

# EQUITY’S FEDERALISM

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*The United States has had a dual court system since its founding. One might expect such a pronouncement to refer to the division between state and federal courts, but in the early republic the equally obvious referent would have been to the division between courts of common law and the court of chancery—the distinction, that is, between law and equity. This Essay sketches a history of how the distinction between law and equity was gradually transformed into a doctrine of federalism by the Supreme Court. Congress’s earliest legislation jealously guarded federal equity against fusion with common law at either the state or federal levels. The antebellum Supreme Court obligingly adopted a strongly anti-fusion stance and took pains to protect federal equity from experimental state-level reforms. In the midst of Reconstruction, Congress reconfigured the ways federal equity would intermix with state law and legal process. But in the twentieth century, Supreme Court doctrine set aside the well-documented legislative history of Reconstruction statutes in favor of a mythic retelling of the 1790s that reduced equity to a principle of federalism. This judicially invented historical narrative has led to a peculiar asymmetry in practice today, where it has become surprisingly easy for federal courts to equitably restrain the other federal branches but significantly difficult for them to redress even extreme violations of federal rights at the state and local level.*

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## INTRODUCTION

“The United States has a dual court system” is today an obvious statement, clearly referencing the separate and semi-independent court systems of the states on the one hand and of the federal government on the other. “The United States have<sup>1</sup> dual court systems” was an equally obvious statement in the early republic, but with a different referent: discussion of and complaints about dual courts and double proceedings were in that era far more often referring to the distinction between courts of common law and the court of chancery, or for short, courts of law and of equity. To be sure, not all of the American colonies tried to transplant England’s dual system of courts—Puritan New England devised a legal system without a separate branch of equity<sup>2</sup>—but in sophisticated commercial colonies like New York and South Carolina, and for the nascent English-trained bar in the Americas, the rigid institutional division and jurisprudential distinction between law and equity inhered, as it was often said, “in the nature of things.”<sup>3</sup>

Meanwhile at the national level, the Constitution defined judicial power as extending to cases in “law and equity,” and the first Judiciary Act treated law and equity as separate jurisdictions even as the same federal judge would be called upon to administer them both.<sup>4</sup> The mimicry of English legality could run only up to a point, then, for England had neither inferior nor local courts of equity.<sup>5</sup> The double

1 “There was a time a few years ago when the United States was spoken of in the plural number. . . . [b]ut the war changed all that.” WASH. POST, Apr. 24, 1887, at 4.

2 See Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in LAW IN AMERICAN HISTORY 257, 262–65 (Donald Fleming & Bernard Bailyn eds., 1971).

3 See Kellen Funk, *The Union of Law and Equity: The United States, 1800–1938*, in EQUITY AND LAW: FUSION AND FISSION 46, 56–69 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019); see also Katz, *supra* note 2, at 264.

4 U.S. CONST. art. III, § 2; see Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

5 See P. Tucker, *The Early History of the Court of Chancery: A Comparative Study*, 115 ENG. HIST. REV. 791, 795–96 (2000); JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY (London, Longman, Rees, Orme, Brown & Green 1828).

duality of the United States, a dual court system within a dual sovereignty, has thus been a defining feature of American legal history.

This Essay offers a sketch of that history. Of course, the history of equitable practices at the state and federal level is a vast terrain, much of it remaining to be explored, particularly at the level of lower courts. Relying on archival research, this Essay focuses on the history of equity's federalism as it has been regulated by congressional statutes and as its story has been retold by the Supreme Court in pivotal interpretations of those statutes.

Congress's earliest legislation jealously guarded federal equity against fusion with common law at either the state or federal levels. The antebellum Supreme Court adopted a strongly anti-fusion stance and took pains to protect federal equity from experimental state-level reforms. In the midst of Reconstruction, however, Congress reconfigured the ways federal equity would intermix with state law and legal process. Providing for expansive removal rights and original causes of action, the Reconstruction Congress empowered federal courts to seize control of former state law actions without particular regard for maintaining the distinction between law and equity.

After equitable remedies were extended against public officials and law and equity procedure were merged in the 1938 Federal Rules of Civil Procedure, the federal courts wrangled over competing historical visions of how federal equity was to operate against state actors and especially state courts. In a series of pivotal cases from 1960 to 1975, Supreme Court doctrine set aside the well-documented legislative history of Reconstruction statutes in favor of a mythic retelling of the 1790s that reduced equity to a principle of federalism, one defined by an overdrawn regard for the sovereignty and prerogative of the states.

In short, my account of federal equity is a story of anti-fusionist structures and attitudes being exchanged for anti-federalist ones. In arguing this, I do not mean to imply that some pure essence of equity has been lost or distorted. In many ways the essential precepts of equity—such as the maxim that *equity follows the law*—have remained consistent over time, though they may struggle to bear the federalism-protecting weight the modern Court expects them to. What I think has gotten lost and distorted is the intent of the Reconstruction Congress that federal practice should be otherwise. As my brief foray into the archives of the Justices' chambers reveals, the Court has had to actively ignore the Reconstruction statutes and their animating intent in order to construct its modern fable of an anti-federalist equity.

This judicially invented historical narrative has led to a peculiar asymmetry in practice today, where it has become surprisingly easy for

federal courts to equitably restrain the other federal branches but significantly difficult for them to redress even extreme violations of federal rights at the state and local level. This asymmetry is explored briefly in the concluding section. The Parts that follow proceed chronologically.

## I. EQUITY'S ESSENCES

A great deal of scholarship on equity and federalism has treated equity as something familiar, federalism as the puzzle to be solved.<sup>6</sup> More recent commentary, however, has shown just how variable equity practice could be over time.<sup>7</sup> This Part offers a brief overview of what made equity special along the horizontal dimension—that is, as compared to law. We will then be better equipped to assess equity along the vertical dimension of state and federal interaction.

The essential features of equity often seem to be in the eye of the beholder. During the same decade that practical treatise writers emphasized equity's malleable formlessness, Joseph Story published his landmark account of equity as following rule-bound formality.<sup>8</sup> Likewise, today's jurists are divided on whether equity's supplemental character means it should fill the gaps left by the law,<sup>9</sup> or should leave such gaps as it finds them.<sup>10</sup>

Without space to fully describe equity's history, we might best follow the advice of law-and-litterateur Gary Watt by giving up the hunt for "essential" features of equity and instead treat equity as several "clusters" of ideas and languages that involve remedies, doctrines, and maxims.<sup>11</sup> As to the first two, equity exercised jurisdiction over

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6 See, e.g., Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) and the literature discussed therein.

7 See Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020); Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 255–56 (2010); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184–87 (2005).

8 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA (Boston, Hilliard, Gray & Co. 1835); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA (Boston, Hilliard, Gray & Co. 1836). On the formlessness of equity and the problem it posed for treatise writers, see 1 OLIVER L. BARBOUR, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY, at iv–vi (Albany, Wm. & A. Gould & Co. 1843).

9 See, e.g., *United States v. Texas*, No. 21-CV-796, at 38–41 (W.D. Tex. Oct. 6, 2021) (order granting preliminary injunction).

10 See, e.g., *Whole Woman's Health v. Jackson*, 141 S. Ct. 522 (2021).

11 GARY WATT, EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW 89–90 (2009). Watt also includes property among his clusters, a subject beyond the scope of this Essay but

contested points of intent or will, matters of mind or soul that could not be penetrated by lay jurors such as trusts, fraud, accident, or mistake.<sup>12</sup> Under the sure hand of churchly and royal officials, equity developed a tolerance for balancing competing claims of merit rather than handing victory to one side or another in an adjudication. It could thus tackle complicated questions of guardianship, partition, and account.<sup>13</sup> By acting on persons rather than properties, equity offered extraordinary remedies like injunctions and contempts backed by the threat of imprisonment. All these features together gave equity the “inquisitorial” powers to peer into the minds of its subjects through the bill of discovery and interrogatory conferences.

As to equity’s famous maxims, two are particularly important for the history of equity’s federalism. The first was at the heart of Story’s Commentaries: *equity follows the law*.<sup>14</sup> Writing against a seventeenth-century moral tradition that supposed equity supplied discretion to mitigate the harshness of common-law rules,<sup>15</sup> Story pronounced that equity could make up for a legal deficiency only “where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy.”<sup>16</sup> In cases where “there exists no rule, applicable to all the circumstances,” the chancellor had to decide “whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed.”<sup>17</sup> In Story’s view, equity did not offer causes of action independent of common-law rights. Equity could act only on entitlements established at law. In the absence of those entitlements, parties might well be left without a remedy by the equitable judge.

Equity followed the law in a more mundane sense as well. As a matter of practice, suits in equity were often filed only after litigation had begun in the courts of common law, either because the legal entitlement first had to be established at law or because the legal

explored in Henry E. Smith, *Property, Equity, and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 224 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

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

13 See generally GEO. TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY (6th ed. 1902) (discussing the historical churchly and royal foundations of equity and the equitable treatment of, inter alia, guardianship, partition, and account).

14 1 STORY, *supra* note 8, at 1.

15 See RICHARD FRANCIS, MAXIMS OF EQUITY (London, E. and R. Nutt, and R. Gosling 1728); 1 HENRY BALLOW, A TREATISE OF EQUITY (Dublin, Messrs. Byrne, J. Moore, W. Jones, S. Lynch, and H. Watts 1793); 2 HENRY BALLOW, A TREATISE OF EQUITY (Dublin, Messrs. P. Byrne, J. Moore, W. Jones, S. Lynch, and H. Watts 1795).

16 1 STORY, *supra* note 8, at 30–31.

17 *Id.* at 8–9, 30–31.

remedy had to be shown insufficient or inaccessible.<sup>18</sup> This feature of double filing in separate courts to resolve what seemed to be a single claim would be a crucial problem for the early history of equity's federalism.

The second maxim, *equity acts on conscience*, was most often used to explain what equity was *not*, rather than what it was.<sup>19</sup> Equity was *not* a license, the treatises emphasized, for judges to rule according to their own notions of private morality or of natural law. It did *not* confer discretion to set aside legal rules or statutes—even harsh ones—where they otherwise clearly applied. Story lamented that “many persons are misled into the false notion” that equity’s “real and peculiar duty” was to provide discretion in “correcting, mitigating, or interpreting the law.”<sup>20</sup>

If equity was not discretion to depart from legal rules, what did it mean that equity was a jurisdiction of conscience? We can make some headway by paying attention to discussion of equity’s forms of proceeding in the nineteenth century.<sup>21</sup> Often those discussions had the peculiar quality of describing equity’s form while arguing for equity’s essential formlessness. As one leading New York lawyer put it, “There was literally no form about it. The party stated his case, and asked the relief he desired, and the court, if he proved his case, gave him that relief.”<sup>22</sup> What this lawyer meant was that equity did not use forms of action the way the common-law courts did. Instead of tethering specific pleas to particular remedies, a typical equitable bill opened with the general assertion that “your orator is remediless . . . by the strict rules of the common law,” and prayed for a decree “as shall be agreeable to equity and good conscience.”<sup>23</sup> That is, the

18 See BISPAM, *supra* note 13, at 527–38.

19 See 1 CHARLES FISK BEACH, JR., MODERN EQUITY: COMMENTARIES ON MODERN EQUITY JURISPRUDENCE AS DETERMINED BY THE COURTS AND STATUTES OF ENGLAND AND THE UNITED STATES (New York, Baker, Voorhis & Co. 1892); H. ARTHUR SMITH, A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY (London, Stevens & Sons 1882); THOMAS BRANCHE, PRINCIPIA LEGIS ET AEQUITATIS: BEING AN ALPHABETICAL COLLECTIONS OF MAXIMS, PRINCIPLES OR RULE DEFINITIONS, AND MEMORABLE SAYINGS, IN LAW AND EQUITY (London, W. Clarke & Sons 3d ed. 1818).

20 1 STORY, *supra* note 8, at 10. See also 3 WILLIAM BLACKSTONE, COMMENTARIES, \*432–34, \*440–42.

21 Mike MacNair argues that conscience traditionally meant only “private knowledge of facts,” but this meaning was significantly obscured by the nineteenth-century practice. Mike MacNair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 659 (2007).

22 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 562 (William G. Bishop & William H. Attree eds., Albany, Office of the Evening Atlas 1846) (Remarks of Charles O’Conor).

23 3 OLIVER L. BARBOUR, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY WITH AN APPENDIX OF PRECEDENTS 355–57 (Albany, Banks and Brothers, 2d ed. 1875).

typical cause of action<sup>24</sup> was a failure of legal process, and the court enjoyed latitude to choose among types and degrees of remedial interference in ways the common-law forms of action typically locked down.<sup>25</sup>

From the perspective of a court, this difference in forms of proceeding was an essential feature of the division between law and equity. As one New York jurist vividly put it, the difference between common law and chancery, legal and equitable adjudication, was the difference between the chain and the rope.<sup>26</sup> Common law actions had to be formed of indispensable links of material elements that had to be pleaded and proven to support the claim. A trover pleading had to allege the casual loss of an item found and converted to a defendant's use; the trial had to prove perfect title in the plaintiff and converted possession and use by the defendant.<sup>27</sup> A link was either established or it was not, and the loss of any link destroyed the whole claim. Equitable actions, on the other hand, included many strands of factual allegations braided from narrative pleadings and fulsome interrogatories. Break a strand, perhaps even many strands, and the whole might yet hold together as an entitlement to relief. A claim of fraud did not have indispensable elements; it rather told a story with enough factual detail (proven in court) to move the individual conscience of the judge.<sup>28</sup>

The essence of equitable conscience consisted of this triumph of facts over form. Common-law juries found facts but could usually render only binary verdicts on remedies that had been constrained from the start by the pleadings. Chancellors not only found facts but also weighed them, tailoring remedies to whatever factual strands held

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24 Such as there was. On the equitable cause of action, see Professor Bray and Professor Miller's essay in this Symposium, Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 NOTRE DAME L. REV. 1763 (2022).

25 For instance, a common law writ of trover could recover the market price of converted chattels, while replevin sought the return of the chattel property itself. Each entailed different pleading requirements that would pose different questions to the jury for resolution. Remedial theories could not be changed halfway through a case, nor could a plaintiff merely establish an injury without simultaneously invoking the proper writ and remedy.

26 *Wooden v. Waffle*, 6 How. Pr. 145, 152 (N.Y. Sup. Ct. 1851).

27 "[T]he conversion is the gist of the action, the remainder being a mere fiction," one popular treatise explained of trover pleading. DAVID GRAHAM, JR., A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW-YORK 172 (New York, Gould, Banks & Co. 1832).

28 *See, e.g.*, WILLIAM WILLIAMSON KERR & ORLANDO F. BUMP, A TREATISE ON THE LAW OF FRAUD AND MISTAKE 41–53 (New York, Baker, Voorhis & Co. 1886).

together across the elaborate and lengthy written records of chancery.<sup>29</sup>

No surprise, then, that jurists sharply differed over whether it was even possible to “fuse” or merge the systems of law and equity. For some, the chain and the rope were inherently incompatible. The images pointed to entirely different modes of adjudication, each of which made sense only in light of its opposite.<sup>30</sup> Others were more sanguine about the chances for fusion, particularly if fusion meant a greater role for equitable procedures and remedies to protect common-law rights.<sup>31</sup> Story’s Commentaries hedged on the question. “The union of Equity and Law in the same Court,” he concluded, “must be a mixed question of public policy and private convenience; and never can be susceptible of any universal solution.”<sup>32</sup> Nothing inherent in the nature of jurisprudence demanded the eternal separation of law and equity, but Story worried that fusion might have unintended consequences. Remedies were tricky things, and remedies to a remedial system trickier still. “The new remedy, to be applied, may otherwise be as mischievous, as the wrong to be redressed,” Story warned.<sup>33</sup> For most of the nineteenth century, the federal courts were far more inclined to heed Story’s warning than to strike off toward fusion.

## II. FUSION AND FEDERALISM IN THE ANTEBELLUM REPUBLIC

Among the challenges of erecting a national government in a single legislative session, the First Congress had to decide what to do with a judicial power defined in terms of “law and equity”<sup>34</sup> against a backdrop of multifarious state practices, some of which had totally repudiated an equitable jurisdiction. English precedent was little help. The British had to manage the law-equity distinction only horizontally, across the Courts of Westminster.<sup>35</sup> The American federation of state

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29 On the distinctive culture of early chancery’s written record practices, see AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877*, at 27–34 (2017).

30 See Funk, *supra* note 3, at 53–56.

31 See *id.* at 56–60.

32 1 STORY, *supra* note 8, at 35–36.

33 *Id.* at 61.

34 U.S. CONST. art. III, § 2.

35 Such at least was the theory. Although Thomas Macaulay remarked that British India administered “a kind of rude and capricious equity,” English imperialists did not regard the management of colonial law and equity as a domestic problem of federalism. Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 L. & HIST. REV. 631, 639 (2005) (quoting 19 HANSARD’S PARLIAMENTARY DEBATES: FORMING A CONTINUATION OF “THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803” 532 (London, T.C. Hansard 1833)).

and national judiciaries thus raised complicated questions about how bifurcated courts were to relate across divided levels of government.

Much of Congress's early legislation concerned this double duality, often in explicit terms of state law and federal equity. Twentieth-century jurists supposed that this legislation "reflected the then strong feeling against the unwarranted intrusion of federal courts upon state sovereignty,"<sup>36</sup> but such readings give undue weight to the federalist (vertical) dimension and ignore Congress's aim to guard against the fusion of law and equity (horizontally). This Part surveys some of this major legislation and argues that federalism was a comparatively minor concern of antebellum legislators and jurists who were otherwise preoccupied with the fusion, or as it happened, the non-fusion, of law and equity.

### A. *Early Statutes and Anti-Fusion in Congress*

Chief among the early attempts to manage the law-equity distinction alongside the state-federal division was the Anti-Injunction Act of 1793. The name is somewhat of a misnomer. While the Anti-Injunction Act today is a freestanding statute,<sup>37</sup> it originated as half a sentence in a broader set of strictures on federal jurisdiction.<sup>38</sup> The Supreme Court has noted that "[t]he precise origins of the legislation are shrouded in obscurity,"<sup>39</sup> but recent work by Professor James Pfander and Nassim Nazemi has helped lift the shroud.<sup>40</sup> They have shown that while the text of the Act refers to federal courts interfering with *state* process, Congress's chief aim was to restrain federal equity from interfering with *legal* process. As vividly illustrated by the landmark litigation against "financier of the American Revolution" Robert Morris, equitable procedure could essentially allow for the horizontal re-litigation of a claim even as the same parties pursued vertical re-litigation in the courts of appeals.<sup>41</sup> The aim of the Anti-

36 *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 131 (1941).

37 Codified at 28 U.S.C. § 2283 (2018).

38 See Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 334–35 ("but no writ of ne exeat shall be granted unless a suit in equity be commenced . . . ; nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable previous notice to the adverse party").

39 *Mitchum v. Foster*, 407 U.S. 225, 232 (1972).

40 See James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1 (2013); James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187 (2014) [hereinafter Pfander & Nazemi, *Morris v. Allen*].

41 Pfander & Nazemi, *Morris v. Allen*, *supra* note 40, at 195.

Injunction Act, Pfander and Nazemi conclude, was to avoid these kinds of “bifurcated proceedings.”<sup>42</sup>

A 1790 report of Attorney General Edmund Randolph sustains this conclusion. Proposing language similar to the adopted statute,<sup>43</sup> Randolph commented that “[i]t is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the state courts, and the equity side into the federal courts.”<sup>44</sup>

These remarks seem to contemplate a variety of dual filings in law and equity beyond the re-litigation problem identified by Pfander and Nazemi. For instance, law reformers at the time frequently complained about the dual filings required for discovery procedure and for creditors’ remedies. Because parties were disqualified from testifying at common law, litigants frequently had to file in chancery for a bill of discovery to force admissions and disclosures that could then be entered into evidence before the law courts.<sup>45</sup> And while common law could establish the right of a creditor to collect on a debt, states like New York empowered only the court of chancery to issue coercive process against defendants who fraudulently concealed assets.<sup>46</sup> To take just one notable example, by the time the Erie Canal was completed, numerous merchants complained that collection suits required at least two litigations: one to establish the right at common law and one to effectuate the collection in equity.<sup>47</sup> Randolph’s report recognized that “[t]he common law is confessedly incompetent” on matters of proof-taking and execution, but his proposed solution was not to protect state process, but rather to enact a federal code of

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42 *Id.* at 194.

43 *But see id.* at 221–26 for an in-depth discussion of the difference between Randolph’s Report and the text of the Anti-Injunction Act.

44 EDMUND RANDOLPH, REPORT OF THE ATTORNEY-GENERAL TO THE HOUSE OF REPRESENTATIVES 29 (1790).

45 *See* KESSLER, *supra* note 29, at 26; GEORGE VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE 36–37 (Albany, W.C. Little & Co. 2d ed. 1855) (describing discovery process before the code reforms).

46 On creditor bill procedure, see 2 ALEXANDER M. BURRILL, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW-YORK 290–303 (New York, John S. Voorhies 2d ed. 1846). For practitioner complaints about double-filing, see THEODORE SEDGWICK, JR., A STATEMENT OF FACTS IN RELATION TO THE DELAYS AND ARREARS OF BUSINESS IN THE COURT OF CHANCERY OF THE STATE OF NEW-YORK 30–35 (New York, Alex. S. Gould 1838). GULIAN C. VERPLANCK, SPEECH WHEN IN COMMITTEE OF THE WHOLE IN THE SENATE OF NEW-YORK, ON THE SEVERAL BILLS AND RESOLUTIONS FOR THE AMENDMENT OF THE LAW AND THE REFORM OF THE JUDICIARY SYSTEM 3–7 (Albany, Hoffman & White 1839).

47 VERPLANCK, *supra* note 46, at 21–22.

procedure that would supplant the insufficient processes of the states.<sup>48</sup>

Indeed, Randolph's report said nothing about the sanctity of state court process. Instead, he made clear that his recommendations were meant to restrict litigants to their own choice of forum: "For if the plaintiff and defendant rely upon the state courts . . . they ought to continue there as they have begun."<sup>49</sup> Rather than protecting states from federal interference, Randolph's logic ran in the other direction: federal courts were not equitable adjuncts of the state tribunals, supplying a bill of discovery or enforcement procedure for litigation otherwise conducted wholly inside state tribunals. This reasoning applied with special force for litigation in states that had not established courts of equity. If New England states had not provided for chancery courts, why should their litigants be able to dragoon a federal chancellor into litigations they had chosen to commence in equity-less jurisdictions?<sup>50</sup>

This same logic of insulating federal equity from the diverse state experiments with judicial structure animated other signal acts constituting the early federal courts. What we now call the Rules of Decision Act—Section 34 of the first Judiciary Act—commanded federal trial courts to apply the laws of the states in which they sat in common-law cases, but not in equity.<sup>51</sup> The Process Acts of 1789 and 1792 likewise ordered federal courts to use state procedures only in common-law cases.<sup>52</sup> By contrast, the same statutes provided (tautologically) that procedures in equity would consist of "rules[] and usages which belong to courts of equity . . . as contradistinguished from the courts of common law" and without regard to state practices or constraints.<sup>53</sup> Section 16 of the first Judiciary Act codified the maxim that *equity follows the law* by declaring "suits in equity shall not be sustained . . . in any case where [a] plain, adequate and complete remedy may be had at law."<sup>54</sup> Early commentary confirmed that the

48 RANDOLPH, *supra* note 44, at 31–32.

49 *Id.* at 29.

50 Randolph's suggested bill made sure to preserve federal equitable process in states that had not established courts of equity. *See id.* at 17.

51 Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified at 28 U.S.C. § 1652 (2018)).

52 Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94; Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. The latter Act permitted the lower courts to issue rules of practice in common-law proceedings if they wished to depart from the default rule of state procedure.

53 Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 94 n.(a). Even after Congress in 1828 commanded the courts to adhere more strictly to state enforcement and execution procedures, it preserved an independent federal equity in states that did not maintain equitable courts and actions. *See* Process Act of 1828, ch. 68, § 3, 4 Stat. 278, 281.

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

decree had no reference to federalism—“adequate . . . at law” always meant federal, not local law.<sup>55</sup>

In short, Congress’s early legislation sought to ensure that the rope of federal equity did not become entangled with the chain of common law. That common law might arise as a source of restriction at either the federal or the state level was almost purely incidental to Congress’s program to protect against fusion. As a note in the first volume of the *Statutes at Large* explained,

The equity jurisdiction of the courts of the United States is independent of the local law of any State, and is the same in nature and extent as the equity jurisdiction of England from which it is derived. Therefore it is no objection to this jurisdiction, that there is a remedy under the local law.<sup>56</sup>

Federal equity was released or cabined only by federal law. States simply had nothing to do with it.

### *B. State Codes and Anti-Fusion at the Supreme Court*

As states ventured further into the fusion of law and equity at midcentury, the Supreme Court took up Congress’s mantle to protect federal equity from fusionist reforms. Since 1792, both the Supreme Court and lower federal courts possessed rulemaking power over legal and equitable procedure.<sup>57</sup> The High Court’s power was largely dormant until the twentieth century.<sup>58</sup> But as Randolph’s call for a federal code of procedure continued to go unanswered, many lower federal courts tried their hand at codification, especially as state after state adopted New York’s *Field Code of Procedure*.

Named after its trial lawyer draftsman David Dudley Field, the *Field Code*<sup>59</sup> declared the distinction between law and equity entirely abolished. One of its most important provisions operationalizing this

<sup>55</sup> See *id.* § 16; n.(b).

<sup>56</sup> *Id.* at n.(b).

<sup>57</sup> See *Process Act of 1792*, ch. 36, § 2, 1 Stat. 275, 276.

<sup>58</sup> The Supreme Court never issued rules for common-law proceedings. A brief set of ad hoc “rules of practice” for equity was promulgated in 1822 and re-issued with slight amendments in 1842. *Rules of Practice for the Courts of Equity of the United States*, 20 U.S. (7 Wheat.) v (1822); *Rules of Practice for the Courts of Equity of the United States*, 42 U.S. (1 How.) xxxix (1843). But neither of these pamphlets resembled the systematic and code-like *Federal Rules of Equity* that issued in 1912 and became a model for the *Federal Rules of Civil Procedure of 1938*. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1048 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 909–1002 (1987).

<sup>59</sup> ARPHAXED LOOMIS, DAVID GRAHAM & DAVID DUDLEY FIELD, *FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS* (Albany, Charles van Benthuysen 1848).

decree was Section 231,<sup>60</sup> now imitated by Federal Rule of Civil Procedure 54(c): a judgment “should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”<sup>61</sup> “There is no magic in forms,” the Code’s commentary declared.<sup>62</sup> No longer would common-law “jingles” like trover and assumpsit unlock particular remedies.<sup>63</sup> Instead, all pleaders would, as they had done in equity, relate narratives of facts to conclusions of law, and together courts and pleaders would select from an open menu of remedies to provide the appropriate relief.<sup>64</sup>

The fusion of law and equity in the Field Code consequently transformed both categories. Common-law procedure lost the rigidity, but also the stability, of its formulary system.<sup>65</sup> Equity’s insistence that it could not intervene until the common-law process was shown to be insufficient was annihilated—in a world without law *and* equity, equity could hardly follow law.<sup>66</sup> Field was perhaps too good a practitioner, or too poor a theorist, to appreciate the transformations that his Code set in motion. Key terms like remedy, entitlement, facts, and law were left undefined. To fill the gaps, the Code relied on the situation sense

60 *Id.* at 194, § 231.

61 FED. R. CIV. P. 54(c). The 1937 Advisory Committee’s note explained that 54(c) “is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both.” REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, 135 (1937). *Cf.* LAWS OF THE STATE OF NEW-YORK, PASSED AT THE SEVENTY-FIRST SESSION OF THE LEGISLATURE 540, § 231 (Albany, Charles Van Benthuyzen 1848). I explore several dimensions of the Field Code’s attempt at fusion in Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152 (2015).

62 LOOMIS ET AL., *supra* note 59, at 141.

63 *Id.* at 145.

64 In this and in other regards my account differs from Professor Subrin’s assessment that equity “conquered” common law only in the Federal Rules, while the Field Code “leaned as much, or more, toward the view of common law procedure as to equity.” Steven N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 338 (1988); *see also* Subrin, *supra* note 58. Field’s co-commissioner thought their system “approaches and assimilates more nearly with the equity forms.” ARPHAXED LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 25 (Little Falls, J.R. & G.G. Stebbins 1879). And Field declared the triumph of equity to be “implied in the blending of the procedure.” David Dudley Field, *Law and Equity*, 18 ALB. L.J. 509, 511 (1878). Altogether, it is worth taking seriously the commission’s claim that “the basis” for the code “was substantially that upon which courts of equity were originally founded.” ARPHAXED LOOMIS, DAVID GRAHAM & DAVID DUDLEY FIELD, SECOND REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS 7 (Albany, Weed, Parsons & Co. 1849).

65 For a humorous illustration of the value of forms, see Samuel L. Bray, *The Parable of the Forms*, 93 ST. JOHN’S L. REV. 623 (2019).

66 *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 19–20 (1991).

of lawyers and judges, a sense developed in the pre-Code days of law and equity, to apply “appropriate” remedies to cognizable harms.<sup>67</sup>

Until the Field Code, federal courts had managed to operate in states that had never established equity courts but still recognized a distinct body of common law. But the Field Code was different. It did not take away equity and leave common-law systems in place, but rather the opposite. Since Congress in the Process Acts had commanded federal courts to use state procedure in law but not in equity,<sup>68</sup> federal courts in fusionist states now had to identify law and equity in state rules that no longer maintained a distinction.

Several federal courts escaped the dilemma by using their rulemaking power to overwrite the Field Code and reject fusionist reforms. The Eastern District of Wisconsin ignored the state’s Field Code and advised litigants to “consider the practice of the Courts of King’s Bench, and of Chancery, in England, as affording outlines for the practice of this court.”<sup>69</sup> The federal courts of Michigan also opted for English procedure as it existed “prior to 1840” (even though the rule itself was written in 1871).<sup>70</sup>

Other district courts attempted to accommodate the codes despite Congress’s proscriptions against fusion. The District of Iowa enumerated in one long rule all of the state’s code sections it would accept in federal practice.<sup>71</sup> The Northern District of Ohio promulgated fifty-seven rules retaining formulary actions for replevin and ejectment while otherwise following the Field Code’s prescription to require factual narrative pleadings.<sup>72</sup>

67 See, for instance, LAW REFORM TRACTS NO. 5: A SHORT MANUAL OF PLEADING UNDER THE CODE 13–14 (Albany, W.C. Little & Co. 1856), in which Field had to relent and leave the division between material facts and mere evidence unarticulated, supplied instead by the lawyer’s craft sense: “What is and what is not essential, an uninstructed person might not readily discover; but a lawyer ought not to be in doubt.”

68 See *supra* notes 52–53.

69 RULES OF PRACTICE OF THE SUPREME COURT OF THE UNITED STATES AND OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN 4 (Milwaukee, Starr’s Book & Job Printing House 1871).

70 RULES OF THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE DISTRICTS OF MICHIGAN, IN CASES AT LAW, IN EQUITY, ADMIRALTY, AND BANKRUPTCY 6 (Detroit, Richmonds & Backus, Law Book Publishers & Stationers 1871).

71 See RULES OF PRACTICE IN THE FEDERAL COURTS OF IOWA, SUPREME COURT OF THE UNITED STATES, SUPREME COURT OF THE STATE OF IOWA, AND THE GENERAL ORDERS IN BANKRUPTCY, OF THE DISTRICT COURT FOR THE DISTRICT OF IOWA 1 (Des Moines, Mills & Company Publishers, Law Booksellers, & Stationers 1871).

72 RULES OF PRACTICE OF THE SUPREME COURT OF THE UNITED STATES, INCLUDING THE RULES IN EQUITY AND ADMIRALTY; ALSO, THE RULES ADOPTED BY THE CIRCUIT AND DISTRICT COURTS OF THE U.S. FOR THE NORTHERN DISTRICT OF OHIO; AND THE ACT OF CONGRESS DIVIDING THE DISTRICT OF OHIO 5–18 (Cleveland, Sanford & Hayward 1859). For a full overview of the procedure rules of the various federal district courts on the eve of

The Supreme Court rebuffed these accommodations on numerous occasions, but the logic of its opinions ran in the same direction as Randolph's report had: federal equity had to be insulated from state process, not the other way around. Otherwise, as the Taney Court noted in two leading cases out of Texas, state procedure might invite equitable scrutiny where it did not belong—most especially in the domestic law of slavery.

*Randon v. Toby* involved a routine debt collection on a promissory note issued to purchase enslaved persons.<sup>73</sup> “But, unfortunately,” the Court opinion read, “the District Court has adopted the system of pleading and code of practice of the State courts; and the record before us exhibits . . . a wrangle in writing extending over more than twenty pages.”<sup>74</sup> The real problem for the Court was not the number of pages but their content. A routine common-law complaint would have consisted of a single page with largely formulaic pleas (many of them fictitious). But Texas's equity-like procedures called for pleading the facts of the case, telling the story of an illegal importation of Africans. This story was irrelevant to the Court, because “[t]he buying and selling of negroes, in a State where slavery is tolerated, and where color is *primâ facie* evidence that such is the *status* of the person, cannot be said to be an illegal contract, and void on that account.”<sup>75</sup> The chain of bona fide purchase agreements was not to be entangled with the narrative rope relating the inequities of the property's origination.<sup>76</sup>

In the same Term, Chief Justice Taney excoriated the Texas district court for permitting a jury to assess the value of enslaved persons rather than holding a bench trial in an equitable action for account.<sup>77</sup> The lapse, Taney believed, perfectly illustrated the limits of federal conformity with state practice: state codes could not “govern the proceedings in the courts of the United States . . . as authorizing

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the Conformity Act of 1872, see generally 2 BENJAMIN VAUGHN ABBOTT, *A TREATISE UPON THE UNITED STATES COURTS, AND THEIR PRACTICE: EXPLAINING THE ENACTMENTS BY WHICH THEY ARE CONTROLLED; THEIR ORGANIZATION AND POWERS; THEIR PECULIAR JURISDICTION; AND THE MODES OF PLEADING AND PROCEDURE IN THEM* (New York, Diossy & Company 1871).

73 52 (11 How.) U.S. 493, 502 (1851).

74 *Id.* at 517.

75 *Id.* at 520.

76 *See id.* The Court's condemnation of “code” procedure in Texas was somewhat imprecise. Despite its civilian heritage, Texas did not enter the Union with a procedure code, and it was the only jurisdiction west of the Mississippi River to reject the Field Code. *See* Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 134, 161 (2018). Nevertheless, Texas's simple narrative pleadings essentially tracked with the Field Code prescription. *See* William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 717–21 (2013).

77 *See* *Bennett v. Butterworth*, 52 U.S. (11 How.) 669, 676–77 (1851).

legal and equitable claims to be blended together in one suit.”<sup>78</sup> To say the Taney Court was suspicious of federal action on the domestic law of slavery would be an understatement, but its fusion-resistant jurisprudence showed that its concerns could often be addressed in the same fashion Congress had provided for in its earliest statutes: federal equity simply had to be walled off from state practice.

To be sure, the Justices grouched about the fusion of law and equity in cases that did not involve slavery. Justice Robert Cooper Grier, the author of *Randon*, frequently decried the rash substitution of traditional practice with “the suggestions of sciolists, who invent new codes and systems of pleading to order.”<sup>79</sup> In an 1858 opinion, Grier wrote for the Court that fusion “is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things.”<sup>80</sup>

It can be difficult for us who live on the other side of federal fusion to appreciate the threat that Grier and his contemporaries perceived in the prospect of a merged system of law and equity. The rigidity of common-law pleading was not suddenly discovered in 1850. Jurists long before then had recognized that short, general, often fictitious pleas suppressed the backstory of a complaint and left the ambiguous complications of any given case shorn from the record. That was the point. Common-law pleading was valued not for what was said in the pleas but for all that could be left unsaid. Where the rules of generality worked injustice in a particular case—where, for instance, actionable fraud was left out of the backstory—equity stood by to render assistance. But for jurists like Grier, equity’s role was not to turn routine litigation on a promissory note into a wide-ranging debate on the justice of chattel slavery.

Anti-fusion was a consistent stance in the antebellum federal courts, from Congress’s enabling legislation in the 1790s to the Supreme Court’s decisional law of the 1850s. Where federalism arose as an explicit concern, it was often subordinated to this anti-fusionist stance. Federal equity had to follow federal law, not to protect state process from federal disruption, but to protect federal equity from the corrosive practices of the states.

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78 *Id.* at 674.

79 *McFaul v. Ramsey*, 61 (20 How.) U.S. 523, 525 (1858). *See also* *Green v. Custard*, 64 (23 How.) U.S. 484, 485–86 (1860) (Grier, J.); *Farni v. Tesson*, 66 (1 Black) U.S. 309, 315 (1862) (Grier, J.).

80 *McFaul*, 61 U.S. at 525. Grier’s complaint was shared by many common-law lawyers. *See Funk, supra* note 61, at 183–86.

### III. THE RECONSTRUCTION OF CHANCERY'S REACH

It is a well-known story that the Reconstruction Amendments reversed the Taney Court on the legal personhood and citizenship of slaves and freedmen. What is far less well understood is how extensively the Reconstruction Congress also overthrew the Taney Court jurisprudence on fusion and federalism. Two statutes were foundational to this effort: the removal provision of the Civil Rights Act of 1866, and the opening section of the 1871 Ku Klux Klan Act, our modern 42 U.S.C. § 1983. This Part takes up these two well-known statutes and seeks to relate their significance to the history of fusion and equity's federalism.

Still on the books today, the civil rights removal law was the most sweeping conferral of federal question jurisdiction on the lower courts until 1875.<sup>81</sup> Enacted before the Fourteenth Amendment, the Civil Rights Act of 1866 defined national citizenship and committed the government to protecting an enumerated list of civil rights.<sup>82</sup> Section 3 of the Act empowered both civil and criminal defendants in state tribunals to remove cases against them to a federal court if these rights were “denied or cannot [be] enforce[d] in the courts or judicial tribunals of the State or locality where they may be.”<sup>83</sup> Congress recognized that removal might shift a great deal of unfamiliar proceedings into the federal courts, including misdemeanor prosecutions, or actions sounding in probate or guardianship. Contrary to the old Rules of Decision Act and Process Acts, the removal provision instructed federal courts to apply federal law where they could, but whenever federal law ran out, “the common law, as modified and changed by the constitution and statutes of the State . . . shall be extended to and govern [federal] courts in the trial and disposition of [a] cause.”<sup>84</sup>

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81 The Civil Rights Act of 1866, ch. 31, 14 Stat. 27, (codified inter alia at 28 U.S.C. § 1443 (2018)). Until Congress enacted our current 28 U.S.C. § 1331 in 1875, the lower federal courts exercised only a very limited federal question jurisdiction, extending mostly to cases removed by federal customs officers and, after 1866, civil rights defendants. See generally Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986).

82 The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified inter alia at 28 U.S.C. § 1443 (2018)) (“[T]o make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property”).

83 *Id.* at § 3.

84 *Id.* Whereas *Swift v. Tyson* (41 (16 Pet.) U.S. 1 (1842)) had read “laws of the several states” in the Rules of Decision Act to mean only state statutes, leaving room for the development of an expansive federal common law, *Id.* at 18–19, the Reconstruction Congress required courts to apply the “common law” of the states except where the “laws of the United States,” likely meaning only statutory law, clearly governed. The Civil Rights

Civil rights removal made two things clear. First, the Reconstruction Congress valued federal courts for their personnel more than for their practices. The removal act was one of several during the period in which Congress left state substantive law and procedure largely intact but substituted federal judges or commissioners to make the decisions at every step from mesne process to final judgment and appeal.<sup>85</sup> Second, federal lawmakers had devised removal in a way that substituted the conventional back-and-forth dialogue of law and equity with a much more categorical ouster of one jurisdiction (the state's) in favor of another (the federal), all necessarily enforced by a federal equitable decree. To effect this, the Civil Rights Act incorporated by reference an earlier officer removal provision that required a state court to "proceed no further in the cause or prosecution" removed.<sup>86</sup> Although the Anti-Injunction Act was never referenced, jurists understood that Congress had superseded its anti-injunction statute with the new removal statute.<sup>87</sup> In the 1790s, federal injunctions were restricted to insulate federal equity from state procedure and to force litigants to proceed in state courts if they had opted to begin there. After the Civil Rights Act of 1866, federal injunctions kept the legal and equitable aspects of a case together while forcing the whole litigation into a federal court at the option of defendants with civil rights claims.

Section 1983 further extended these two aims. Finding persistent "outrages" that included voter intimidation, midnight raids, whippings, and even murders of freedmen and white southern allies, Congress created an original cause of action for "the deprivation of any rights" secured by the Constitution.<sup>88</sup> A plaintiff injured by "any

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Act of 1866, ch. 31, § 3, 14 Stat. 27, 27. The reversal prefigured the regime that would take hold after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

85 See, e.g., An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 80, 12 Stat. 755 (1863); An Act to Continue in Force and to Amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees," and for Other Purposes, ch. 200, 14 Stat. 173 (1866); An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867); An Act to Further the Administration of Justice, ch. 255, 17 Stat. 196 (1872).

86 The Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (permitting removal "in the manner prescribed" in the Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755).

87 See, e.g., COMM. ON THE JUDICIARY HOUSE OF REPRESENTATIVES, REVISION OF TITLE 28, UNITED STATES CODE, H.R. REP. NO. 80-308, at A181 (1947) (construing injunctions against proceeding in removed cases as a power necessarily "in aid of" a federal court's jurisdiction); *Mitchum v. Foster*, 407 U.S. 225, 234 n.12 (1972) (construing the Civil Rights Act to create an explicit exception to the Anti-Injunction Act).

88 An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (2018)). For the background history of southern violence and Congress's response in the Enforcement Acts, see Robert J. Kaczorowski, *Federal Enforcement of Civil*

person” acting “under color of any [State] law” could bring an “action at law, suit in equity, or other proper proceeding for redress.”<sup>89</sup> Jurisdiction was conferred upon the lower federal courts, and once again Congress incorporated state practice and procedure to fill in the gaps as it had in the civil rights removal provision.<sup>90</sup>

Jurists have long debated whether Congress really intended § 1983 to disrupt or displace judicial proceedings at the state level.<sup>91</sup> But most of this debate has been carried on without reference to the legislative drafts that preceded the 1871 Act. Professor Achtenberg’s meticulous research has shown that § 1983 originated in a bill proposed by Senator Frederick Frelinghuysen a couple weeks before the House took up its own version of the Ku Klux Klan Act.<sup>92</sup> Frelinghuysen’s bill created an original cause of action at law or in equity just as the House bill did, but Frelinghuysen further specified that federal courts had “power to issue injunctions and other proper process for enforcing such jurisdiction.”<sup>93</sup> Such a formulation appears to be unprecedented in federal legislation up to this time but was probably crafted to mirror the Anti-Injunction Act’s prohibition on issuing the “writ of injunction” against state courts.<sup>94</sup>

The express reference to enjoining state proceedings was removed from the final draft, but the substantive power was not. As the House sponsor Samuel Shellabarger made clear in his speech opening the debate, his changes to Frelinghuysen’s text were a matter

*Rights During the First Reconstruction*, 23 *FORDHAM URB. L.J.* 155 (1995); MARK WAHLGREN SUMMERS, *THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION* 255–77 (2014).

89 An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (2018)).

90 *Id.* (“[S]ubject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six.”).

91 See, e.g., Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism*, A Brief Historical Overview, 11 *J. CONST. L.* 1381 (2009); George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 *VA. L. REV.* 925 (2003); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 *STAN. L. REV.* 51 (1989); Eric H. Zagrans, “Under Color of” What Law: A Reconstructed Model of Section 1983 Liability, 71 *VA. L. REV.* 499 (1985). See also, e.g., *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Mitchum v. Foster*, 407 U.S. 225 (1972).

92 See David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 *UTAH L. REV.* 1, 56 (1999).

93 S. 243, 42d Cong. (1871), available in Achtenberg, *supra* note 92, at 61–63.

94 See Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 334–35 (codified at 28 U.S.C. § 2283 (2018)).

of style.<sup>95</sup> Fearful of losing moderate Republican support over questions of constitutionality, Shellabarger repeatedly emphasized to the House how closely he had made the text of § 1983 track with the Civil Rights Act of 1866, an unquestionably constitutional statute that, indeed, the Fourteenth Amendment had been ratified to uphold.<sup>96</sup> The removal provision of the Civil Rights Act had secured federal jurisdiction to suspend state proceedings by incorporating prior legislation.<sup>97</sup> Shellabarger followed suit by incorporating the procedural and remedial provisions of the Civil Rights Act, including the removal section.<sup>98</sup> The whole formed an elegant symmetry: whereas *defendants* could escape biased state courts and enjoin their further proceedings through civil rights removal, now *plaintiffs* could avoid state courts and enjoin parallel proceedings through § 1983.

While President Grant deployed the other provisions of the Ku Klux Klan Act successfully to eradicate the Klan in the Carolinas,<sup>99</sup> the success of civil rights removal and original causes of action under § 1983 was far more uneven. Thousands of cases quickly overwhelmed federal dockets—the District of Kentucky saw its caseload triple in the early 1870s—and extreme delays became common.<sup>100</sup> Soon enough the Supreme Court lent its hand to the forces of reaction. Landmark cases imposed an overly rigid state action doctrine that was blind to the

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95 Achtenberg writes that Shellabarger's stylistic changes are "of interest only to students of bad writing." Achtenberg, *supra* note 92, at 51. But this humorous observation misses what Shellabarger was after. The point was not baroque for its own sake, but to mimic the baroque yet indisputably constitutional formulations of the Civil Rights Act. The other radical supporters of the Ku Klux Klan Act did not find the change material. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871) (statement of Sen. Frelinghuysen) (urging the passing of a bill reflecting the policies of his S. 243 but using the language of the current draft of H.R. 320 (§ 1983)); see *id.* at 776–77 (arguing against an amendment that altered what his committee had endorsed when considering early drafts of S. 243 and H.R. 320). The ultra-radical Benjamin F. Butler, whose own version of § 1983 would have had an army of federal commissioners supervising and restraining state court proceedings in every southern locality, believed the draft as amended accomplished all his proposal had set out to do. See CONG. GLOBE, 42d Cong., 1st Sess. 441–52 (1871) (statement of Rep. Butler). Many of Butler's opponents agreed with him. See CONG. GLOBE, 42d Cong., 1st Sess. 351, 353 (1871) (statement of Rep. Beck); *id.* at 365 (statement of Rep. Arthur); *id.* at 398 (statement of Rep. Roosevelt); CONG. GLOBE, 42d Cong., 1st Sess. 91 (1871) (statement of Rep. Duke). For the details of Butler's prescription, see Achtenberg, *supra* note 92, at 7–11, 64–74.

96 See CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871) (statement of Rep. Shellabarger).

97 See *supra* note 84.

98 See An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871).

99 See Kaczorowski, *supra* note 88, at 179–80.

100 See ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 42 (2d ed. 2005).

ways state officials condoned putatively private violence.<sup>101</sup> Civil rights removal was nearly obliterated when the Court held in 1880 that racial discrimination had to appear on the face of state legislation before removal could be authorized.<sup>102</sup> Civil plaintiffs increasingly learned their lesson and filed their claims on the diversity docket as the surer path to federal jurisdiction.<sup>103</sup> But key to the story of equity's federalism, the Civil Rights Act and § 1983 at least remained on the books, where they could be rediscovered in a later era.

#### IV. RECONSTRUCTION REMEMBERED IN THE ERA OF EQUITY'S PUBLIC LAW

The twentieth century opened with a full reversal of the anti-fusion stance formerly adopted by federal jurists. At the same time, equity's reach was made to extend further beyond the traditional private law boundaries known to the old courts of chancery. By midcentury, the availability of public law injunctions on the menu of federal court remedies made federal equity quite potent indeed. At first, the Supreme Court eagerly recalled the lessons—and the history—of Reconstruction as it deployed remedies against state violations of constitutional rights. But over time, the Court gave up on Reconstruction's history and tried instead to put a novel twist on the maxim that *equity follows the law*. From a principle of anti-fusion before the War, the maxim was reborn as a timeless principle of federalism. This Part surveys these developments in turn.

##### A. *Fusion in the Federal Rules*

“Equity conquered common law” in the 1938 Federal Rules of Civil Procedure, Professor Subrin has written.<sup>104</sup> The Federal Rules brought an end to the statutory distinction between law and equity by declaring there to be “one form of action—the civil action.”<sup>105</sup> Old legislation forbidding “suits in equity . . . in any case where [a] plain,

101 See *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875). See also HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 488–97 (1982).

102 See *Virginia v. Rives*, 100 U.S. 313, 319–20 (1879); see also Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 843–50 (1965).

103 See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 80 (1997).

104 Subrin, *supra* note 58, at 909.

105 FED. R. CIV. P. 2. The Rules of Decision Act followed suit by making state law the “rules of decision in civil actions” when federal courts exercised diversity jurisdiction. 28 U.S.C. § 1652 (2018).

adequate and complete remedy may be had at law” was cast aside.<sup>106</sup> Rule 54 made clear that “a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both.”<sup>107</sup> The fusion of law and equity, as Subrin notes, generally entailed the diffusion of equitable procedures and remedies to all cases coming before the federal bar. Judges gained enhanced powers to order discovery, aggregate claims, and terminate cases with vanishing reliance on (or impediments from) juries.<sup>108</sup>

The codification of federal procedure was fairly rapid, but the turn toward fusion was not. David Dudley Field called for federal fusion as president of the American Bar Association in 1888.<sup>109</sup> William Howard Taft pressed for fusion after joining the Supreme Court in 1922.<sup>110</sup> Professor Burbank has documented how legislation stalled many times as Populists battled Progressives for control over the courts.<sup>111</sup>

While a full account of the dramatic change from the staunchly anti-fusionist stance of the antebellum federal courts has yet to be written, the mere changing of the generations no doubt played some role. The main draftsman of the Federal Rules, Charles E. Clark, took up the academic study of code procedure as a young law professor and was quite struck by the “cold, not to say inhuman, treatment which the infant Code received from the New York judges.”<sup>112</sup> If Field’s experiments had not proven a success, Clark believed, it was only because they had never really been tried. Free from New York’s backward-looking jurists, the federal courts under Clark’s code were to show the nation how fusion could be done.<sup>113</sup>

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106 An Act to Establish the Judicial Courts of the United States, ch. 20, § 16, 1 Stat. 73, 82 (1789) (repealed 1948).

107 REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, *supra* note 61, at 135; FED. R. CIV. P. 54(c).

108 Subrin, *supra* note 58, at 934; John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 555–56, 567–72 (2012).

109 See AM. BAR ASS’N, REPORT OF THE ELEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 69–70 (Philadelphia, Dando Printing. & Publishing Co. 1888).

110 Burbank, *supra* note 58, at 1048, 1070–71.

111 See *id.* at 1069–94.

112 *McArthur v. Moffett*, 128 N.W. 445, 446 (Wis. 1910). The quotation was a favorite of Clark’s. See Charles E. Clark, *A Striking Feature of the Proposed New Rules—Change in Bar’s Attitude Towards Improved Procedure—What Particularly Interested the Lawyers*, 22 A.B.A.J. 787, 787 (1936); Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 2–3 (1925) [hereinafter Clark, *The Union of Law and Equity*].

113 See Clark, *The Union of Law and Equity*, *supra* note 112.

### B. *Public Law Equity*

While federal jurists traveled the slow road to fusion, equity practice in America was bursting its traditional bounds. English equity performed only private law functions. The Court of Chancery was occupied with claims between private parties involving trusts and a routinized interference in private contract and property cases at common law.<sup>114</sup> Public law functions were mostly taken up by the Courts of Common Law through the prerogative writs like mandamus and certiorari that could supervise and at times restrain the illegal acts of the crown's servants.<sup>115</sup> Criminal equity was snuffed out by the Puritan abolition of Star Chamber; after the seventeenth century, it was practically a maxim of chancery that equity did not interfere in criminal matters.<sup>116</sup>

These conventions of English equity were seriously challenged by American practice in the twentieth century, at both the state and the federal levels.<sup>117</sup> Economic recessions in the Gilded Age meant that bankrupt railroad corporations were entering equitable receiverships at the same time that striking workers were destroying property under the new management of courts and public officers.<sup>118</sup> Injunctions and counter-injunctions hopelessly confused the lines between public and private equitable decrees,<sup>119</sup> when the Court ruled definitively in *Ex parte Young* that federal equity could restrain the unconstitutional acts

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114 See generally, e.g., 1 GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* (Philadelphia, Lea & Blanchard 1846); 2 GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* (London, V. & R. Stevens & G.S. Norton 1850).

115 On the common-law prerogative writs and their gradual merger with American equity, see James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1304, 1336 (2020); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011).

116 See Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570–1640*, 51 AM. J. LEGAL HIST. 639, 705 (2011); F.W. MAITLAND, *EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW* 260 (A.H. Chaytor & W.J. Whittaker eds., 1910).

117 On the tensions wrought by fusion of law and equity in New York, see, for instance, CHARLES FRANCIS ADAMS, JR. & HENRY ADAMS, *CHAPTERS OF ÉRIE, AND OTHER ESSAYS* 1–99 (Boston, James R. Osgood & Company 1871).

118 See Donald L. McMurry, *The Legal Ancestry of the Pullman Strike Injunctions*, 14 INDUS. & LABOR RELATIONS REV. 235, 236–38 (1961). See also Seth Davis, *Implied Rights of Action*, 114 COLUM. L. REV. 1, 21 (2014) (noting the federal government's property interest in the U.S. mail as a ground for equitable intervention).

119 Cf. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 515–16 (1954) (attempting to shore up the distinction between prohibitive and affirmative injunctions).

of state enforcement officers, including criminal prosecutions.<sup>120</sup> Fearful that federal equity would overprotect commercial interests, an increasingly Progressive Congress responded with a procedural brake. Injunctions against state officers enforcing state laws would have to go before a panel of three lower court judges with a mandatory right of appeal to the Supreme Court.<sup>121</sup>

School desegregation cases in a later era reflected both sides of the *Young* settlement. Federal equity could reach down to the lowest officers of local school boards and demand action, yet three-judge panels operating at “all deliberate speed”<sup>122</sup> and interlocutory appeals slowed the pace of reform.<sup>123</sup> Nevertheless, desegregation cases fired the imaginations of a generation of jurists on what federal equity might be, just as the labor controversies had instructed an earlier generation on the perils of equity. In 1930, Felix Frankfurter published *The Labor Injunction* to advise Congress on how to avoid “[g]overnment by injunction,” that is, government by federal injunction of state officers.<sup>124</sup> Fifty years later, Owen Fiss published *The Civil Rights Injunction* as something of a field guide for suing state officers in federal equity.<sup>125</sup>

### C. Reconstruction’s Revival

As the Civil Rights Movement expanded its focus from schools to police departments, the Supreme Court developed competing historical visions to describe the competing imperatives from Congress: one encouraging equitable intervention and the other equitable restraint. Both were on full display in *Monroe v. Pape*, a case with claims that sounded in common law but that presaged broader application in a federal system which had at last followed the states into fusion.<sup>126</sup>

The *Monroe* litigation was part of a systematic effort by the American Civil Liberties Union to make § 1983 an effective vehicle for

120 The story of *Young* has been told from many angles, each drawing a different lesson. For an overview, see David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011).

121 Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 103 (2008).

122 *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955).

123 See generally PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* (1990); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

124 FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION I* (1930). At Frankfurter’s urging, Congress significantly restricted federal courts’ power to issue labor injunctions in the Norris-LaGuardia Act of 1932. See Mathew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. 6 (2014).

125 OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978).

126 365 U.S. 167, 169–72 (1961).

challenging police abuses in federal court.<sup>127</sup> Despite the possibility of injunctive relief under *Ex parte Young*,<sup>128</sup> the *Monroe* team was convinced that even small damages actions, gradually accumulating against the budgets of police departments, would spur more meaningful reform.<sup>129</sup> The difficulty was that without modern class action procedures, each case presented just one instance of abuse, usually concerning conduct that was already proscribed and at least theoretically punishable in state courts.<sup>130</sup> Did § 1983 permit federal jurisdiction over such local, apparently one-off claims in lieu of state proceedings? To make the affirmative case, the *Monroe* team scoured the legislative record of the Forty-Second Congress and submitted hundreds of pages arguing that *Monroe* was exactly the kind of case § 1983's proponents expected (and its opponents feared) would come before the federal bar.<sup>131</sup>

In one of the great ironies of the Court's history, the close reading and skillful archival work of the *Monroe* team garnered the unfading admiration of the rustic William O. Douglas while provoking the ire of the Court's resident academic Felix Frankfurter. While there were precedents enough to support *Monroe's* reading of "under color of" state law,<sup>132</sup> Douglas opened the opinion and rested his holding on the force of legislative history. Thrice he reminded readers that § 1983 was once known as the Ku Klux Klan Act, premised on distrust that state courts would enforce facially legitimate state laws equally.<sup>133</sup> The opinion cited congressmen's statements from the *Congressional Globe* over thirty times to conclude, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused

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127 See Philip O'Sullivan, *Putting a Check on Police Violence: The Legal Services Market, Section 1983, Torture, Abusive Detention Practices, and the Chicago Police Department from 1954 to 1967*, 56 HARV. C.R.-C.L. L. REV. (forthcoming 2022) (manuscript at 6).

128 *Young* and rulings like it had not been premised on § 1983. See Woolhandler, *supra* note 103, at 100. Some have supposed the Fourteenth Amendment's Due Process Clause directly grounds a cause of action for injunctive relief against the unconstitutional acts of state officers. See RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 927 (7th ed. 2015).

129 Although numerous suits succeeded, the expected incentive effects did not materialize. See O'Sullivan, *supra* note 127, at 42–45. See also Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 952–60 (2014).

130 See Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 330 (2017).

131 For further discussion of the contents of the briefing, see Sheldon Nahmod, *Section 1983 Is Born: The Interlocking Supreme Court Stories of Tenney and Monroe*, 17 LEWIS & CLARK L. REV. 1019, 1044–45 & n.144 (2013).

132 See *Screws v. United States*, 325 U.S. 91, 107–08 (1945); *United States v. Classic*, 313 U.S. 299, 325 (1941).

133 *Monroe v. Pape*, 365 U.S. 167, 171, 172, 185 (1961).

before the federal one is invoked.”<sup>134</sup> Although Douglas’s loyalty to any particular interpretive theory could be fleeting,<sup>135</sup> he remained strongly committed to the historical approach to § 1983 to the end of his career.

Where Douglas was welcoming of Reconstruction’s history, Frankfurter was dismissive. Tasking his law clerk to peruse 400 pages of the *Congressional Globe*, Frankfurter announced that “under color of” law was barely mentioned, and what little discussion existed was consistent with Frankfurter’s conclusion that misconduct had to be the official policy of a state before a federal action could lie.<sup>136</sup> Relying on recent Civil War historiography that viewed the War and its aftermath as a tragic accident of overheated rhetoric, Frankfurter discounted the statements of Radical Republicans on which Douglas relied.<sup>137</sup>

Instead, Frankfurter emphasized the moderate Republican James Garfield’s view that “when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.”<sup>138</sup> The selection of that quotation was telling, because Garfield had not made the statement in reference to § 1983 but as a general observation of how he read § 1 of the Fourteenth Amend-

134 *Id.* at 183.

135 See NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES (2010); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 81 (1988).

136 Frankfurter described his methods and laid out his views in a fifty-three-page memo circulated to the conference, much of which became the basis of his dissenting opinion in *Monroe*. Memorandum for the Conference, Re: No. 39—*Monroe v. Pape* (Nov. 9, 1960) (on file with author). The clerk in question was Professor Anthony Amsterdam, who appears not to have taken his Justice’s history lessons to heart. See Amsterdam, *supra* note 102, at 856–57 (arguing that legislative history from Reconstruction supported federal suspension of state court proceedings). The memo with a cover letter can be found in the Papers of William O. Douglas, Library of Congress, Box 1246, No. 39.

137 *Monroe*, 365 U.S. at 225 & n.35 (Frankfurter, J., dissenting) (citing with approval the “dispassionate appraisal” of J.G. RANDALL, THE CIVIL WAR AND RECONSTRUCTION 724–30 (1937)). Randall’s account of *The Blundering Generation*, 27 MISS. VALLEY HIST. REV. 3 (1940), was intended to revise the interpretation, announced by Lincoln’s Secretary of State William Seward and propounded by Randall’s contemporary W.E.B. Du Bois, that the Civil War had been a “irrepressible conflict” between a southern slave society and an increasingly liberal democratic North. Randall’s volume became the standard text on Reconstruction for decades, while Du Bois’s was ignored, not even noticed in the *American Historical Review*. See Georg G. Iggers, *The Historian as an Engaged Intellectual: Historical Writing and Social Criticism—A Personal Retrospective*, in THE ENGAGED HISTORIAN: PERSPECTIVES ON THE INTERSECTIONS OF POLITICS, ACTIVISM AND THE HISTORICAL PROFESSION 277, 285–86 (Stefan Berger, ed., 2019).

138 *Monroe*, 365 U.S. at 231 n.47 (Frankfurter, J., dissenting) (quoting remarks of Rep. Garfield, CONG. GLOBE APP., 42d Cong., 1st Sess. 154 (1871)).

ment.<sup>139</sup> While Frankfurter doubted that Congress meant to confer jurisdiction up to the limits of the Fourteenth Amendment, he did not think Congress's intent had to be determined, because the Constitution itself could not reach *Monroe's* case.<sup>140</sup> Section 1983, Frankfurter concluded, had to "accord[] with the presuppositions of our federal system," chief among them that "the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism."<sup>141</sup> The radical views of the drafters of an act to enforce the Fourteenth Amendment could thus be conveniently ignored.

#### *D. Federal Equity Follows State Law*

Over time, the Justices continued to argue with one another about Reconstruction's history as they applied § 1983, sometimes with Douglas's views commanding a majority,<sup>142</sup> sometimes Frankfurter's.<sup>143</sup> A decade after *Monroe*, the Court considered what to do with § 1983's grant of federal equity power. Given that federal courts had jurisdiction to award remedies whether or not state courts would hear the federal claim, what happened if state courts were in the process of hearing such claims? Could these proceedings be equitably enjoined as they could under the removal statutes?<sup>144</sup> In two cases decided in consecutive terms, the Court gave two contrary answers.

139 Frankfurter noted that Garfield's statements were directed at § 3 of the draft Ku Klux Klan Act and not what became § 1983. *Id.* Frankfurter did not contend with the fact that Garfield explicitly pressed for an amendment limiting federal court jurisdiction to cases of "systematic maladministration" by state officials but was rebuffed by the bill's sponsor, Samuel Shellabarger. *See* CONG. GLOBE APP., 42d Cong., 1st Sess. 153–54 (1871).

140 *See Monroe*, 365 U.S. at 202 (Frankfurter, J., dissenting).

141 *Id.* at 237.

142 *E.g.*, *Mitchum v. Foster*, 407 U.S. 225 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

143 *E.g.*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Younger v. Harris*, 401 U.S. 37 (1971).

144 Although civil rights removal was moribund after the Court's decision in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), legislation in 1875, now codified at 28 U.S.C. § 1441, gives defendants (originally both parties) broad rights to remove almost any case that could have been originally filed in federal court. Despite no textual reference to equitable injunctions in aid of enforcing this jurisdiction, the consensus of authorities has long maintained such decrees do not come under the bar of the Anti-Injunction Act. *See supra* note 40.

*Younger v. Harris* involved the criminal prosecution of several California professors for teaching “the doctrines of Karl Marx.”<sup>145</sup> Going only off the majority opinion by Justice Black, one could hardly guess that Harris’s claim was brought under § 1983. The statute and its history were nowhere mentioned in the opinion; the cause of action was left unstated. Yet the opinion did not lack a historical recounting. “Since the beginning of this country’s history, Congress has . . . manifested a desire to permit state courts to try state cases free from interference by federal courts,” Black’s opinion began.<sup>146</sup> And the beginning of the nation’s history remained Black’s theme. “The Framers rejected” both “centralization” and “blind deference” to state courts.<sup>147</sup> They believed “that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”<sup>148</sup> This ideal Black famously described as “Our Federalism” and rhapsodized, “It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”<sup>149</sup>

Initially, Black’s opinion said almost nothing at all about equity. Our Federalism, paired with the Anti-Injunction Act, grounded the holding. After ruling that the Anti-Injunction Act trumped § 1983, Black’s first draft of *Younger* concluded that “the policy of state trials of state crimes is too much a part of the warf and woof of our society, too essential a part of our Federalism to be lightly sacrificed.”<sup>150</sup> But that holding apparently could not keep a majority. Black subsequently abandoned his analysis of the Anti-Injunction Act (and with it all mention of § 1983). Perhaps in response to Douglas’s stinging dissent, Black dropped the “warf and woof” line and added the defense that “[t]he concept” of Our Federalism did “not mean blind deference to

145 401 U.S. at 42.

146 *Id.* at 43.

147 *Id.* at 44.

148 *Id.*

149 *Id.* at 44–45. “Our Federalism” had no clear referent as a “slogan.” Indeed, Black’s initial draft did not capitalize the phrase or set it off in quotation marks. *Younger v. Harris* (C.D. Cal.) (draft opinion) (on file with author). The phrase crops up several times without systematic elaboration in the decisions of Justice Frankfurter, including in his *Monroe* dissent quoted above. Cf. John M. Harlan, *The Bill of Rights and the Constitution: An Excerpt from an Address*, 64 COLUM. L. REV. 1175, 1176 (1964) (“And it should further be observed that our federalism not only tolerates, but encourages, differences between federal and state protection of individual rights, so long as the differing policies alike are founded in reason and do not run afoul of dictates of fundamental fairness.”).

150 *Younger v. Harris*, at [9] (C.D. Cal.) (draft opinion) (on file with author), available in Papers of Hugo Lafayette Black, Library of Congress, Box 438 [hereinafter Papers of Hugo Lafayette Black].

‘States’ Rights’”—the only allusion to nineteenth-century history that appeared anywhere in the final opinion.<sup>151</sup>

Now without a statute for his ground, Black switched to equity. The revised draft suddenly identified the maxim that equity followed the law as among “the primary sources of the policy” of Founding-era federalism, but Black turned the maxim in new directions.<sup>152</sup> Laying out the traditional principle that “courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law,” Black’s *Younger* opinion treated the criminal prosecution itself as the adequate remedy that extinguished equity’s jurisdiction.<sup>153</sup> Up to this point, “adequate at law” had been a term of art used to refer to money damages and the common-law pleadings that secured them.<sup>154</sup> *Younger* took the phrase and vacated its law and equity distinction, replacing it with a state and federal one. Now any state forum that would hear a federal claim—whether or not it would actually provide relief—could preclude the federal hearing. Equity no longer followed the law in the sense that chancery came behind to cure the deficiencies of common-law remedies, but rather in the sense that federal jurisdiction obtained only after states had finished with the claim.<sup>155</sup>

Douglas’s lone dissent chided the majority for gushing over eighteenth-century history while ignoring all that came after.<sup>156</sup>

151 *Younger*, 401 U.S. at 44.

152 *Id.* at 43.

153 *See id.* at 43–44; *see also* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.

154 *See supra* notes 18, 55. *See also* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82; *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 569 (1939) (“By long-settled construction, the accepted test of legal adequacy . . . is the legal remedy which the federal, rather than state, courts afford.”).

155 Once a state has finished with a claim, the usual path to federal court is certiorari to the Supreme Court, not review in fact-finding federal trial courts under § 1983. Further, the Court’s increasing discretion to order certiorari of state court decisions calls into question whether “the judicial power of the United States [shall] be called into play at all.” Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1728 (2000). *Younger* was neither the first nor the last time the Court announced a broad rule of equitable “abstention” from exercising federal jurisdiction. *See, e.g.*, *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (although the equitable nature of *Colorado River* abstention is open to some doubt). *Younger* abstention is, however, significantly harsher than the other varieties. *See Colorado River*, 424 U.S. at 816 n.22 (noting that “[w]here a case is properly within this category of [*Younger*] cases, there is no discretion to grant injunctive relief”). At least as crafted by its principal author, Justice Frankfurter, *Pullman* abstention was to be at most a *delay* rather than a *declination* of federal jurisdiction. *See* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1163–87 (1974).

156 *Younger*, 401 U.S. at 58 (Douglas, J., dissenting). Justices Stewart and Harlan concurred but wrote separately to make clear the Court was not reaching a decision on the

“Whatever the balance of the pressures of localism and nationalism prior to the Civil War, they were fundamentally altered by the war.”<sup>157</sup> Because Douglas wrote his dissent right after receiving Black’s first draft, he focused his arguments on the Anti-Injunction Act.<sup>158</sup> Relying on his *Monroe* opinion, Douglas argued that § 1983 was an “express” exception to the 1793 Act.<sup>159</sup> Given the legislative context and the breadth of the jurisdiction conferred, there was “no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century to control another statute also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War.”<sup>160</sup> Douglas did not revise his dissent after Black shifted his grounds to federal equity. Thus, the majority’s dramatically altered reading of “adequate at law” passed without further remark.

Douglas’s views prevailed the very next Term in *Mitchum v. Foster*, a case challenging a municipal obscenity ordinance in Florida.<sup>161</sup> In the period between the retirement of Justice Black and the seating of his successor, the Court revisited the question of how § 1983 was to operate under the Anti-Injunction Act.<sup>162</sup> Sidestepping the application of *Younger*, the Court ruled that § 1983 was indeed an “express” exception to the Act, although the expression became clear only in the light of § 1983’s Reconstruction context. Guided by a remarkable 200-page memo submitted by his clerk, Justice Potter Stewart issued a unanimous ruling that carefully retraced the legislative history of § 1983.<sup>163</sup>

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scope of the Anti-Injunction Act. *Id.* at 54–56. Justices Brennan, White, and Marshall concurred only in the result. *Id.* at 56–58. For an explanation of Justice Brennan’s concurrence, see Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1120–22 (1977).

157 *Younger*, 401 U.S. at 61 (Douglas, J., dissenting).

158 Compare Douglas’s published dissent with that received by Black after the initial, pre-equity draft of *Younger* circulated, Papers of Hugo Lafayette Black, *supra* note 150.

159 *Younger*, 401 U.S. at 62 (Douglas, J., dissenting).

160 *Id.*

161 407 U.S. 225 (1972). Apparently the Court had been sharply divided before Black’s departure. Douglas circulated a draft dissent on April 16, 1971, before the Court came around to his views. See Papers of William O. Douglas, *supra* note 136, Box 1520, No. 876.

162 Justice Harlan had also retired. The new Justices, Powell and Rehnquist, were not seated in time to participate in *Mitchum*. See *Mitchum*, 407 U.S. at 225.

163 The memo was written by James Bieke, now a partner at Sidley Austin LLP. It proposed several steps the Court should take to conform its jurisprudence to the original intent of § 1983’s framers. Memorandum from Justice Potter Stewart to the Conference (Dec. 20, 1971) (on file with author), available in Papers of William J. Brennan, Library of Congress, Box I:259, No. 70-27. Justice Stewart authored opinions following the memo’s recommendations in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Once again, citations to the *Congressional Globe* dominated the Court's opinion, including entries that had been missed in the *Monroe* litigation such as the biblical prose of Congressman Aaron F. Perry:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.<sup>164</sup>

Although much criticized for creating an implied express exception,<sup>165</sup> *Mitchum's* holding offered a plausible reading of the original statutes if one agreed with the Court that the removal statutes incorporated by § 1983 were themselves express exceptions to the Anti-Injunction Act.<sup>166</sup>

After the back-to-back decisions in *Younger* and *Mitchum*, the lower federal courts were left in an unenviable dilemma. Were they supposed to suspend state proceedings in § 1983 actions or not? Was the eighteenth century to be their primary guide, or the nineteenth? Understandably, few lower courts had followed the Supreme Court into the century-old *Congressional Globe* in crafting their § 1983 rulings. But *Monroe* and now *Mitchum* had treated the legislative history as essential to the correct application of the statute. Finally in 1972, the Seventh Circuit became the first lower court to issue a major opinion grounded on the historical background of § 1983.

The case, *Littleton v. Berbling*,<sup>167</sup> could hardly be surpassed as a paradigm case for the Reconstruction statute. Nineteen plaintiffs, a mix of white and black residents and activists, sued the principal judges and police officers of Cairo, the southernmost town in Illinois and reputed to be one of the major midwestern holdouts against the Civil Rights Movement.<sup>168</sup> The complaint alleged a variety of due process and equal protection violations.<sup>169</sup> Officers arbitrarily denied parade permits or changed their conditions at the eleventh hour. Prosecutors refused to charge a man who murderously drove a truck through a

164 *Mitchum*, 407 U.S. at 241 (quoting CONG. GLOBE APP., 42d Cong., 1st Sess. 78 (1871) (remarks of Rep. Perry)).

165 See, e.g., David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 329 (1978); Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 733–39 (1977).

166 See *supra* note 163.

167 468 F.2d 389 (7th Cir. 1972).

168 For the story of the litigation from the perspective of Littleton's trial court counsel, see MARTHA A. MILLS, *LAWYER, ACTIVIST, JUDGE: FIGHTING FOR CIVIL AND VOTING RIGHTS IN MISSISSIPPI AND ILLINOIS* 303–24 (2015).

169 Complaint, *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), (No. 70–103).

protest. Magistrates set discriminatory bail amounts based on the race of the defendant. Violent intimidation of protestors and voters went unchecked by the local and state authorities. Taking the operative complaint as true, one would have to conclude that the scene described by Congressman Perry during Reconstruction had gone undisturbed in Cairo for a hundred years.

The Seventh Circuit saw it that way. Given “a distinct allegation that plaintiffs are being subjected to unequal treatment by the judges because of their race and their civil rights activity,” the court found that *Younger’s* equity rules did not pose much of a problem.<sup>170</sup> A fair criminal hearing in such circumstances was unlikely in state court, and a discriminatory sentence that was nevertheless within the guideline range would be difficult to overturn. Therefore, the plaintiffs’ “remedy at law is plainly inadequate and equitable relief is proper.”<sup>171</sup> The court thus accepted *Younger’s* federalist meaning of “adequate at law” but used it to reach discriminatory state practices rather than to shield them. That, after all, is what *Mitchum* seemed to counsel when it declared that “legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights.”<sup>172</sup> Taking its own dive into the legislative history, the Seventh Circuit bolstered its ruling with citations not just from the debates surrounding § 1983 but the entire panoply of Enforcement Acts passed to implement the directives of the Fourteenth Amendment against state officers.<sup>173</sup>

The Supreme Court reversed.<sup>174</sup> A five-Justice majority gave up any attempt to square its federalism jurisprudence with the legislative history of the statute it was applying. The Court was troubled by a proposed remedy that “would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by” local officers.<sup>175</sup> Ignoring the historical record quoted by both the dissent and the lower court showing that § 1983’s framers had contemplated this scenario, the majority flatly declared that no “adequate basis for equitable relief” had been shown.<sup>176</sup>

In a passage that has since become a canonical statement on ripeness doctrine, the Court worried that the plaintiffs did not want to

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170 *Littleton*, 468 F.2d at 408–09.

171 *Id.* at 412.

172 *Id.* at 401 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

173 *See id.* at 396–405. On the Enforcement Acts that preceded § 1983, see HYMAN & WIECEK, *supra* note 101, at 467–72, 488–97.

174 *O’Shea v. Littleton*, 414 U.S. 488 (1974).

175 *Id.* at 500.

176 *Id.* at 499–500.

enjoin the state's criminal statutes but to monitor the prosecution of them. Although some of the plaintiffs alleged they had been subjected to discriminatory prosecutions in the past, the majority believed it was speculative to infer that discriminatory practices might continue (notwithstanding a class certification covering presently detained and prosecuted defendants).<sup>177</sup> Any equitable relief struck the Court as "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . sought to prevent."<sup>178</sup>

In one of his final opinions for the Court, Douglas dissented. "We know from the record and oral argument that Cairo, Illinois, is boiling with racial conflicts," he observed.<sup>179</sup> To be sure, the exact proofs might not be forthcoming on all points, but the complaint at least alleged "a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen."<sup>180</sup> The dissent acknowledged that it might be awkward to craft a sufficient remedy, and an ongoing audit was "a regime that we do not foster."<sup>181</sup> But in answer Douglas combined the old idea of the chain of the rope with the modern fusionist ideal that remedies could depend not on pleadings but on trials. "It will be much more appropriate to pass on the nature of any equitable relief to be granted after the case has been tried," Douglas argued.<sup>182</sup> Let the court find the facts and see if the strands added up into a rope. "A single instance of sentencing by itself might not strike the conscience of a reviewing court, but when coupled with a pattern of discriminatory treatment could well justify the equitable intervention of a federal court."<sup>183</sup>

*Littleton* marked a decisive shift in the history of equity's federalism. It signaled the triumph of *Younger's* state-protecting definition of "adequate at law" dressed up in the garb of eighteenth-century rhetoric,<sup>184</sup> and the demise of *Mitchum's* quest to apply the original intent of the Reconstruction Congress.<sup>185</sup> In the years follow-

177 Class certification today provides one rather direct path around *O'Shea v. Littleton's* ripeness concerns, so long as certification is moved at the proper time. See *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78–79 (2013). On *Littleton's* canonical status, see FALLON ET AL., *supra* note 128, at 227–37.

178 *O'Shea*, 414 U.S. at 500.

179 *Id.* at 507 (Douglas, J., dissenting).

180 *Id.* at 509 (Douglas, J., dissenting).

181 *Id.* at 510 (Douglas, J., dissenting).

182 *Id.* (Douglas, J., dissenting).

183 *Id.* at 511 (Douglas, J., dissenting).

184 See Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1141–44, 1204 n.255 (1977).

185 Reconstruction history appeared again from time to time in Supreme Court opinions, but virtually never as the chief or sole support of the holding as it had in *Monroe*

ing *Littleton*, the Court swiftly extended *Younger* abstention to state proceedings filed *subsequent* to federal actions, a kind of “reverse removal” that allowed state prosecutors to yank cases from federal court into their exclusive jurisdiction.<sup>186</sup> Lower courts have extended *Younger* further. The Second Circuit, for instance, does not permit federal jurisdiction in equity to review any part of a state’s criminal justice system, including systemwide regulatory policies of detention and mesne process.<sup>187</sup> Surely this marks one of the odder applications of the Ku Klux Klan Act.

### CONCLUSION

A peculiar divergence has opened in recent years between the horizontal and vertical applications of federal equity. In an increasingly fused system of law and equity, horizontal injunctions against the coordinate branches of the federal government have become remarkably easy for the federal courts to order. Inspired by *Younger* and its progeny, the Supreme Court has for a while maintained that “federalism concerns” counsel more hesitancy in awarding equitable relief against state as opposed to federal agencies.<sup>188</sup> But even against the latter, the dam appears to have burst in 2016’s *United States v. Texas*. The Fifth Circuit affirmed a nationwide injunction against the Obama Administration’s Deferred Action for Parents of Americans program, and a divided Supreme Court affirmed the judgment without opinion.<sup>189</sup> What was the grave injury entitling Texas to such dramatic relief? The state pleaded a variety of options, but the one the Fifth Circuit proceeded on was the claim that Texas sustained a small financial loss on each driver’s license it issued to undocumented immigrants.<sup>190</sup>

Since 2016, these relatively minor financial injuries have sustained several requests for nationwide injunctions.<sup>191</sup> Most recently, in August

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and *Mitchum*. See, e.g., *Pulliam v. Allen*, 466 U.S. 522, 540 (1984) (finding no common law judicial immunity from prospective relief); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 707 n.41 (1979) (inferring a private right of action from Title IX’s prohibition of sex discrimination). But see *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 665–69 (1978) (examining the legislative history of § 1983 at length to find municipalities are “persons” under the statute).

186 *Hicks v. Miranda*, 422 U.S. 332, 352 (1975); Fiss, *supra* note 156, at 1134–36.

187 *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975).

188 *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995).

189 *United States v. Texas*, 136 S. Ct. 2271 (2016), *aff’g without op. by an equally divided court* 809 F.3d 134 (5th Cir. 2015).

190 *Texas v. United States*, 809 F.3d at 149–53.

191 See, e.g., *E. Bay Sanctuary Covenant v. Barr*, F. Supp. 3d 922, 957, 960 (N.D. Ca. 2019) (granting preliminary injunction); *U. S. House of Representatives v. Price*, No. 16-5202, 2017 WL 3271445 (D.C. Cir. Aug. 1, 2017) (granting motion of 17 states to intervene);

2021, a district court in Texas issued yet another nationwide injunction against the Biden Administration's arrest and deportation priorities for certain classes of immigrants.<sup>192</sup> This time, Texas's injury was the cost of detaining an alien that could have been subject to federal detention and deportation. Although the arrest of any given alien could hardly be more speculative than the arrest of the *Littleton* plaintiffs, the court decided that "[i]f even one alien not detained due to the [Administration's] Memoranda recidivates, Texas's costs 'will increase' in accordance with its current cost per inmate."<sup>193</sup> The court did not even entertain the question of whether any other available remedy might adequately address a purely fiscal injury.

In addition to restraining the Executive from departing from the prior Administration's enforcement priorities, the district court ordered monthly reports from the government listing every alien known to the government eligible for detention under the relevant statutes, a list of reasons why the alien was not immediately detained, and the identity of the government official making the decision not to arrest.<sup>194</sup> While the merits appeal remains pending, so far the en banc Fifth Circuit has gone out of its way to sustain what *O'Shea* once called an "ongoing federal audit."<sup>195</sup>

If these trends continue, the merger of law and equity at the horizontal, federal level will go further than any reformer at the turn of the twentieth century could have expected, as virtually any financial injury supports an entitlement to an injunction against the Executive. Professor Laycock has long argued the "death of the irreparable injury rule" as a matter of practice, but here at last we see the purest obliteration of the principle that equity follows the law.<sup>196</sup> Despite purely monetary injuries, state petitioners against the federal government

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Washington v. Trump, No. C17-0141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order).

192 Texas v. United States, No. 21-cv-00016, slip op. at 157 (S.D. Tex. Aug. 19, 2021).

193 *Id.* at 27.

194 *Id.* at 158–59. Curiously, the court later characterized its reporting order as one of case management rather than equitable relief. *See id.* at Docket Entry No. 92 (Aug. 23, 2021). But so far as this author is aware, orders regulating mesne process under equitable jurisdiction are indistinguishable from orders of provisional relief.

195 *O'Shea v. Littleton*, 414 U.S. 488, 510 (1974). *See Texas v. United States*, Order Lifting Stay, No. 21–40618 (5th Cir. Nov. 30, 2021) (en banc). The Fifth Circuit has recently sustained two other regional or nationwide injunctions against the Administration over motions to stay. *BST Holdings v. OSHA*, 17 F.4th 604 (5th Cir. 2021); *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021).

196 LAYCOCK, *supra* note 66. *See also AZIZ Z. HUQ*, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 3–4 (2021) (noting that challengers "that bridle against [federal] government regulation tend to have an easy glide path into federal court . . . [b]ut when an individual challenges illegal violence physically inflicted by a particular government agent as a violation of constitutional rights, the Court takes a less hospitable view").

have received injunctions protecting not only their treasuries, but also those of every other non-complaining state. More than that, state policy has determined the entitlement to equitable relief, because one state's choice to issue licenses at a loss or to jail immigrants subject to federal jurisdiction has created the very injury it petitions federal equity to redress. Where the antebellum statutes sought to protect federal equity from the policy experiments of the states, federal equity now follows state policy.

Meanwhile along the vertical, state and federal dimension, federal equity has been largely reduced to a doctrine of federalism that bars relief except in the most extreme cases of unconstitutional violations—and even then, relief can be uncertain and oft delayed.<sup>197</sup> The same Fifth Circuit that sustains national injunctions against immigration policy consistently stays or overturns district court orders that reach the merits of civil rights claims against state officers.<sup>198</sup> In January 2022, the en banc Fifth Circuit invited a district court to extend *Younger* abstention to pretrial bail proceedings found to be in violation of the Constitution by every other court that has evaluated similar bail regimes on the merits.<sup>199</sup> Along the vertical dimension, then, equity's rope now functions more like a chain. No matter the factfinding of the court below, no matter the careful braiding of narratives entitling civil rights plaintiffs to relief, the bare presence of injunctive relief

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197 A robust federal equity power against state regulatory or quasi-criminal proceedings appears to persist in at least the domain of First Amendment rights of free exercise and assembly. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *Okla. State Conf. of the NAACP v. O'Connor*, No. CIV-21-859-C, 2021 WL 4992754, at \*6 (W.D. Okla. Oct. 27, 2021); *Dream Defs. v. DeSantis*, No. 21cv191, 2021 WL 4099437, at \*32 (N.D. Fla. Sept. 9, 2021); *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 893 (D. S.D. 2019). In this domain the Court's substantive law of impermissible burdens and overbreadth has been able to overcome its procedural concerns with speculative harm and invasive remedies expressed in cases like *Littleton*. This development was hardly foreordained, as *Younger*, *Mitchum*, and *Littleton* themselves were squarely raising First Amendment claims.

198 See, e.g., *United States v. Texas*, No. 21-50949, 2021 WL 4786458 (5th Cir. Oct. 14, 2021) (motions panel); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (motions panel); *ODonnell v. Salgado*, 913 F.3d 479 (5th Cir. 2019) (motions panel).

199 See *Daves v. Dall. Cnty.*, 22 F.4th 522, 548 (5th Cir. 2022). The cases concern allegations of illegal detention and arbitrary process in the setting of criminal bail. The practices have been ruled constitutionally deficient by numerous federal courts. See *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018); *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017); *Buffin v. City & Cty. of S.F.*, No. 15-cv-04959, 2018 WL 424362 (N.D. Cal. 2018); as well as many state courts, for example, see *In re Humphrey*, 482 P.3d 1008, (Cal. 2021); *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976 (Nev. 2020); *State v. Pratt*, 166 A.3d 600 (Vt. 2017); *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

against state officers triggers suspicion on review and, quite often, a stay or reversal of the order.<sup>200</sup>

The asymmetry between vertical and horizontal federal equity has been cast into especially stark relief during the COVID-19 pandemic. While jails and prisons have become epicenters of disease transmission and many states have suspended trials (but not arrests), leading to ever more brutal and overcrowded conditions, federal courts have found themselves largely powerless to order meaningful relief against state and local practices.<sup>201</sup> Yet surprisingly, “[l]itigation involving ICE detention was the exception.”<sup>202</sup> Immigration statutes are hardly accommodating of federal court interference with federal detention,<sup>203</sup> but *in extremis*, federal equity has found its way through against the coordinate federal branches.<sup>204</sup> That the exact same conditions confront state jail detainees possessed of the same constitutional rights has, however, failed to move the federal chancellors.

Nevertheless, equity’s federalism still has its surprising turns. District courts continue to find their way through the thickets of *Younger* and *Littleton* to award meaningful relief, often with explicit reference to the Reconstruction statutes whose purpose they seek to fulfill.<sup>205</sup> Sometimes appellate courts sustain them.<sup>206</sup> But over time the federal courts and especially the Supreme Court have changed their attitude toward equity’s federalism, changed their orientation to what, as Hart and Wechsler once phrased it, federal “courts are good for.”<sup>207</sup> At one time, Congress and the courts agreed that federal equity had to be protected from the manipulation of state practices and fusionist reforms. The Reconstruction Congress empowered the

200 Professor Fallon suggests that the function of justiciability doctrines to cut off the factfinding powers of district court has made these doctrines primary tools of appellate courts resistant to the substantive merits of a claim. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–39 (2006); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 5 (1984).

201 See Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. REV. (forthcoming 2022), (manuscript at 4) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3790859](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790859) [<https://perma.cc/59BJ-6XB9>].

202 *Id.* (manuscript at 35).

203 See *Jennings v. Rodriguez*, No. 15-1204 (U.S. 2018).

204 Garrett & Kovarsky, *supra* note 201, (manuscript at 35–38).

205 See Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2335–37, 2351–53 (2018).

206 *E.g.*, *Brown v. Plata*, 563 U.S. 493 (2011).

207 Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (quoting HENRY MELVIN HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* xii (1953)) (reviewing PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988)).

courts to apply a broad menu of remedies to the unconstitutional practices of the states, and at the height of the Civil Rights Movement, the Supreme Court made this legislative history the centerpiece of its federalism jurisprudence. The statutes remain on the books, the legislative history in the archives. But what was once said of the state courts could now be said of the federal: courts “having eyes to see, see not; judges, having ears to hear, hear not.”<sup>208</sup>

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208 *Mitchum v. Foster*, 407 U.S. 225, 241 (1972) (quoting CONG. GLOBE APP., 42d Cong., 1st Sess. 78 (1871) (remarks of Rep. Perry)).