad a right of way through a public park). In *Joy*, the Court wrote that equity performs one of its "most beneficent functions" when it resolves such rights conflicts:

Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. . . . These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity.

Id. at 50.

243. *See supra* Part II.

244. *See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 342 (1999) (Ginsburg, J., concurring in part and dissenting in part).

permit only incremental changes. The latter approach provides little practical guidance and cannot account for precedents like *Ex parte Young* and *Brown II*.²⁴⁵

Originalists, traditionalists, and incrementalists might respond that *Young* is less novel than is often said;²⁴⁶ that *Brown II* gave an exceptional remedy for an exceptionally odious wrong;²⁴⁷ and that other examples either predated *Erie*'s proscription on judge-made federal law or simply went too far. Each of these points is contestable,²⁴⁸ but even granting them, where do these approaches leave the federal courts? Applying its traditionalist approach in *Whole Women's Health v. Jackson*, today's Supreme Court succumbed to the very opportunism that *Ex parte Young* once rejected: a state law's deliberate attempt to evade the Constitution's enforcement mechanisms.²⁴⁹ This result not only allows states to avoid the Constitution's prohibitions by copying Texas's model,²⁵⁰ but it also means that, even if Congress were to extend *Young* to block S.B. 8-type laws, states like Texas could then search for other loopholes, and federal courts would be powerless to respond until Congress intervened again. In other words, opportunism in constitutional remedies—like all opportunism—is a complex problem that Congress cannot cost-effectively address with *ex ante* rules. The only effective response is *ex post*, judge-driven adjustments to the doctrine.

Originalism, traditionalism, and incrementalism also claim the mantle of legislative deference.²⁵¹ But in reality, they get Congress's preferences precisely backwards. Despite its broad power to modify equity,²⁵² Congress rarely takes

245. See *supra* Subpart I.B. Scholars have debated the precise extent to which *Ex parte Young* departed from traditional equity practice. John Harrison argues that *Young* was an example of a so-called “anti-suit injunction,” the traditional equitable practice of enjoining legal actions that fell within equity's concurrent or exclusive jurisdiction. See Harrison, *supra* note 173, at 990, 998–99. James Pfander and Jacob Wentzel have disputed this account, arguing that *Young* is better understood as reflecting a shift in judicial review of government action from law to equity. See Pfander & Wentzel, *supra* note 9, at 1355–59. But all agree that it was innovative at least insofar as it sanctioned the use of an injunction to restrain enforcement of an unconstitutional statute absent any showing of tortious harm. See Harrison, *supra* 173, at 1019.

246. See Harrison, *supra* note 173; see also *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part and dissenting in part) (quoting Harrison, *supra*, at 990); Gallogly, *supra* note 10, at 1315–16.

247. *Missouri v. Jenkins*, 515 U.S. 70, 124–26 (1995) (Thomas, J., concurring) (arguing that the equity powers authorized by *Brown II* “should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution”).

248. See, e.g., *supra* notes 245–246 and accompanying text.

249. Transcript of Oral Argument at 57, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463) (Kagan, J., questioning) (noting that S.B. 8's “entire point is to find the chink in the armor of *Ex parte Young*”).

250. See *Jackson*, 142 S. Ct. at 546, 550 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (explaining that the Court's decision “invites other States to refine S.B. 8's model” and that by “writ[ing] their laws to more thoroughly disclaim all enforcement by state officials,” states can “nullify federal constitutional rights”).

251. See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999); Bray, *supra* note 7, at 1010 & n.61; Gallogly, *supra* note 10, at 1221; Harrison, *supra* note 7, at 1925–26.

252. See *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945); HOFFER, *supra* note 1, at 105–06.

the initiative, preferring instead to leave change to the courts and to intervene only when they go too far.²⁵³ Functional federal equity restores this status quo.

Two final clarifying points. First, functional federal equity is a theory of doctrinal change. It does not aim to describe how existing doctrines (like laches) and remedies (like injunctions) work in ordinary cases.²⁵⁴ These doctrines and remedies do not need to target complexity because they are already first-order law.²⁵⁵ The same is true once a court extends an equitable doctrine or remedy.²⁵⁶

Second, this Article's proposal applies only to matters governed by federal equity today—that is, mainly remedies. *Erie* prohibits federal equitable doctrine on matters of substance,²⁵⁷ so functional federal equity is not a power to create substantive legal rules in response to complexity. Where complexity calls for such a response, litigants must look to other organs of government for relief.²⁵⁸

IV. FUNCTIONAL FEDERAL EQUITY IN ACTION

This Part applies functional federal equity to two important problems: the private enforcement of public laws and universal injunctions.

A. Private Enforcement of Public Laws

The Supreme Court recently addressed the problem of private enforcement of public laws in *Whole Women's Health v. Jackson*.²⁵⁹ To review, in that case, the plaintiffs sought two novel remedies: first, an injunction restraining a Texas

253. For example, in the first few decades of the twentieth century, federal courts repeatedly enjoined labor strikes, subverting the federal government's emerging labor policy. See *In re Debs*, 158 U.S. 564, 587–92, 600 (1895); FRANKFURTER & GREENE, *supra* note 88, at 1–46. Congress responded by prohibiting antilabor injunctions. Norris–LaGuardia Act § 1, 29 U.S.C. § 101 (1932). Responding to concerns that structural injunctions had gone too far, Congress eventually limited the use of structural injunctions against state prisons. See Prison Litigation Reform Act of 1995, Pub. L. 104-134, § 802, 110 Stat. 1321-66, 1321-66 to -70 (codified as amended at 18 U.S.C. § 3626). Today, some contend that universal injunctions represent an abuse of equity power, see *infra* Subpart IV.B, and Congress has responded by considering legislation to prohibit the practice. Injunctive Authority Clarification Act, H.R. 43, 117th Cong (1st Sess. 2021).

254. These doctrines are “equitable” only in the sense that they trace their roots to historical courts of equity (i.e., in the institutional sense). At this clarification suggests, the functional and institutional definitions of equity do not always overlap. Just as some doctrines whose roots trace to the courts of common law are “equitable” in the sense that they call for second-order reasoning, see Smith, *supra* note 16, at 1070, other doctrines and remedies whose roots trace to courts of equity now work like straightforward, first-order law. This Article's proposal uses both definitions: the institutional definition to identify a set of “equitable” doctrines and remedies and the functional definition to say when and how courts may change them.

255. See *id.* at 1060 (analogizing equity as meta-law to common law reasoning).

256. This model allows federal equity's solutions to complexity to crystalize even as its frontier remains in flux. See *id.* at 1108–10 (arguing that second-order law can adapt while first-order law remains stable).

257. See *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 205 (1938); see also Cross, *supra* note 106, at 212 (explaining that, after *Erie*, “federal courts in equity lost the power to define substantive rights,” but because “equity typically already looked to other sources for the substantive rules,” the change was relatively minor).

258. See Blackhawk, *supra* note 217, 2069–72 (arguing that legislatures and administrative agencies also play an important role in the process of correcting the law when it fails because of its generality).

259. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021); see also *supra* Subpart IIB.2.

state judge from hearing S.B. 8 actions (and a Texas court clerk from docketing them); and second, an injunction restraining Texas's attorney general from enforcing S.B. 8, which the plaintiffs argued would also bind would-be private plaintiffs.²⁶⁰ The Supreme Court applied the historical approach and refused both remedies, leaving the plaintiffs with little possibility for timely relief.²⁶¹

Had the Court instead applied functional federal equity, it could have reached a more sensible result. As all parties agreed, existing equitable remedies provide no relief: *Ex parte Young* authorizes injunctions against state officers,²⁶² but the *Jackson* plaintiffs sought relief against would-be private plaintiffs. Accordingly, to determine whether to extend *Young* as the plaintiffs proposed, the Court would first look for complexity. Here, Texas designed S.B. 8 to circumvent the Constitution's protections for abortion—an instance of opportunism, or a bad-faith attempt to evade the law.²⁶³ So, the federal courts' equitable lawmaking powers would kick in.

From there, the Court would seek out the extension that does the least violence to precedent while still resolving the state's opportunism. In *Jackson*, the plaintiffs' first proposal—an injunction running against Texas courts—runs up against a major precedent: traditionally, equity's decrees were in personam, meaning that they operated only on litigants and not on other courts.²⁶⁴ Though this rule was initially meant to prevent conflict between England's Chancery Court and law courts,²⁶⁵ the Supreme Court later repurposed it to promote federalism—a policy concern that remains important today.²⁶⁶ Accordingly, the Court might properly hesitate to extend *Young* to state courts.

The plaintiffs' second proposal—an injunction against Texas's attorney general—dodges that problem but encounters another. Even if an injunction against the attorney general could bind private S.B. 8 plaintiffs,²⁶⁷ how would it

260. *Jackson*, 142 S. Ct. at 531–35; see also Reply Brief for Petitioners 16–17, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21–463) (arguing that “relief against the attorney general in this case would bind private enforcers, whose authority is derivative of his”).

261. The Court allowed the suit to proceed under a standard *Ex parte Young* theory against certain medical licensing officials, *Jackson*, 142 S. Ct. at 535–37, but the Fifth Circuit later ordered the case dismissed in full after the Texas Supreme Court clarified that the licensing officials had no authority to enforce the law, see *Whole Woman's Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam).

262. See *Ex parte Young*, 209 U.S. 123, 163 (1908).

263. See Smith, *supra* note 16, at 1080.

264. See *supra* note 47 and accompanying text.

265. See MAILLAND, *supra* note 219, at 9–10; STORY, *supra* note 48, § 875; Raack, *supra* note 45, at 568.

266. *Younger v. Harris*, 401 U.S. 37, 43–44 (1971). *Ex parte Young* itself clarified in dicta that its remedy “does not include the power to restrain a court from acting in any case brought before it.” *Young*, 209 U.S. at 163. *But see Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 548 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (explaining that “modern cases . . . have recognized that suit may be proper even against state-court judges”).

267. A court can hold a nonparty in contempt when the nonparty has some relationship to an enjoined party (e.g., an employee) and knowingly aids a violation. See *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (citing *Ex parte Lennon*, 166 U.S. 548 (1897)). So if a federal court could enjoin the attorney general from enforcing S.B. 8, then arguably it could hold private S.B. 8 plaintiffs in contempt as his “agents.” See *Jackson*, 142 S. Ct. at 550 n.4 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

issue in the first place? All agreed that the attorney general had no power to enforce S.B. 8, and an injunction prohibiting an act that a person cannot do seems incoherent.²⁶⁸ This solution too falters on a major obstacle.

Functional federal equity points to a third solution that more closely tracks Texas's opportunism: instead of issuing an injunction against the attorney general and seeking to enforce it against private plaintiffs, the Court could enjoin the would-be plaintiffs directly.²⁶⁹ True, as the Court wrote in *Jackson*, such an injunction would run against "the world at large," and due process might require that an S.B. 8 plaintiff have actual notice of the injunction before being punished for violating it.²⁷⁰ But no traditional equitable rule prohibits injunctions against nonparties,²⁷¹ and because Texas outsourced enforcement of its abortion ban to private parties in the first instance, this extension of *Young* yields a characteristically equitable symmetry between remedy and wrong. Finally, the extension would become precedent, and future plaintiffs could use it to defeat copycat statutes without having to show complexity in each case.²⁷²

B. Universal Injunctions

Another area where functional federal equity could lead to better outcomes is the now-infamous practice of universal injunctions—orders that prevent the government from enforcing a law against anyone, not just the parties who challenged it in court.²⁷³ Because any federal district judge can issue a universal injunction, plaintiffs can "shop" for judges who are more likely to grant that

268. See *Jackson*, 142 S. Ct. at 534.

269. See Michael C. Dorf, *A Modest Proposal: Extend Ex Parte Young to Cover the Likes of Texas Bounty Hunters*, DORF ON L., (Sept. 9, 2021, 9:34 AM), <http://www.dorfonlaw.org/2021/09/a-modest-proposal-extend-ex-parte-young.html>. To show Article III standing, an abortion provider might have to identify a would-be S.B. 8 plaintiff who was willing to identify as such. Cf. *Jackson*, 142 S. Ct. at 537 (noting that plaintiffs did not dispute the sole private defendant's declaration that he did not intend to sue).

270. *Jackson*, 142 S. Ct. at 35 (quoting *Staff*, 42 F.2d at 832). The Second Circuit's decision in *Staff* holds that "no court can make a decree which will bind any one but a party." *Staff*, 42 F.2d at 832. But this rule is rooted in due process, not equity. See *infra* note 271. And it allows exceptions where there are adequate procedural safeguards. See *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008) (giving class actions as an example).

271. No such rule appears in the standard treatises on equity. See, e.g., POMEROY, *supra* note 47, §§ 132–133 (describing the jurisdiction of equity courts to restrain actions at law); STORY, *supra* note 48, §§ 893–899 (listing cases in which equity courts will not interfere in legal proceedings); see also *Bray*, *supra* note 11, at 473 (acknowledging the lack of such a rule in traditional equity practice). The Supreme Court seems to have affirmed such an injunction at least once, forbidding a state's attorney general and "all . . . individuals, persons, or corporations" from "instituting or prosecuting any suit" under a state statute. *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 370 (1894) (emphasis added); see *Sohoni*, *supra* note 9, at 937–39 (identifying *Reagan* as an early example of a universal injunction). And one treatise writer identifies as a *potential* justification for the rule against private rights to use public highways the argument that such a decree would effectively "enjoin all the inhabitants of the state or country," but he later explains that the "true reasons" for the rule "rest entirely upon considerations of public policy." POMEROY, *supra* note 47, § 251.

272. See *Jackson*, 142 S. Ct. at 551 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (predicting copycat laws); see also CAL. BUS. & PROF. CODE ANN. §§ 22949.60–71 (West 2022) (reflecting a privately enforced gun regulation modeled on S.B. 8).

273. *Bray*, *supra* note 11, at 419; *Sohoni*, *supra* note 9, at 922.

relief.²⁷⁴ Accordingly, critics argue that universal injunctions issue too readily, interfering with the orderly implementation of federal policy and manufacturing the need for urgent Supreme Court intervention.²⁷⁵

Some scholars look to history for a solution. For example, Samuel Bray frames the problem as a mistranslation of equity from eighteenth-century England (which had only one chancellor) to the federal system (where each district judge has equity powers).²⁷⁶ To correct this mismatch, Bray proposes a blanket rule that injunctive relief cannot benefit nonparties in cases against the federal government.²⁷⁷ Justice Thomas draws the same conclusion from more explicitly originalist premises.²⁷⁸ Other scholars offer less categorical tests.²⁷⁹

Universal injunctions present precisely the type of issue that traditionalism and incrementalism are ill-equipped to address. Although universal injunctions were not unheard of before the mid-twentieth century,²⁸⁰ they only recently became a problem, so historical practice has few insights to offer.²⁸¹ And because there was no rule against universal injunctions in traditional equity,²⁸² adopting such a rule now seems like the sort of major change that incrementalism would eschew. Faithfully applied, these methods suggest that courts should simply wait for Congress to address the problem.

And yet no scholar seriously advocates that approach. Instead, as all seem to recognize, the problem of universal injunctions calls for a sensitive balancing of policy concerns, including consistency, efficiency, discouragement of forum shopping, and avoidance of intrajudicial conflict.²⁸³ Only functional federal equity allows courts to make that clear-eyed, policy-based assessment. Universal injunctions exhibit polycentricity and opportunism, allowing litigants to exploit the interdependent behavior of district judges to secure unforeseen and

274. See, e.g., Bray, *supra* note 11, at 457–61; Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1104 (2018).

275. See Bray, *supra* note 11, at 461–65; Frost, *supra* note 274, at 1107–09.

276. See Bray, *supra* note 11, at 445; see also Samuel L. Bray, *Form and Substance in the Fusion of Law and Equity*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* (Dennis Klimchuk, Irit Samet, and Henry Smith eds., 2020) (comparing the exercise to translation of historical texts).

277. *Id.* at 469–73.

278. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

279. See, e.g., Frost, *supra* note 274, at 1090–1101 (arguing that federal courts should issue universal injunctions only where required to provide complete relief to the plaintiff, to prevent irreparable injury to third parties, or where a more limited injunction would be impractical). *But see* Bray, *supra* note 11, at 480 (arguing that such flexible standards would not be fairly applied by forum-shopped judges).

280. See Sohoni, *supra* note 9, at 935–36 (identifying early examples of universal injunctions). *But see Trump*, 138 S. Ct. at 2425–29 (Thomas, J., concurring) (arguing that universal injunctions “emerg[ed] for the first time in the 1960s”).

281. Attempts to extract solutions from history tend to yield nonsequiturs. For example, Justice Thomas has argued that universal injunctions are unlawful because, “[a]s an agent of the King,” the English chancellor did not enjoin Crown officials. *Trump*, 138 S. Ct. at 2427 (citing Bray, *supra* note 11, at 425). But federal courts are not “agents” of the Executive Branch, so that fact seems like a reason to disregard founding-era English equity practice—not to follow it until Congress prescribed a different rule.

282. See Bray, *supra* note 11, at 424–45, 473.

283. See Bray, *supra* note 11, at 457–65, 473; Frost, *supra* note 274, at 1090–1101.

unintended benefits.²⁸⁴ So, under a functional approach, courts may experiment with new solutions to that problem—perhaps by selecting from the menu of options that scholars have already assembled.²⁸⁵

CONCLUSION

When the Constitution and the First Judiciary Act gave the federal courts equity powers, they drew on an ancient jurisprudence that was famous for its capacity for change. In England, equity began as the caprice of a single judge endowed with royal prerogative,²⁸⁶ and although it later grew into a “regular system” of rules in England and the United States,²⁸⁷ it continued to respond to society’s changing needs.²⁸⁸ Lacking a consistent partisan valance, federal equity was sometimes used for progressive ends and other times for conservative ones.²⁸⁹ But always, its spark of innovation remained lit.

Today, the Supreme Court has all but put out that spark. Due in part to skepticism of judicial lawmaking and in part to a conservative backlash against late-twentieth-century rights jurisprudence,²⁹⁰ today’s Supreme Court demands increasingly specific historical and textual evidence for rights and remedies of all stripes. Equity has not escaped that trend.²⁹¹ But because equity deals mostly in remedies, traditionalism there disrupts the enforcement of rights quietly, for reasons that do not translate easily into the nation’s political discourse.

The Supreme Court is right to reject an unbounded vision of equity, but its historical approach is not the answer. Instead, the Court should think more deeply about equity’s nature and why it persists in our legal system today. Functionalism is the starting point for this project. By determining what equity should do, courts can say what it should *not* do—and from there derive a theory of its limits. This Article performs that exercise using one account of equity’s function, arguing that federal courts should extend equity’s doctrines and remedies to address complexity. Other theories may emerge from other functional accounts. But if we expect equity to continue shouldering so much of the burden of rights enforcement in the United States, then we must think more carefully about its purpose and limits. Our system of constitutional adjudication depends on it.

284. See Smith, *supra* note 16, at 1137–38.

285. See *supra* notes 276–279 and accompanying text.

286. See *supra* notes 43–48 and accompanying text.

287. See Hamilton, *supra* note 74, at 438.

288. See generally *supra* Part I.

289. See *supra* Part I.B.

290. See *supra* Part I.B.2.

291. See generally *supra* Part II.